





# THE ALL INDIA DIGEST

SECTION II (CIVIL)—1811-1911

BY

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VOL. IV

Evidence—Hypothecation.

PUBLISHED BY

T. A. VENKASAWMY ROW

AND

T. S. KRISHNASAWMY ROW

Proprietors, The Law Printing House, Madras and The Lawyer's  
Companion Office, Trichinopoly and Madras

1912

REPRINTED 1923.

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PRINTED AT  
THE LAW PRINTING HOUSE  
MOUNT ROAD, MADRAS.

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# ABBREVIATIONS EXPLAINED.

## REPORTS.

|                |     |     |     |     |                                          |
|----------------|-----|-----|-----|-----|------------------------------------------|
| A.             | ... | ... | ... | ... | Indian Law Reports, Allahabad Series.    |
| A. L. J.       | ... | ... | ... | ... | Allahabad Law Journal.                   |
| A. W. N.       | ... | ... | ... | ... | Allahabad Weekly Notes.                  |
| B.             | ... | ... | ... | ... | Indian Law Reports, Bombay Series.       |
| B. H. C.       | ... | ... | ... | ... | Bombay High Court Reports.               |
| B. L. R.       | ... | ... | ... | ... | Bengal Law Reports.                      |
| Bom. L. R.     | ... | ... | ... | ... | Bombay Law Reporter.                     |
| Bur. L. R.     | ... | ... | ... | ... | Burma Law Reports.                       |
| C.             | ... | ... | ... | ... | Indian Law Reports, Calcutta Series.     |
| C. L. J.       | ... | ... | ... | ... | Calcutta Law Journal.                    |
| C. L. R.       | ... | ... | ... | ... | Calcutta Law Reports.                    |
| C. W. N.       | ... | ... | ... | ... | Calcutta Weekly Notes.                   |
| C. P. L. R.    | ... | ... | ... | ... | Central Provinces Law Reports.           |
| Cor.           | ... | ... | ... | ... | Coryton's Reports.                       |
| I. A.          | ... | ... | ... | ... | Law Reports, Indian Appeals.             |
| Ind. Cas.      | ... | ... | ... | ... | Indian Cases.                            |
| L. B. R.       | ... | ... | ... | ... | Lower Burma Rulings.                     |
| M.             | ... | ... | ... | ... | Indian Law Reports, Madras Series.       |
| M. H. C.       | ... | ... | ... | ... | Madras High Court Reports.               |
| M. L. J.       | ... | ... | ... | ... | Madras Law Journal.                      |
| M. L. T.       | ... | ... | ... | ... | Madras Law Times.                        |
| M. W. N.       | ... | ... | ... | ... | Madras Weekly Notes.                     |
| Marsh.         | ... | ... | ... | ... | Marshall's Reports.                      |
| M. I. A.       | ... | ... | ... | ... | Moore's Indian Appeals.                  |
| Moo. P. C. C.  | ... | ... | ... | ... | Moore's Privy Council Cases.             |
| N. L. R.       | ... | ... | ... | ... | Nagpur Law Reports.                      |
| N. W. P. H. C. | ... | ... | ... | ... | North-West Provinces High Court Reports. |
| O. C.          | ... | ... | ... | ... | Oudh Cases.                              |
| P. R.          | ... | ... | ... | ... | Punjab Record.                           |
| P. L. R.       | ... | ... | ... | ... | Punjab Law Reporter.                     |
| P. W. R.       | ... | ... | ... | ... | Punjab Weekly Reporter.                  |
| S. L. R.       | ... | ... | ... | ... | Sind Law Reporter.                       |
| U. B. R.       | ... | ... | ... | ... | Upper Burma Rulings.                     |
| W. R.          | ... | ... | ... | ... | Sutherland's Weekly Reporter.            |

## OTHER ABBREVIATIONS.

|                    |     |     |     |     |                 |
|--------------------|-----|-----|-----|-----|-----------------|
| Appl.              | ... | ... | ... | ... | Applied.        |
| Appr.              | ... | ... | ... | ... | Approved.       |
| Cons.              | ... | ... | ... | ... | Considered.     |
| D. or Dstd.        | ... | ... | ... | ... | Distinguished.  |
| Diso.              | ... | ... | ... | ... | Discussed.      |
| Diss.              | ... | ... | ... | ... | Dissented from. |
| Exp.               | ... | ... | ... | ... | Explained.      |
| F.                 | ... | ... | ... | ... | Followed.       |
| (F.B.)             | ... | ... | ... | ... | Full Bench.     |
| Obs.               | ... | ... | ... | ... | Observed on.    |
| (P.C.)             | ... | ... | ... | ... | Privy Council.  |
| R. or Refd. to.... | ... | ... | ... | ... | Referred to.    |
| Rel. on.           | ... | ... | ... | ... | Relied on.      |
| (S.B.)             | ... | ... | ... | ... | Special Bench.  |

**N.B.**—In the Punjab Record and the Punjab Law Reporter, the Cases are known by their numbers and not by the pages where they are printed ; (e.g.) 4 P.R. 1910 would mean Case No. 4, in the Punjab Record of 1910. The same explanation applies to the Punjab Law Reporter also. It has also to be remarked that the Punjab Record and the Punjab Law Reporter have been divided into two sections, Civil and Criminal.





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# THE ALL INDIA DIGEST, 1811—1911.

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(1)—*Duty of party to adduce his own evidence.*—A party is bound to adduce his own evidence, and the Court need not ask him to do so. **NOBO KRISTO SIRCAR v. KALA CHAND DOSS**, 12 W.R. 470.

(2)—*Neglect of party to put in all available evidence—Effect.*—If in any suit, a portion of the available evidence has been neglected by a party in reliance on a particular document, not in itself decisive of the issue, but only affording strong evidence bearing upon it, he cannot claim that this defect of judgment on his part should be remedied by a new trial of the same issue. **BASAWA AND GURBASAWA v. KAL-KAPA SHARBANA**, 2 B. 489.

(3)—*Practice — Concurrent findings — Evidence—Native Courts.*—The native Courts in India, in receiving evidence, do not proceed

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according to the strict technical rules adopted in England. According to the practice there, a copy of a public document, authenticated by the signature of the proper officer, is received as *prima facie* evidence, subject to further inquiry, if it is disputed. It is not the practice of the Judicial Committee to advise the reversal of a decision of the Court below, merely on the effect of the evidence or the credit due to witnesses, as the Judges in India have better means of determining questions of fact than the appellate Court. **NARAGUNTY LUCHMEDEVAMA v. VENGAMA NAIDU**, 1 W.R., P.C., 30=9 M.I.A. 66. [*Appl. & R.*, 10 W.R., P.C. 10; *Expl.*, 6 C. 171=6 C.L.R. 439.]

(4)—*Evidence—Examination of witnesses—Mode of taking evidence.*—Observations on the improper manner, in which evidence, is generally recorded in the subordinate Courts, on the omission to examine the parties to suits, and on the practice, obtaining among judicial officers, of committing the function of taking evidence to native *Muharirs*. **PHUL KUAR v. SURJAN PANDEY**, 4 A. 249=A.W.N. 1882, 40. [*R.*, 16 P.R. 1891.]

(5)—*Evidence — Judge can look at whole evidence on whichever side given — Burden of proof.*—A Judge is entitled to look at and draw his conclusions from the whole of the evidence before him, no matter on which side the *onus* of proof originally might have been. When a plaintiff on whom lies the *onus* of proof fails, at the close of his case, to prove a case against the defendant, the defendant has two courses which he can adopt; he can either submit that no case has been proved against him and take his stand on such submission, declining to call any evidence on his own behalf, if he thinks right. If he does call evidence and the evidence which he calls should prove the plaintiff's case, he must only take the consequences of having proved a case for the plaintiff which the plaintiff had failed to prove. A Judge can look at all the evidence on the record no matter on which side it is given. **MURLIDHAR v. CHHAJMAL**, A.W.N. 1887, 299.



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(6)—*General rule of evidence—Title—Proof of negative.*—The general rule of evidence is that if, in order to make out a title, it is necessary to prove a negative, the party who avers a title must prove it. **PULIN BEHARI v. WATSON, B.L.R. Sup. Vol., 904=9 W.R. 190. [R., 13 W.R. 91.]**

(7)—*Evidence—Admission.*—Admission by a party dispenses with other proof. When no admission is made of a relevant fact, it may be proved *aliunde*. **VELAN v. KUMARASWAMI, 11 M. 296.**

(8)—*Evidence—Document—Non-production—Presumption.*—It is a cardinal rule of evidence, not one of technicality, but of substance, that where written documents exist they shall be produced as being the best evidence of their own contents. When an important letter is not produced, and no explanation is given for its non-production, an inference not unnaturally arises, either that the letter, if written, does not contain that which it is represented to contain, and therefore it would not suit the purpose of the party to produce it, or that no such letter ever existed. **DINOMOYI DEBI v. LUCHMIPUT SINGH BAHADUR, 6 C. L.R. 101, P.C.=7 I.A. 8=4 Sar. 112.**

(9)—*Evidence—Admission of documents.*—With reference to the laxity prevailing in the Indian Courts in admitting documents, the Privy Council remarked that while it might not be desirable in all cases to apply strict and technical rules to the admissibility of evidence in the Courts of India, the substantial principles on which the authenticity and value of evidence rest should be observed. A letter of the Collector, containing a summary of the statements by zemindars, for information of the Board of Revenue, in a dispute as to the right of inheritance to a zemindari in the same district, is not admissible as evidence. **RAMA-LAKSHMI AMMAL v. SIVANANANTHA PERUMAL SETHURAYER, 12 B.L.R. 396, P.C.=14 M.I.A. 570=17 W.R. 552. [Appl., 25 W.R. 554.]**

(10)—*Evidence, Reception of.*—When a document is tendered in evidence, the Court has no power, without distinctly deciding whether it is or is not proved to be genuine, to decline to receive it for the mere general reason that it may possibly or probably be a forgery. **THOMAS OMAN v. KUMAR PRAMATHANATH ROY, 1 B. L.R., S.N., 25 (b).**

(11)—*Unproved documents filed with the record.*—Unproved documents simply filed with the record in accordance with some usage must be passed over by the Judge; and the party against whom they are intended to be used must insist on their removal from the record. **KALLIDA PERSHAD DUTT v. RAM HARI CHUCKERBUTTY, 5 C. 317.**

(12)—*Practice—Witnesses—Court expressing opinion as to sufficiency of evidence—Pleader declining to call further evidence—Second appeal.*—Where the pleader of a party, in view of the

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expression of opinion by the Subordinate Judge in the midst of the case that it was unnecessary for him to examine any more witnesses, declines to examine more witnesses, and this fact is not mentioned in the lower Court of appeal, the party cannot be heard in second appeal to say that he should be allowed the opportunity of adducing the evidence. **PANNALAL NATHU-LAL MARWADI v. GANU BABAJI NHAIVI, 13 Bom. L.R. 1021. (18 B. 336, R.)**

(13)—*Suit, Proper trial of—First Court not taking defendant's evidence and dismissing suit—Lower appellate Court decreeing claim upon the same evidence—Irregularity.*—In a suit for possession, the defendant set up a plea of adverse possession. The first Court recorded the evidence of the plaintiffs, but without taking the evidence of the defendant, dismissed the suit on the ground of jurisdiction. The lower appellate Court, upon the evidence on the record, proceeded to decide the suit on its merits: *Held*, that there was no proper trial of the case, and that, as the defendant's evidence was shut out by the action of the Court of first instance, the lower appellate Court had decided the case upon an incomplete record. **GANGA SINGH v. LACHMAN SINGH, 10 Ind. Cas. 441.**

(14)—*Evidence—Unstamped document—Secondary evidence—Civ. Pro. Code—Revision—Irregularity—Practice.*—Where the original document is unstamped, no secondary evidence of its contents is admissible. Rule of practice when applying for adjournment on the ground of producing a document, indicated. **SAMI-NATHA PILLAI v. SUNDARA RAJA PILLAI, 2 M.W.N. 1911, 166.**

(15)—*Proof—Presumption of genuineness of adoption deed—Copy only produced—Document 80 years' old.*—Where a deed of adoption is said to have been executed so long ago as 80 years, and a copy of the deed and not the original is produced and the witnesses to it are dead, and it appears that the adoption had for a very long time (40 or 50 years) been acted upon and acquiesced in by the parties interested in opposing it, and by the members of the family whose rights had been set aside by the adoption, and who had not made any opposition to it, it should be presumed that the deed, of which a copy is produced and which had been filed many years before is a genuine one, and the Court is not justified in setting it aside upon suspicion on account of the apparent character or position of the attesting witnesses. **TARA SOONDAREE CHOWDHRAIN v. THE COLLECTOR OF MYMENSINGH, 13 B.L.R. 495=20 W. R. 446.**

(16)—*Local investigation by Amin—Evidence taken—No report—Admissibility—Civ. Pro. Code, 1882, s. 180.*—Where a Court issued a commission to an Amin, directing him to make a local investigation and report the result to the Court, and the Amin had examined certain witnesses, but could not examine the rest of the witnesses as the plaintiff failed to deposit



**Evidence—continued.****—1.—General—continued.**

the amount necessary to meet the expenses of the investigation, and the Amin, thereupon, without making any report, stated the circumstances and transmitted the depositions to the Court, held, that there was nothing in s. 180 of the Civ. Pro. Code, that would warrant the Court in treating the deposition taken under the imperfect investigation, as part of the record or as evidence in the cause. **DEBNARAYANDEB v. KALIDAS MITTER**, 6 B.L.R. App. 70=14 W.R. 397.

(17)—*Evidence to explain decree—Admissibility of.*—A decree described the lands dealt with as north of a line marked in the plan attached to the decree. A schedule attached to the decree but not referred to in it, however, described the field as S. No. 265/1. Held that evidence was admissible to show that S. No. 265/1 was not included in the land to the north of the line marked in the plan attached to the decree. **P. V. GOVINDA VARIAR v. PARU AMMA**, M.W.N. 1912, 401.

(18)—*Evidence—Sale—Description of house and site — Oral evidence—Admissibility.*—Where a sale-deed purported to convey an upstairs house standing on a certain site which was also described and conveyed, and the vendor had no upstairs house on that site but had one on the opposite side of the same street and no other in that town or elsewhere. Held, that parol evidence was admissible to show that the house intended to be conveyed was the latter upstairs house. **ANNATHURI IYER v. T. RAMANUJA CHARIAR**, M.W.N. 1912, 402.

(19)—*Official records—Entry as regards area cultivated—Evidence to prove cultivated area—Evidentiary value—Second appeal—Interference in.*—Where, to prove the cultivation of 90 acres of land, accounts prepared in the ordinary course by a Revenue Officer which showed that the officer after enquiry found that the 90 acres were cultivated, were tendered in evidence by the plaintiff and where the other side did not call any evidence to disprove the cultivation. Held, that it was not necessary to prove the cultivation by the evidence of a witness who actually saw the cultivation, and that the accounts ought to have been acted upon as being correct. **G. NARAYANA SAMI NAIDU v. CHINTALAPATI SUBBARAJU**, 22 M.L.J. 393.

Person adjudged to be of unsound mind—Petition by person appointed *curator bonis*—Necessity of—of unsound mind — See ACT XXXIV OF 1858, s. 25, 8 B. 280.

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Unregistered lease—Suit for damages for breach of stipulation in lease—Admissibility of lease in evidence—*See* LEASE—GENERAL, 4 A. 232=A.W.N. 1882, 18.

Conduct of parties when may be looked into—*See* LEASE—CONSTRUCTION OF LEASE, 10 Ind. Cas. 431.

Acknowledgment in writing—Parol—*See* LIMITATION ACT, 1908, s. 19, 5 B.L.R. 633, Note=12 W.R., P.C., 2.

*See* LIMITATION ACT, 1908, s. 20, 19 B. 663.

Suit to recover lands given in lieu of dower—Evidence—*See* MAHOMEDAN LAW—DOWER, 9 M.L.J. 141.

Endorsement and delivery of Government securities by Mahomedan father to son—Effect of—Of conduct of parties—*See* MAHOMEDAN LAW—GIFT, 19 A. 267, P.C.=24 I.A. 1.

*See* MAHOMEDAN LAW—GIFT, 13 B. 352.

*See* MAHOMEDAN LAW—INHERITANCE, 1 M.H.C. 92.

Continual co-habitation and acknowledgment of parentage is presumptive of marriage and legitimacy—*See* MAHOMEDAN LAW—MARRIAGE, 3 M.I.A. 295.

Puberty and discretion,—of—*See* MAHOMEDAN LAW—MARRIAGE, 2 O.C. 90.

Application to cancel order for maintenance of wife—Evidence of adultery—*See* MAINTENANCE, A.W.N. 1893, 56.

**Evidence—continued.****—1.—General—continued.**

Suit for damages—Reversal of conviction on appeal—Nature of evidence required to maintain suit—*See* MALICIOUS PROSECUTION, 26 M. 506.

*See* MALICIOUS PROSECUTION, 19 B. 717.

Entry of cess—Not conclusive evidence of custom—*See* MARRIAGE, 2 A. 49.

*See* MASTER AND SERVANT, 2 B.L.R., O.C. 140, 2 B.L.R., A.C., 227=11 W.R. 101.

Certificate of guardianship—Evidentiary value of certificate on question of age of minor—*See* MINORITY, 18 A. 478=A.W.N. 1896, 158.

Earlier bond recited in later bond—No evidence of loss of former bond—Secondary evidence—Admissibility—*See* MORTGAGE—REDEMPTION, 9 A.L.J. 323.

Mortgage suit—Question whether suit amount belongs to mortgagee personally, or to trust funds in his hands—Evidence—*See* MORTGAGE—MISCELLANEOUS, 4 C.W.N. 70.

Of dishonour and of presentment—Noting on bill—*See* NEGOTIABLE INSTRUMENTS—BILL OF EXCHANGE, Bourke, O.C. 274.

*See* NEGOTIABLE INSTRUMENTS ACT, 1881, s. 4, 4 O.C. 318.

Promissory note payable to two persons—Endorsement by one payee in favour of the other—Suit by endorsee as such—Right of endorsee to sue as assignee of chose in action—Admissibility of endorsement as evidence of assignment—*See* NEGOTIABLE INSTRUMENTS ACT, 1881, s. 51, 24 M. 654.

Oath—Conscientious objections to take oath on Bible by member of Church of England—Admissibility of evidence not given on such oath—*See* OATH, 2 M.H.C. 246.

Possession is evidence of title, and gives a good title against a wrong-doer—*See* POSSESSION—EVIDENCE OF POSSESSION AND TITLE. Marsh 75=W.R., F.B., 20=1 Ind. Jur., O.S. 97=1 Hay 137.

Decrees, judgments and proceedings in suits—*See* POSSESSION—EVIDENCE OF POSSESSION AND TITLE, 2 B.L.R. App. 8=10 W. R. 477.

Possession—Evidence of title—*See* POSSESSION—SUITS FOR POSSESSION, 3 B.L.R., A. C., 99=11 W.R. 465.

*See* POSSESSION—MISCELLANEOUS, 142 P.L.R. 1901.

Documents received without objection by lower Court—Right of appellate Court—*See* PRACTICE AND PROCEDURE, 6 C. 666=7 C.L.R. 497.

Partice—of doubtful admissibility—*See* PRACTICE AND PROCEDURE, 6 B.L.R. 509, P.C.=15 W.R., P.C., 1=13 M.I.A. 519.



**Evidence—continued.****—1.—General—continued.**

Tendered to lower Court for review, refused—No appeal from order of refusal—Such evidence cannot be referred to in appeal—See PRACTICE AND PROCEDURE, 6 W.R. 24, P.C. = 3 M.I.A. 1.

Interrogatories, answers to—See PRACTICE AND PROCEDURE, 4 C. 836 = 4 C.L.R. 164.

Tender of documentary and oral evidence—Refusal by first Court to record oral evidence—Reversal of decree by lower appellate Court without admitting fresh evidence—Power of High Court to remand—See PRACTICE AND PROCEDURE, 17 A. 29 = A.W.N. 1894, 190.

Application to restore appeal dismissed for default—Evidence of sufficient cause for restoration—See PRACTICE AND PROCEDURE, 20 A. 266 = A.W.N. 1898, 34.

Practice—Taking further — on hearing of motions — Oral evidence—Adjournment—See PRACTICE AND PROCEDURE, 8 B.L.R., App., 65.

Practice—Appeal from order dismissing an application to set aside an *ex parte* order—Fresh—tendered in the appellate Court—See PRACTICE AND PROCEDURE, A.W.N. 1890, 166.

Opinion of witness as to market value of property—Evidence—Evidence Act, s. 45—See PRE-EMPTION—GENERAL, 4 O.C. 247.

See PRE-EMPTION — CONSTRUCTION OF WAJIB-UL-ARZ, A.W.N. 1901, 29.

Registers of transfers, whether admissible to prove the fact of transfers—See PRE-EMPTION—CONSTRUCTION OF WAJIB-UL-ARZ, 10 Ind. Cas. 225.

See PRE-EMPTION — PURCHASE MONEY, A.W.N. 1882, 9.

Suit for pre-emption — Defence of vendee being co-sharer—Judgment in former suit as to vendee's status—See PRE-EMPTION—MISCELLANEOUS, A.W.N. 1888, 212.

See PRE-EMPTION—MISCELLANEOUS, A.W.N. 1904, 117.

Power of agent to borrow — Evidence of authority — See PRINCIPAL AND AGENT—AUTHORITY OF AGENTS, Marsh 544 = 2 Hay 644.

Duty of appellate Court — Suits heard together, evidence in—See PRIVY COUNCIL, PRACTICE OF—PRACTICE AS TO OBJECTIONS, Marsh 455 = 2 W.R., P.C., 19, 9 M.I.A. 287.

See PRIVY COUNCIL, PRACTICE OF — QUESTIONS OF FACT, 9 B.L.R. 364 = 16 W.R., P.C., 11 = 14 M.I.A. 86.

Improperly admitted—Appeal—See PRIVY COUNCIL, PRACTICE OF — QUESTIONS OF FACT, 6 B.L.R., P.C., 495 = 15 W.R., P.C., 8.

See REGISTRATION, 4 B.L.R., F.B., 1.

**Evidence—continued.****—1.—General—continued.**

Admissibility in—of document — Question of procedure—Law at time of suits, applicable—See REGISTRATION ACT, 1866, 7 M.H.C. 348.

Unregistered assignment of mortgagee, if admissible to prove personal obligation—See REGISTRATION ACT, 1908, s. 17, 4 M.H.C. 378.

Execution sale, evidence of—Sale certificate not admissible for want of registration—See REGISTRATION ACT, 1908, s. 17, 7 C.L.R. 115.

Admissibility of—Doul Fehrist—See REGISTRATION ACT, 1908, s. 17, 1 C.L.R. 328.

Receipt for payment of mortgage money—Oral—See REGISTRATION ACT, 1908, s. 17, A.W.N. 1887, 188.

Instrument creating charge in nature of mortgage—Necessity for registration—Admissibility in—See REGISTRATION ACT, 1908, s. 17, 20 B. 553.

See REGISTRATION ACT, 1908, s. 17, 9 C. 68, 5 B. 143, 20 M. 484.

See REGISTRATION ACT, 1908, ss. 17, 49, 3 B.L.R., O.C., 90, 17 B. 235, 4 A. 3 = A.W.N. 1881, 93, 10 B. 101.

Memorandum of receipt of consideration—Admissibility in evidence, if unregistered—See REGISTRATION ACT, 1908, ss. 17, cls. 2, 3, 49 1 B. 196, Note.

Unregistered mortgage-bond—Evidence of personal liability—See REGISTRATION ACT, 1908, s. 49, 9 C. 520 = 12 C.L.J. 209.

Payment of mortgage-debt — Endorsement of payment on mortgage-bond—Endorsement not registered—Admissibility in evidence—See REGISTRATION ACT, 1908, s. 49, 7 M.H.C. 1.

See REGISTRATION ACT, 1908, s. 57, 7 O.C. 365.

Mortgage—Foreclosure proceedings—Service of notice—Substituted service when permissible—Demand by registered notice—Burden of proof—Evidence—See BEN. REG. XVII OF 1806, 63 P.L.R. 1902.

Insufficiency of evidence for decision of material issue—Civ. Pro. Code, 1859, ss. 351, 354—See REMAND, 3 Agra 146.

See REMAND, A.W.N. 1888, 81, 1 Ind. Jur., N.S., 35, Marsh 121 = 1 Hay 260.

See RENT, 1 C.L.R. 564.

Documentary—Discovery of new and important—Evidence of doubtful character—Discovery of new evidence, when may be good ground for review of judgment—See REVIEW—GENERAL, 5 O.C. 59.

Discovery of fresh evidence—Review—See REVIEW—GROUNDS FOR REVIEW, 4 B.L.R., A.C., 213.



**Evidence—continued.****—1.—General—continued.**

Review on new—discovered—See REVIEW—  
—GROUNDS FOR REVIEW, 7 B. 287.

Wrongly rejecting — See REVISION —  
GENERAL, 3 C.W.N. 581.

See RIGHT OF SUIT—DECREES, 6 B. 7.

See RURAL POLICE RATE, 7 O.C. 35.

Execution sale of immoveable property—  
Confirmation of sale and certificate—See SALE  
—SALE IN EXECUTION OF DECREE—MIS-  
CELLANEOUS, 9 C. 842=12 C.L.R. 448.

Admission of documents in second appeal—  
Effect of documents not produced at first hear-  
ing—See SPECIAL OR SECOND APPEAL—  
GENERAL, 11 Ind. Cas. 289.

Receipts for rent—Comparison of signatures  
—Credibility -- See SPECIAL OR SECOND  
APPEAL—GROUNDS OF APPEAL. Marsh 322  
=2 Hay 421.

Decision without sufficient—See SPECIAL  
OR SECOND APPEAL—GROUNDS OF APPEAL,  
Marsh 556=2 Hay 663.

See SPECIAL OR SECOND APPEAL —  
GROUNDS OF APPEAL, 21 B. 91.

See STAMP, 9 C.L.R. 272.

Unstamped bond—Intention to evade stamp  
laws—Evidence — Construction—See STAMP  
ACT, 1862, 3 B.L.R., A.C., 329=11 W.R. 553.

See STAMP ACT, 1862, s. 17, 3 B.L.R., A.C.,  
235=12 W.R. 47.

Bond written partly on one and partly on  
another stamp paper, admissibility in evidence  
—Stamp duty and penalty—See STAMP ACT,  
1869, s. 49, 7 M.H.C., App., 36.

See STAMP ACT, 1879, ss. 10, 11, A.W.N.  
1885, 317.

Admission of document in evidence as being  
duly stamped—Competency of appellate Court  
to question the admissibility — See STAMP  
ACT, 1879, s. 24, cl. (3), 13 B. 493.

Debt—Negotiable instrument not admissible  
in evidence—Proof of debt *aliunde* permissible  
—See STAMP ACT, 1889, ss. 12, 35, 18 P.R.  
1912.

See ST. 11 & 12 VIC., c. 21, ss. 26, 72, 73,  
7 B.L.R. 74=15 W.R., O.C. 16.

See SUCCESSION ACT, 1865, ss. 2, 331, 19  
B. 783.

Value of Thakbust maps—See THAKBUST  
MAPS, 15 C.W.N. 887.

Registry in Collector's book no—of title—See  
TITLE, 9 M.I.A. 303.

Of title—See TITLE, 16 C.W.N. 683.

Of fraud—See TRADE-MARK, 2 Hyde 185 ;  
1 Hyde 270.

Party setting up a secret trust—See TRUST,  
30 C. 783.

**Evidence—continued.****—1.—General—concluded.**

Evidence of custom—See WAJIB-UL-ARZ,  
12 A. 328, A.W.N. 1898, 89.

Construction of will—Letter written long  
after will—Admissibility in — See WILL—  
CONSTRUCTION, 10 M.L.T. 42.

Evidence taken at *ex parte* hearing—See  
WITNESS—EXAMINATION OF WITNESSES, 3  
B.L.R. A.C., 273=12 W.R. 130.

**—2.—Accounts.**

See ACCOUNTS.

(1)—*Account books—Corroborative evidence.*  
—Account books are legal evidence to corrobo-  
rate oral testimony. RAJNARAIN ROY CHOW-  
DHRY v. OLIVIA ATKINS, 5 W.R., Act X, Rul.  
30.

(2)—*Account-sales—Goods consigned from  
London.*—A at Calcutta consigned goods  
through B at Calcutta to C at London for sale  
on his (A's) own account and risk. B advanced  
money thereon to A. The goods were sold in  
London by C, who sent the account-sales to B  
in Calcutta. In a suit by B against A in  
Calcutta for the balance due to him on account  
of the money so advanced after giving credit to  
A for the amount realised by the sale of the  
goods according to the account sale, *held* that  
the account-sale was *prima facie* conclusive of  
the amount realised ; and if A wished to falsify  
the account, the onus lay upon him. DOOMUN  
v. STEVENS, 2 Ind. Jur., N.S., 5.

(3)—*Account and account books—Act II of  
1855, s. 43.*—The books of a creditor are not  
admissible as evidence against his debtor to  
prove the debt, unless there is other evidence  
of the debt, in which case entries in such  
books may be admitted as corroborative  
evidence under Act II of 1855, s. 43. RAM-  
KISTO PAUL CHOWDHRY v. HURRY DASS  
KOONDOO, Marsh 219=1 Hay 569.

(4)—*Evidence—Account books—Corrobor-  
ation.*—One party, by merely producing his own  
account-books, cannot bind the other. SORAB-  
JEE VACHA GANDA v. KOONWURJEE MA-  
NICKJEE, 5 W.R., P.C., 29=1 M.I.A. 47,  
[R., 5 M.I.A. 432.]

(5) *Accounts and Account books—Entry  
against interest of witness.*—In a suit for account  
by the representatives of A, deceased, evidence  
was adduced of a document purporting to be a  
copy made by the deceased of an account fur-  
nished him by the defendant containing an  
entry of a payment of Rs. 5,000 by the deceased  
to the defendant, and the purchase therewith  
by the defendant of Company's paper for the  
deceased. *Held* that by itself the document  
was inadmissible. But when further evidence  
was given by a witness that the deceased had  
stated to him that the document was a correct  
statement of his account with the defendant,  
*held* that such evidence was admissible ; and  
that with the addition of this evidence, the  
document also was admissible as containing an



**Evidence—continued.****—2.—Accounts—continued.**

entry by the defendant against his interest. But *quære* whether the circumstance that the entry only indicated conversion of the money into a new shape did not take away the character of its being an entry against interest. *ZAYNUB v. HADJEE BABA CAZRANEE*, 2 Ind. Jur., N.S., 84.

(6)—*Hath-chitta book — Evidence against vendors.*—A *hath-chitta* book is a document kept especially as a security for the vendor; and, in the absence of fraud, it must be considered binding upon him. *GOPEEMOHUN ROY v. ABDOL RAJAH SUBJUN NACODA*, 1 Ind. Jur., N.S., 358.

(7)—*Account books kept in regular course of business.*—In an action by a banking firm against another firm to recover a balance upon an account between them, the plaintiff put in evidence the account books of his firm, and the Inspector of the Court certified that the books were regularly kept, consistently with the rules of banking and that they agreed with the account rendered by the plaintiff to the defendant. The plaintiff, however, examined no witness to prove that the books were regularly kept, or the general accuracy of the particular charges constituting the demand; he proved admissions by the defendant of the correctness of the account and of an award in his favour of one of the disputed items. The defendant in his defence did not deny the accuracy of the appellant's account, or of the books put in evidence, but objected to two items in the account, and claimed a set-off, but examined no witnesses to rebut the plaintiff's case. *Held* (reversing the *Sudder Court's* decree), that although the plaintiff's books and the Inspector's report were not conclusive evidence, yet that the necessity of strict proof was removed by the admission of the defendant, and the fact of the absence by him of any evidence to impeach the accuracy of the accounts, the disputed items being satisfactorily accounted for. *DWARAKA DASS v. BABOO JANKEE DOSS*, 6 M.I.A. 88.

(8)—*Evidence Act (I of 1872), s. 34—Relevancy of entries in regularly kept account books — Correspondence with other evidence, a test of genuineness — Comparison of handwriting.*—Plaintiff sued for the amount due to him on several *hundis* drawn by the defendant. The main question was whether the *hundis* were genuine or false. The first Court found that the *hundis* were forged and dismissed the suit. The High Court on appeal gave a decree to the plaintiff, deciding that the *hundis* were genuine and that the defendant's answer was false. Certain account books filed by the plaintiff and the evidence connected with them formed the main ground for the decision of the High Court in favour of the plaintiff. The Judicial Committee likewise observed that not only was there no discrepancy between the several account books, but each book contained that amount of difference which was appropriate to

**Evidence—continued.****—2.—Accounts—continued.**

its character. The Committee also used even the better test of genuineness than the correspondence of the books with themselves, and that was their correspondence with other evidence, and, agreeing with the High Court on the entire evidence, confirmed the decision of that Court. *JASWANT SINGH v. SHEO NARAIN LAL*, 16 A. 157=21 I.A. 6. P.C.

(9)—*Evidence Act (I of 1872), s. 34—Account books, Entries in—Necessity of corroboration to establish defendant's liability.*—Plaintiffs sued to recover money due as balance of a running account, and relied chiefly on their account books. The lower Court found that the books were regularly kept, and assumed in point of law that, by reason of having been regularly kept, the books would by themselves constitute *prima facie* evidence against the defendant of the matters entered therein. The various items entered in the books not having been specifically proved by the plaintiff, the High Court held that the entries alone would not constitute, under s. 34 of the Indian Evidence Act, sufficient evidence to charge the defendant with liability. On the evidence, however, one of the plaintiffs having given evidence, with reference to the account books, stating the amounts advanced to and repaid by the defendant, and no question having been put to him suggesting that he was not speaking from his own personal knowledge, such evidence, along with the evidence of a witness for the plaintiff and the entries in the plaintiff's account books, was sufficient to uphold the decree given to the plaintiff by the lower Court. *DWARAKA DAS v. SANT BAKSHI*, 18 A. 92=A.W.N. 1895, 233. [R., 110 P.R. 1908.]

(10)—*Evidence Act (I of 1872), s. 34—"Entries in books of account, regularly kept in the course of business"*—It would be giving a too limited meaning to s. 34, if it be held that "books of account regularly kept in the course of business" mean books entered up from day to day or from hour to hour as transactions take place. (4 B. 576, *overruled*) The time of making the entries may affect their value, but would not, by the mere fact of the entries not being made from day to day or from hour to hour, make them entirely irrelevant. *THE DEPUTY COMMISSIONER OF BARA BANKI v. RAM PARSHAD*, 27 C. 118, P.C.=26 I.A. 254=4 C.W.N. 147=7 Sar. 586. (4 B. 576, *Not Appr.*) [R., 25 B. 616.]

(11)—*Evidence of correctness of accounts—Independent evidence.*—It is unnecessary to prove, by independent evidence, the correctness of every single item of an account extending over seven years, in the absence of any denial of the correctness of any one of those items. *MOORTEE RAM BABOO v. LALJEE SAHOO*, W.R. 1864, 174.

(12)—*Paimaish accounts.*—An entry in the *paimaish* alone is not sufficient evidence to establish a right to property which is denied. *KESHAVAN v. VASUDEVAN*, 7 M. 297.



*Evidence—continued.**—2.—Accounts—continued.*

(13)—*Ayakut accounts—Admissibility as evidence of reputation.*—Ayakut accounts prepared from time to time by village officers for administrative officers, are to some extent public documents, and they are admissible as evidence of reputation, provided they are produced from proper custody and otherwise sufficiently proved to be genuine. No distinction can be drawn between the evidence of reputation to establish, and that to disparage, a public right. *SIVA-SUBRAMANYA v. SECRETARY OF STATE FOR INDIA*, 9 M. 285. [Affirmed, 15 M. 101, P.C.]

(14)—*Factory account books sworn to by manager, sufficient legal evidence of payment of rent.*—This case having been remanded by the High Court with directions to adjudicate on the evidence adduced in support of the alleged payment of rent, the first appellate Court did so, and it was urged on special appeal that there was no legal evidence to justify the finding of that Court. The High Court dismissed the appeal holding that the account books of the factory in question were regularly sworn to by the manager, that by them the payment of the rent claimed was established and that the above was perfectly legal evidence sufficient to warrant the finding of the first appellate Court thereon. *KALEE KANT MAJOMDAR v. MESSRS. R. WATSON AND CO.*, 2 W.R., Act X. Rul. 75.

(15)—*Single account-book admissible in evidence—Agricultural tribe—Bairagis in Karnal.*—Bairagis in the Karnal District are not an agricultural tribe. A single account-book, not otherwise suspicious, is admissible in evidence, particularly when it is supported by *prima facie* reliable witnesses. *JITA v. NEKI*, 4 Ind. Cas. 495 = 51 P.W.R. 1909.

(16)—*Partnership accounts—Suit to recover balance of account on winding up partnership—Account books unsatisfactory—Remand.*—Suit to recover balance due on account taken on the winding-up of a partnership transaction between two firms for the purchase and sale of opium. The books of the firms, which were kept at different places, where the partners traded, were not satisfactory; but the Courts in India allowed certain items to be due to the plaintiffs. On appeal, *held*, by the Judicial Committee, that, although it was not clear, whether those items, in taking the account, ought to have been allowed, yet, as the plaintiffs, who had every means of proving their case, had failed to establish their claim against the defendant, the Court of last resort would not on that ground, after twenty-one years' litigation, remit the case to India for further inquiry and investigation to enable the plaintiffs to amend their case. *SETH LUKHEE CHUND RAO v. SETH INDRA MULL*, 13 W.R. 36, P.C. = 4 B.L.R. 31, P.C. = 13 M.I.A. 365.

(17)—*Banker suing deceased's representatives for balance due by deceased—No proof—Effect—Banker's books, Production of—Proof of debt to be strict.*—Action by Bankers, against the representative of a deceased customer, to recover

*Evidence—continued.**—2.—Accounts—continued.*

the balance of an account alleged to be due to the Bankers by the deceased at the time of his death, was dismissed by the Sudder Court, as no satisfactory proof had been given that such balance was due. Such finding was sustained on appeal by the Judicial Committee. The production of Banker's books, with the entries of the items constituting the demand, kept according to the established custom of *Mahajuns* in India, is not of itself sufficient evidence to establish such a claim, strict proof of the debt being required. *RAI SRI KISHEN v. RAI HURI KISHEN*, 5 M.I.A. 432.

(18)—*Suit for—Evidence—Changing cause of action*—The plaintiff, a pardanashin lady of rank, sued the defendant, her cashier, for about a lakh of rupees, alleged to be due under an unadjusted account. She filed with the plaint a *furd* or memorandum, which she described as memorandum A. Later on, at the examination of plaintiff as a witness, it was found that no possible explanation of the contents of memorandum A, without the introduction of other items of charge or discharge, could reconcile it with the plaintiff's statement that she was entitled to recover a lakh of rupees. She, thereupon, filed another memorandum, relating to a period next preceding that to which the suit related, and signed by the defendant, and afterwards admitted by the defendant himself to be genuine. Considered with this latter memorandum, the plaintiff's statements in the plaint were explicable. *Held*, that, under the circumstances, the memorandum produced by the plaintiff at her examination should be treated as evidence supporting the original cause of action on which the suit was based, rather than as an amendment of the case originally laid in the plaint, or as a substitution of one claim for another. *Held*, also, that the mere omission of an accountable party framing his own account, to carry forward, into a new account, a balance against himself existing in a former one, could constitute no evidence in his own favour. To prove the extinction of the balance, such evidence might be considered in conjunction with other evidence in the cause. *MULKA MUKHDRA BEGUM OF THE EX-KING OF OUDH v. TEKAETH ROY*, 14 W.R. 24, P.C.

(19)—*Debt on written agreement—Satisfaction of debt—Written agreement how to be dealt with—Writing not returned to debtor—Effect.*—When the debt is contracted on a formal written agreement, the writing, upon repayment, should be given up to the borrower, or should be destroyed or otherwise cancelled, or a written receipt or acquittance should be given, or the settlement of the account should be shown in some other clear and unambiguous way. If the writing remains uncanceled in the hands of the creditor, the debtor must be required to give strict proof of the repayment and a reasonable and probable account of the creditor's retention of the document intact, and if he fails to do so, he must take the consequences. The evidence tendered in this case.



**Evidence—continued.****—2.—Accounts—concluded.**

is altogether insufficient to rebut the presumption from the creditor's possession of the uncanceled promise in writing of the debtor to pay the money acknowledged to have been lent. *MA PYU v. MA THA*, U.B.R. 1892-1896, 893, Vol. II.

(20)—*Act XVIII of 1869, Sch. II, para. 5—Unstamped acknowledgment of debt by defendant in plaintiff's books—Inadmissibility against defendant—Book itself corroborative evidence of plaintiff's claim.*—Though an unstamped acknowledgment of debt in the plaintiff's book, by the defendant, is not admissible against the defendant under Act XVIII of 1869, Sch. II, para 5 yet the book itself is admissible as corroborative evidence of the plaintiff's claim. *DEVI DITTA v. MIAN SINGH*, 43 P.R. 1874.

(21)—*Acknowledgment of debt.*—The acknowledgment of debt by the debtor by sealing a balance of debt due against himself in the account books of the creditor can be admitted in evidence without any stamp. *KALU v. BASANTA MAL*, 33 P.R. 1873.

**—3.—Accounts and Account Books.**

(1)—*Evidence—Account books regularly kept—Corroborative evidence.*—Books proved to have been regularly kept in course of business are admissible as corroborative, but not as independent, proof of the facts stated. *DWARIKA DASS v. DWARLA DOSS*, 2 Agra 308.

(2)—*Evidence Act (I of 1872), s. 34—Books, regularly kept in course of business, meaning of.*—A private account book entered up casually once a week or fortnight and not from day to day as transactions took place, cannot be regarded as coming within the designation of books of account regularly kept in the course of business, so as to be admissible in evidence as such, under s. 34 of the Indian Evidence Act. *MUNCHERSHAW BEZONJI v. THE NEW DHURUMSEY S. & W. COMPANY*, 4 B. 576. [Not F., 27 C. 118, P.C.; R., 23 B. 63, 2 O.C. 311, 25 B. 616.]

(3)—*Partnership—Joint adventure.*—Two firms started into a joint adventure which was to be conducted by an agent specially appointed by both firms. One of the firms brought a suit against the other to recover their share of the alleged loss upon the joint adventure. The evidence in support of the plaintiffs' claim consisted, however, almost entirely, of books of accounts kept by the plaintiffs themselves and by two corresponding branches of the plaintiffs' firm. Held, that their books of accounts could not be likened to books of partnership to which all the partners in a firm have access, and which are kept by the servants of all; and that although, the books corroborated each other they were not sufficient evidence to entitle the plaintiffs to a decree, in the absence of evidence showing that the sums mentioned in the books as having been paid to the agent specially appointed for carrying on this joint adventure,

**Evidence—continued.****—3.—Accounts and Account Books—concl.**

were really applied by such agent for the purposes of the joint adventure. *SETH LAKHMI CHAND v. SETH INDRA MULE*, 4 B.L.R., P.C., 31=13 W.R. 36=13 M.I.A. 365. [D., 11 B. 514.]

See ACCOUNTS—MISCELLANEOUS, 37 P.R. 1867.

Balance of account signed by agriculturist, necessity of registration of, under s. 56 of the Dekhan Agriculturists' Relief Act (XVII of 1879)—See BOM. ACT XVII OF 1879, s. 56, 6 B. 729.

Suit against agriculturist on khata—Unregistered khata—Admissibility in evidence—See BOM. ACT XVII OF 1879, s. 56, 13 B. 215.

**—4.—Decrees, Judgments and Proceedings in Suits.**

See DECREE.

See JUDGMENT.

(1)—*Judgment made without jurisdiction—Evidentiary value.*—The judgment of any Court, when offered in evidence in a subsequent proceeding, may be shown to have been made without jurisdiction, and therefore to be void. *MERJAH JANAND v. KRISHTO CHUNDER*, 10 C. 507.

(2)—*Decree put in as evidence—Questioning decree.*—Where a decree is put in as evidence, the Judge ought not to consider its merits or the evidence on which it is founded. *BIJONATH CHOWDHRY v. LALL MEAH MUNNEE-POOREE*, 14 W.R. 391.

(3)—*Document—Oral evidence—Admissibility.*—Where the existence or otherwise of a certain document is not clearly proved, oral evidence of its contents is not admissible. *MUFEEZOODEEN KAZEE v. MEHAR ALI*, 1 W.R. 212.

(4)—*Act XL of 1858—Act XXVII of 1860—Proceedings under Acts—Conclusiveness—Corroborative evidence of admissions of opponents.*—Proceedings under Act XL of 1858 and Act XXVII of 1860 are not conclusive evidence, but they are corroborative evidence, where they involve an admission by the opposite party, *KASHEE KANT DOSS v. BROJONATH DOSS*, 18 W.R. 314.

(5)—*High Court decreeing right to assessment on lakheraj—Decree, Lapse of—Bindingness.*—A decree of the High Court declaring plaintiff's right to assess rent on land held as lakheraj though it cannot be executed from lapse of time, is still a binding decision as to title. *RAM SOONDAREE DEBIA v. RAM PERSHAD SADHOO*, 8 W.R. 288. (5 W.R., Act X, Rul. 10 D.)

(6)—*Sale certificate—Boundaries given in certificate and plaint showing previous suit regarding land—Decision in previous suit—Evidence in subsequent suit.*—The boundaries of some land, as given in the sale certificate and



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plaint, identified it as land in regard to which a former decision had been passed. *Held*, that this decision may be used as evidence in support of the plaint. **ANUND CHUNDER CHUND v. GUNEE GAZEE**, 25 W.R. 180.

(7)—*Decree of Supreme Court—Limitation.*—In a suit instituted in the Zillah Court to recover possession of the property mortgaged, it is not competent to the plaintiff to impugn the validity of a decree of the Supreme Court. The fact that litigation is pending would save limitation. **HURO CHUNDER BISWAS v. NOBOKISON MOOKERJEE**, W.R. 1864, 159.

(8)—*Document found authentic in former decision—Former decision relevant to show use of document*—A Judge may lawfully employ a former decision, in which a document, which can no longer be attested in the usual form, has been found authentic, to show that the document had been used publicly. **NAGUR SINGH v. MUSHUNAND KHAN SIRCAR**, 11 W.R. 309.

(9)—*Deposition of Caze—Vendor's admission of sale and receipt of consideration—Evidence of sale—Admission.*—The deposition of a Caze stating the admission to him by the vendors of a sale and receipt of the consideration, together with the conduct and statements of the parties, form legal evidence of sale as against the vendors. **HURISH CHUNDER DUTT v. TEEN COWREE DUTT**, 5 W.R. 175.

(10)—*Suit to which defendant was no party—Copy of deposition in suit—Evidence.*—Where the defendant was no party to a suit, copies of depositions given in such a suit are not evidence in a suit against him. **SHUMBOO GEER GOSSAIN v. RAM JEWAN LALL**, 8 W.R. 509.

(11)—*Objection not raised to copies of documents—Exclusion from evidence—Decision on decree not inter partes—Fraudulent decree—Inquiry.*—Case where it was held that summary exclusion of copies of documents from evidence, merely because they are not originals was wrong, when no objection was taken to them; and that a decision should not be rested on a decree not between the parties, or on a decree fraudulently obtained, without inquiry. **SREEMUTTY LUZINA BIBEE v. JUGGO MOHUN DUTT**, 17 W.R. 378.

(12)—*Reference to evidence of other parties with consent of parties.*—A Judge is warranted, by the consent of the parties, in determining the question in dispute on the basis of the evidence contained in the record of a former case. **BAROO MULL v. CHUJJOO MULL**, 4 N.W.P. 125.

(13)—*Petition by judgment-debtor for time to pay instalments of kistbundee—Contract between decree-holder and decree-holder—Evidence.*—Where a petition was put into Court by a judgment-debtor, for time to pay the instalments due under a *kistbundee*, held that the petition may be considered as evidence of a

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new contract formally entered into with the decree-holder and defendants in Court. **PEAREE MOHUN MITTER v. MOHENDRO NARAIN SINGH**, 23 W.R. 465.

(14)—*Arguments on different portions of proceedings in former suit—Evidence.*—When plaintiff and defendant base their arguments on different portions of the proceedings in a former suit, the Court should use them all as evidence. **BEER CHUNDER ROY v. SHAIKH TUMEE-ZOODDEEN**, 12 W.R. 87.

(15)—*Report of Commissioner—Reliable evidence.*—The Court is not bound to take any other evidence than the report made by the Commissioner, when an investigation of accounts is submitted to him under s. 181, Civ. Pro. Code, 1859. **KISHEN SHAH v. GUR-MOKH**, 40 P.R. 1870.

(16)—*Evidence—Matters of public interest—Decrees of competent Courts.*—The decrees of competent Courts are good evidence in matters of public interest, such as the existence of customs of succession in particular communities; and such decisions form an exception to the general rule which excludes *res inter alios acta*. **BAI BALJI v. BAI SANTOK**, 20 B. 53. (7 W.R. 210, R.)

(17)—*Custom—Subject of public nature—Judgment between other parties—Evidence.*—On a subject of a public nature, previous judgments between other parties are admissible as evidence, though they are not conclusive evidence. They are in the nature of reputation and admissible to prove custom. But it ought to appear clearly from them that the question of custom was determined. A single instance is not sufficient to establish a custom. **TOTA RAM v. MOHUN LAL**, 2 Agra 120.

(18)—*Pre-emption suit—Decree in former suits—Evidence of custom.*—In a suit for pre-emption based upon custom, decrees passed in favour of such custom in suits in which it was alleged on the one side and denied on the other, are the most satisfactory evidence and may be admitted to prove its existence. **GUR-DAYAL MAL v. JHANDU MAL**, 10 A. 585 = A. W.N. 1888, 242. (6 C. 171, D.; N.W.P. 1868, 138, 1 A. 440, R.)

(19)—*Custom as to periodical re-distribution of village lands—Admissibility of judgment inter partes—Prior suit by another co-owner in respect of same relief—Saving of limitation.*—Where a co-owner of village lands sued for delivery to him of certain shares of the village lands as one of such co-owners, in accordance with a custom that, at the expiration of every twelve years, the lands were to be re-distributed the existence of a judgment *inter partes* in a suit brought by another co-owner for a periodical allotment of the lands was cogent evidence of the existence and validity of the custom. [R., 4 M.H.C. 108; D., 3 M.H.C. 226.] Prior to the suit referred to above, another co-owner



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had instituted a suit to which some only of the present defendants were parties, and obtained a decree for the periodical allotment of the lands. *Held*, that the litigation which was commenced by the prior suit was sufficient to prevent the law of limitation from barring the plaintiff's right to sue, and the circumstance that some only of the present defendants were parties to such litigation could make no difference with regard to the bar of limitation. **VENKATASVAMI NAYAKKAN v. SUBBA RAU, 2 M.H.C. 1.**

(20)—*Evidence—Judgment in another case.*—A judgment in another case is insufficient evidence against a party who had no part in it, even though his interests might be of a similar nature to those of the person then suing. **DOST MAHOMED KHAN CHOWDHRY v. SOCLOCHENA DABIA, 1 W.R. 270. [R., 24 B. 591= 2 Bom. L.R. 386.]**

(21)—*Judgment—Admissibility in evidence.*—A judgment, not *inter partes*, but only affecting one of the parties to the suit, cannot be treated as evidence against him. **ROY GOODUR SAHOY v. DRUNNESHUR KOER, 7 C.L.R. 117.**

(22)—*Judgment against plaintiff when defendant no party—Evidence.*—Where, in a previous suit, the defendant was not a party, a judgment then passed against the plaintiff is not evidence between the parties in a subsequent suit. **MAHOMED ALI v. SHURUM ALI, 8 W. R. 422.**

(23)—*Judgment between third parties—Admissibility.*—In a suit to recover arrears of rent for a shop, the plaintiff alleged that the rent was Rs. 250 per annum, and the defendant contended that it was only Rs. 60. In support of the allegation, the plaintiff relied on the evidence of his brother and two entries in his hand-writing in the books of the firm of which the plaintiff's brother and the defendant were partners. To prove the *bona fides* of these entries, the plaintiffs offered in evidence a judgment given in favour of the plaintiff's brother in a suit brought by the defendant, charging him (the plaintiff's brother) with improperly debiting their firm with Rs. 250 as the rent of the shop. *Held*, that the judgment was not admissible in evidence against the defendant in the present suit. **RANCHHODDAS KRISHNA DAS v. BAPAU NARHAR, 10 B. 439. (3 B. 2, D.) [R., 14 B. 372, 12 A. 1, 24 B. 591.]**

(24)—*Judgments in rem and inter partes—Admissibility in evidence—Remand—Material issue.*—A judgment *inter partes* between A and B would not conclude A in a suit between A and C; and would be inadmissible in the second suit to prove the truth of the facts adjudicated in the former one. The High Court remanded the case to the District Court for the determination of a material issue regarding the alienation of Hindu family property

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in land. **BALAJI VISVANATH JOSHI v. DHARMA, 2 B.H.C. 363. [R., 10 B.H.C. 194.]**

(25)—*Plaint and decision in previous suit—Evidence in subsequent suit.*—Case where it was held that the Court below committed an error in law in admitting a plaint filed in a previous suit as evidence against present defendant, and in relying on a former decision which determined no question of right as between present parties with reference to the matter in dispute. **KASHEE CHUNDER MAJUMDAR v. SEETUL CHUNDER TULLAPATTUR, 17 W. R. 151.**

(26)—*Decrees in suits not inter partes—Admissibility in subsequent suits.*—A decree in the matter of a mortgage between B and another of the defendants, in a suit to which neither the plaintiff nor any one privy to him in title was a party, is not relevant in evidence as a decision *inter partes*. **AFZUL KHAN v. BAHADOOR SINGH, 19 W.R. 156.**

(27)—*Judgment in previous suits, admissibility of, in evidence—Rule of English law not quite applicable in India.*—This was a suit, brought to establish the plaintiffs' title to a certain *bheel*. At the same time, another suit was brought to establish the plaintiffs' title to two plots of land situated north of the *bheel*. It appeared that the plaintiffs and defendants were neighbouring zamindars, and that they had constant disputes as to their respective boundaries, the defendants always claiming the *bheel* which ran in a direction nearly east and west, and also asserting that the *bheel* was their southern boundary; whereas the plaintiffs also claimed the *bheel*, and though the major part of their zamindari lay to the south of it, yet they claimed certain plots of land on the north. The evidence in the Courts below consisted almost entirely of decrees in prior suits to relate to disputes about these and neighbouring lands and the question was whether or not the Judge of the lower appellate Court had done rightly in, on the one hand, rejecting, and, on the other hand receiving these decrees as evidence. The ground relied upon by the plaintiffs who sought to exclude some of the decrees was the rule of English law as laid down in most of the English treatises on evidence, that, except in matters of general interest or public rights, a verdict in a previous suit, to be *admissible*, must be between the same parties, or parties through whom the parties actually in litigation claim. Without entering into the question whether the boundaries of a zamindari were or were not a matter of general interest, so as to make evidence of reputation admissible, and to bring the case within the acknowledged exception to the English rule, the High Court was of opinion that the rule itself was not applicable in all its strictness to the Courts in India. The technical considerations by which the rule as to res



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*judicata* is narrowed, lose all their force when the judgment is sought to be used not as a bar but as evidence. **DOORGA DOSS ROY CHOWDHRY v. NURENDRO COOMAR DUTT CHOWDHRY**, 6 W.R. 232. [R., 14 W.R. 201.]

(28)—*Plaintiff no party to previous suit—Decision—Evidence.*—A decision in a suit to which the plaintiff was not a party, though admissible as evidence was held to be not conclusively binding upon him. **OMER DUTT JHA v. COLONEL JAMES BURN**, 24 W.R. 470. [R., 24 B. 591.]

(29)—*Civil cases—Decrees, judgments, and proceedings in former suits—Evidence of adoption.*—A decree to which the defendant was not a party is admissible as evidence of great weight, though not as an estoppel against him, on the question of the plaintiff's adoption, which was established by it in the presence of certain members of the plaintiff's family, who were interested in contesting its validity. **ANNUND-NATH ROY v. THAKOOR DOSS MOZOOMDAR**, 2 Hay 472.

(30)—*Evidence Act, s. 35—Relevancy and admissibility of documents in evidence.*—The following documents, though not conclusive as the defendants were not parties to them, are yet relevant evidence in a suit by the plaintiff to establish his title to certain land:—(1) the conveyance in favour of the plaintiff's father, (2) a sale certificate given to the vendor, (3) a Court's order in which a petition by the plaintiff's father asserting his title is referred to, (4) a judgment of the Court in favour of the plaintiff's father and against the vendor's sons in regard to the land. **VENKATASAMI v. VENKATAREDDI**, 15 M. 12. [R., 24 B. 591.]

(31)—*Judgments not 'inter partes'—Admissibility in evidence.*—In a suit for *khas* possession of land, a decree obtained by an auction-purchaser against the defendant, declaring the liability of the land for rent, was held inadmissible in evidence, as the plaintiff did not claim through such auction-purchaser. (6 C. 171, F.). 11 C.L.R. 528 lays down that judgements not *inter partes* may in certain cases be taken into consideration; and not that they can be treated as conclusive evidence. **MAHENDRA LAL KHAN v. ROSOMOYI DAS**, 12 C. 207. [R., 12 A. 1, F.B., 24 B. 591=2 Bom. L. R. 386.]

(32)—*Finding in former suit 'inter partes'—Evidence.*—A finding in a former suit where the question was tried between all the parties to the subsequent suit, is admissible as evidence. **GUTTEE KOIBURTO v. BHUKUT KOIBURTO**, 22 W.R. 457. [R., 3 B. 3, 24 B. 591.]

(33)—*Evidence Act, I of 1872, s. 11—Decree, not 'inter partes'—Relevancy.*—In a suit for rent brought by one co-sharer against others, the defendants alleged that certain plots of the estate were *lakhiraj* lands, while they admitted exclusive possession of these plots, and also of a number of other plots. The plaintiff put in

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evidence certain decrees obtained by him against persons who were in possession of the plots of land said to be *lakhiraj*. *Held*, having regard to the position of the parties and to the particular defence set up, that the decrees were evidence to show the character of the land, that a claim for rent was successfully made on a former occasion, and that they were not evidence of any decision of a Court of Justice that the land was *mal* and *lakhiraj*. **HIRA LAL PAL v. A. HILLS**, 11 C.L.R. 528. (6 C. 171=6 C.L.R. 439, F.; 6 I.A. 33, R.) [Expl., 12 C. 207.]

(34)—*Judgments and decrees not inter partes—Admissibility as evidence of duration and nature of defendant's possession.*—Plaintiff sued to recover possession of certain mouzahs. He founded his claim on the fact that the mouzahs were locally within his zemindari, a fact which was not disputed by the defendants. The defendants pleaded that from a period before the Permanent Settlement (1793 A.D.) they and their ancestors had been in possession of the mouzahs as a ghatwali tenure, and having been in possession at fixed rents without variation for such a long period of time, the plaintiff had no right to dispossess them. In support of their contention the defendants filed certain judgments and decrees in two suits instituted against their predecessors by a third person, who was not the plaintiff's predecessor. One of those suits was for possession and the other for assessment of rent. The same claim was asserted by the then defendants and the defence was sustained. *Held*, that the judgments and decrees were admissible in evidence as showing ancient possession and that the title which the defendants now relied upon was openly asserted by their predecessors at that time. It was also admissible to show the rate of rent. **RAM RANJAN v. RAM NARAIN**, 5 M. L.J. 7, P.C.=22 C. 533, P.C.=22 I.A. 60=6 Sar. 530. [Cons., 9 C.W.N. 402; R., 25 C. 522, F.B.=4 C.W.N. 63, 24 B. 591, 5 Bom. L. R. 230, 25 A. 546=A.W.N. 1903, 137, 7 O.C. 122, 9 C.W.N. 402, 34 C. 753=12 C.W.N. 193=5 C.L.J. 583, 9 C.L.J. 597=12 C.W.N. 739, 35 C. 701=12 C.W.N. 657=7 C.L.J. 563; D., 13 C.W.N. 217=9 C.L.J. 16=5 M.L.T. 274.]

(35)—*Decrees 'inter partes'—Evidence of title or possession.*—Case where it was held that decrees between parties may be most forcible evidence of title, but scarcely of possession, unless in a form declaratory of possession. **IMDAD ALI v. SHAIKH BOONIAD ALI**, 20 W. R. 271.

(36)—*Apparent inconsistency between certain statements in plaint and evidence—Explanatory value of decree not 'inter partes'—Non-filing of such decree in first Court.*—Case where it was held that a Subordinate Judge was justified in using a decree between other parties to explain an apparent inconsistency between certain statements in the plaint and in the evidence of



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the plaintiff's witnesses, on the ground of which inconsistency the Munsiff had rejected that evidence, and that the non-filing of that decree in the first Court was a matter within the discretion of the Sub-Judge, offering no ground for reversing a judgment. **RADHANATH DOSS v. KHELLUT CHUNDER GHOSE, 17 W.R. 558.**

(37) *Plaintiff successful in two lower Courts—Success in High Court—Findings of lower Court and pleadings left intact—Subsequent suit against same party—Previous proceedings, value of.*—A plaintiff was successful in both the lower Courts, and the decree obtained was only reversed by the High Court, on the ground that he was not entitled to the particular relief asked for, without the finding of the lower appellate Court and the pleadings of the parties being displaced: *Held*, that it was open to the plaintiff in a subsequent suit against the same defendant framed in a different way to adduce the proceedings in the former suit as evidence for what they were worth. **MOHESH CHUNDER BROHMOCHAREE v. DINO BUNDHOO BOSE, 24 W.R. 265.**

(38)—*Judgments, not inter partes—Admissibility in evidence.*—A judgment obtained by the defendant in a suit, to which neither the plaintiff nor his predecessors in title were parties, was held admissible, in order to prove the character of the defendant's possession of the land, to recover which the suit was brought. **PEARI MOHUN MUKERJI v. DROBOMOYI DABIA, 11 C. 745. (6 I.A. 33, 9 C. 255, Appr.) [Rel. on, 9 C.W.N. 383.]**

(39)—*Evidence Act, ss. 13 and 42—Judgments in previous suit not inter partes relevancy of.*—In a suit brought on behalf of a temple against certain proprietors of land for collecting from them certain annual dues to the devastanam, judgments in previous suits not *inter partes*, in which such dues were decided to be claimable by the trustees, as of right, were held admissible in evidence, under s. 13 of the Act, as evidence of "particular instances in which the right or custom was claimed," and also as decisions which relate to "matters of a public nature" within the meaning of s. 42. **RAMASAMI v. APPAVU, 12 M. 9. [Appr., 12 A. 1, F.B.; R., 15 M. 19, 16 M. 191, 24 B. 591.]**

(40)—*Judgments not inter partes—Relevancy of—Evidence Act, s. 35.*—Judgments not *inter partes* are relevant where they are produced not to prove an adjudication between third parties, but in order to prove a statement made by a predecessor in title of the party against whom they are sought to be used. **KRISHNASAWI AYYANGAR v. RAJAGOPALA AYYANGAR, 18 M. 73. [R., 24 B. 591, 3 C.L.J. 521, 19 M. L.J. 347.]**

(41 & 42)—*Admissibility of judgments not inter partes.*—A razinamah, entered into between the tenants of two adjoining lands, belonging to different owners, with respect to flow of

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water in a channel running through the lands may, in a suit between the proprietors, be used in evidence to explain the character of the enjoyment of the water, when it is found to have been subsequently acted upon. **RAMESUR PERSAD NARAIN SINGH v. KOONJ BEHARI PATTUK, 4 C. 633=6 I.A. 33, P.C.=3 Sar. 886. [R., 11 C.L.R. 528, 11 C. 745, 12 A. 1, F.B., 24 B. 591.]**

(43)—*Decree, Evidentiary value—Ex parte decree, Value of.*—A decree is evidence, notwithstanding that nothing has been recovered under it. A Court is bound to consider the value of even an *ex parte* decree pending in appeal, when it is adduced in evidence. **MAHOMED KANA MEAH v. RUN MAHOMED, 24 W.R. 254.**

(44)—*Ex parte decree—Limitation barred—Rights of decree-holder.*—An *ex parte* decree is inoperative, if it has not been executed with the time prescribed by the limitation law, and if the decree-holder had, for a period beyond that of limitation, accepted a status at variance with that assigned to them under the decree. **RAMJEEWUN RAI v. DEEP NARAIN RAI, Agra, F.B., 78=Ed. 1874, 60.**

(45)—*Ex parte decree—Due notice—Evidence.*—An *ex parte* decree in a rent-suit is none the less valuable as evidence of the relation between plaintiff and defendant, provided due notice was served on the latter; and the decree may be filed as evidence without the judgment on which it was founded. **TOOMY v. DHURRUP SINGH, 12 W.R. 473.**

(46)—*Ex parte decree, status of and evidentiary value of—Rent suit—Amount.*—A decree obtained *ex parte* is, in the absence of fraud or irregularity, as binding, for all purposes, as a decree in a contested suit. **[F., 11 C.L.R. 483; D., 7 C. 23=8 C.L.R. 257; R., 16 C. 300, F.B.]** Such a decree is admissible in evidence, though its execution may have been barred. In a suit for a year's rent, the amount was held to be determined by the decree in a suit, for the previous year's rent, between the same parties, though it was *ex parte* and execution thereof had been barred. **BIRCHUNDER MANICKYA v. HURRISH CHUNDER DASS, 3 C. 383=1 C.L.R. 385. (1 C. 202=24 W.R. 403, F.; 14 B.L.R. 370=23 W.R. 128, Expl.)**

(47)—*Ex parte decree. Finality of—Civ. Pro. Code (N of 1877), s. 13, Expl. 4—Ex parte decree, Evidentiary value of—Suit for rent.*—An *ex parte* decree is not final within the meaning of expl. 4 of s. 13 of the Civ. Pro. Code. **[F., 9 M.L.J. 60]** An *ex parte* decree in a suit for rent is not conclusive evidence of the amount of rent payable in respect of the same property in another suit. **NILMONEY SINGH v. HEERA LALL DASS, 7 C. 23=8 C.L.R. 257. [F., 8 C. 275.]**

(48)—*Suit for rent—Prior ex parte decree, Evidentiary value of.*—Where, in a suit for rent of



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a half share of land, an *ex parte* decree in a previous suit against the tenants of this share at a certain rate of rent, and another decree in a contested suit against the tenants of the other half share by the same plaintiff at a lower rate of rent, were the only evidence, *held*, the plaintiff could not rely on the *ex parte* decree, and that the defendants were entitled to dispute the rate claimed. **BHUGIRATH PATONI v. RAM LOCHUN DEB, 8 C. 275=10 C.L.R. 159. (7 C. 23, R.) [F., 9 M.L.J. 60.]**

(49)—*Suit for rent—Ex parte decrees against registered tenant, admissibility of, in evidence—Decree against registered tenant—Evidentiary value against unregistered transferee.*—In a rent suit, wherein the plaintiff claimed payment both in cash and in kind, *ex parte* decrees, for rent both in cash and kind, obtained by the plaintiff's predecessor against the then registered tenants, were held inadmissible in evidence against the defendant, though, at the time of the decrees, he was owner of the tenure, having acquired it by foreclosure (the transfer, however, not having been registered in the plaintiff's books), on the ground that the defendant was neither a party to the suits not claimed through the parties against whom the decrees were passed. 6 C. 171 precludes their admissibility. [R., 12 A. 1.] The decision in 21 W.R. 94 does not lay down that a decree against a registered tenant is to be evidence for ever in future proceedings against an unregistered transferee not a party to it; but all that case decides is, that, for the purpose of satisfying that particular decree, an unregistered transferee is bound by it, whether he was a party to the suit or not, the tenure being liable for the rent. **RAM NARAIN RAI v. RAM COOMAR OHUNDER PODDAR, 11 C. 562.**

(50)—*Civ. Pro. Code, 1882, s. 13—Rent suit—Rate of rent—Effect of ex parte decree.*—The mere statement of an alleged rate of rent in the plaint in a rent-suit, in which an *ex parte* decree is made, is not a statement as to which it must be held that an issue within the meaning of s. 13 of the Civ. Pro. Code was raised between the parties so that the defendant is concluded upon it by such decree. Neither a recital in the decree of the rate alleged by the plaintiff, nor a declaration in it as to the rate of rent which the Court considers to have been proved, would operate in such a case so as to make that matter a *res judicata*; assuming, of course, that no such declaration were asked for in the plaint as part of the substantive relief claimed, the defendant having a proper opportunity of meeting the case. **MODHUSUDUN SHAHA MUNDUL v. BRAE, 16 C. 300, F.B. [R., 1 C.W.N. 120, 23 C. 693.]**

(51)—*Decree ex parte—Evidence—Rent, Rate of.*—An *ex parte* decree for arrears of rent, which has been duly executed, is some evidence as to the rate of rent. **MADHU MUNJARI CHOWDHURANI v. JHUMAR BIBI, 1 C.W.N. 120. (20 C. 505, F.; 16 C. 300, R.)**

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(52)—*Effect of ex parte decree—Effect.*—An *ex parte* decree as to rent which has been executed, is some evidence as to the rate of rent. **MATI LALLPODDAR v. NRIPENDRA NATH RAY CHOWDHRY, 2 C.W.N. 172.**

(53)—*Ex parte summary decrees for rent—Evidentiary value.*—*Ex parte* summary decrees are no evidence at all of the rate of rent leviable. At the most, they are proof only of what the zemindar considered were the proper rates. **ANNA PURNA DAS v. JOYKISTO MOOKERJEE, W.R. 1864, 107.**

(54)—*Decrees, judgments, and proceedings in former suits—Decree in summary suit—Suit for arrears of rent.*—In a suit for arrears of rent, decrees in summary suits against the defendant for rent for years subsequent to those in respect of which the rent is claimed are no evidence of such rent being due; but such a decree is *prima facie* evidence in support of a claim for rent for the next ensuing year. **AFSUROODEEN v. SHOROOSHEE BULA DABEE, Marsh 558=2 Hay 664.**

(55)—*Judgment in one rent suit how far a precedent in another.*—Unless the circumstances of one rent suit are on all fours with those of another, the Court's judgment in the one case cannot supply reasons for its decision in the other. **DHUNRAJ KOONWAR v. OOGGUR NARAIN KOONWAR, 15 W.R. 2.**

(56)—*Rent suit—Measurement of land—Customary hath—Admissibility of judgments not inter partes—Evidence Act, s. 13.*—Where in a rent suit the question was as to the amount of land held by the tenant, and the plaintiff zemindar claimed to measure the land with a *hath* of 18 inches and not one of 21½ inches, certain decrees obtained by the plaintiff against other tenants in the same pergunnah, in suits in which 18 inches had been taken as the customary *hath*, were under s. 13, Evidence Act, *held* admissible as furnishing evidence of particular instances in which a custom was claimed. **JIANUTULLAH SIRDAR v. ROMONIKANT ROY, 15 C. 233. [R., 16 M. 194.]**

(57)—*Previous decisions—Rates of rent—Admissibility as evidence.*—The decisions in previous suits as to rates of rent are admissible as evidence of local usage, though the tenant in the particular case was no party to those suits. **EASWARA DOSS v. PUNGAVANACHARI, 13 M. 361.**

(58)—*Suit for rent—Previous title suit, Compromise in—Admissibility of compromise decree—Suit inter partes—Compromise within scope of suit—Money payable to third persons.*—In a suit for rent, the plaintiffs landlords are entitled to rely upon a compromise decree effected in a previous title suit brought by a third party against the tenants and to which the landlords were parties. Such a compromise cannot be said to have been beyond the scope of the former suit merely because the money was payable to



**Evidence—continued.****—4.—Decrees, Judgments and Proceedings in Suits—continued.**

a third party and not to the plaintiff in that suit. Such a decree is *inter partes* and admissible in evidence. *RAMDHARI KOER v. RAMA KANTA CHOWDHURY*, 9 C.L.J. 16 = 13 C.W.N. 217 = 5 M.L.T. 274 = 5 M.L.T. 359 = 1 Ind. Cas. 572. (31 C. 95, 22 M. 508, P.C., *Rel. on*; 25 C. 522, 22 C. 538, P.C., D.)

(59)—*Occupancy right acquired by ryots—Purchase of land by zemindar—Effect.*—The right of occupancy in a ryot continues only so long as the ryot pays rent for the land he holds, and is unaffected by a wrongful eviction; but where the land is acquired by the zemindar himself by purchase, even though *benami* in the name of a third person, the occupancy right is lost and cannot be revived, seeing that the zemindar cannot pay rent to himself. *RADHA GOBIND KOER v. RAKHAL DAS MUKHERJI*, 12 C. 82. [R., 8 C.P.L.R. 74.]

(60)—*Decree for kabuliati—Conditions, for using it as evidence—S. 81, Act X of 1859.*—In order that a decree requiring a person to execute a kabuliati may be used as evidence of the amount of the rent claimable, the decree-holder must take the steps prescribed in Act X of 1859, s. 81. *SHAIKH MISSER v. KAZEE SYUD NASER ALI*, 21 W.R. 33. [R., 24 W.R. 447.]

(61)—*Decree for kabuliati for arrears of rent—Evidence of rent due from judgment-debtor—Execution of decree.*—A decree for a kabuliati for arrears of rent is evidence of the rent due from the judgment-debtor only when he is called upon to execute such kabuliati, not where the decree has not been executed, and no kabuliati given. *HEERA LALL SEAL v. JOHEER MOLLAH*, 20 W.R. 273. [Appr., 21 W.R. 33.]

(62)—*Ben. Act VIII of 1869, ss. 3 and 4—Applicability to invalid lakheraj grants—Resumption—Permanent Settlement—Decree for rent, when evidence.*—Ss. 3 and 4 of Bengal Act VIII of 1869 apply also to invalid lakheraj grants resumed at a time subsequent to the permanent settlement. A decree for rent at a certain rate will not conclusively establish that the land was held for the years to which the decree relates at that rate, until it has been executed. *BANEE MADHUB BANERJEE v. BHAGBUT PAL*, 20 W.R. 466.

(63)—*Reduction of rent—Copy of document.*—A *dur-putni* had been created subsequently to the passing of a decree in a rent-suit relating to the land in dispute; the sale certificate showed that the rental at the time of sale was lower than what it had been at the time of the first decree; there was evidence to show that some change in the rental had taken place; the plaintiff, though required to do so, had omitted to produce the *kustabood* papers called for by the defendants; and the copy produced by the defendants supported their contention. *Held*, that the Court erred in decreeing the case

**Evidence—continued.****—4.—Decrees, Judgments and Proceedings in Suits—continued.**

on the strength of the original decree. *ADDO NATH SHAHA v. SYED ALI MOHAMED*, 26 W. R. 96.

(64)—*Putnee lease—Subsequent mortgage by the proprietor—Limitation.*—In a former suit the putnee lease of the plaintiff was declared valid, and he was also maintained in possession. Subsequently the proprietor having given a mortgage of the same property to the defendant, who consequently ousted the putneedar, the latter sued for possession. The defendant-mortgagee pleaded limitation. *Held*, (1) that the decision in the former suit was sufficient evidence of the plaintiff's possession, unless rebutted, to meet the plea of limitation set up against him; (2) that the proprietor had no power to mortgage the property subsequent to the date of the putnee; and (3) that the defendant could not set up a plea which the person under whom he claimed could not have raised himself. *BOIDANAUTH SAHOO v. GOPAL CHUNDER PANDA*, 1 W. R. 60.

(65)—*Plaintiff bringing two suits—Appeal in High Court on one suit—Appeal in District Court on second suit—High Court's judgment, Evidentiary value of.*—The plaintiff instituted two suits, one of which came up in regular appeal to the High Court, and the second was heard in appeal by the District Judge: *Held* that the District Judge was wrong in using the High Court's judgment as evidence against the defendants in the suit before him. *ANUND MOHUN GHUTTUCK v. SOORJO KANT ACHARJA CHOWDRY*, 22 W.R. 538.

(66)—*Ss. 11 and 13, I.E.A., 1872—Instance of judgment held admissible or inadmissible.*—Where a previous suit was to recover a two-third share of a property, for the remaining one-third share of which a different plaintiff subsequently sued, the judgment in the former suit was held to be inadmissible in the latter suit, as the subject-matters of the two suits were not identical. [F., 1 Bom. L.R. 436, 10 C.W.N. 1084; R., 7 O.C. 122; D., 9 C.L.J. 16.] Having regard to the observations of the Privy Council in 22 C. 533 and 24 I.A. 10, the F.B. decisions in 6 C. 171, and 13 C. 352, must be regarded as materially qualified, and judgments in a previous suit, to which one of the parties in the subsequent suit was not a party, may be admitted in evidence, for certain purposes and with certain objects, in the subsequent suit. *TEPU KHAN v. RAJANI MOHUN DAS*, 25 C. 522 = 2 C.W.N. 501. [R., 2 O.C. 149, 31 C. 667, 9 C.W.N. 402, 5 C.L.J. 55, 7 C.L.J. 384, 12 C.W.N. 739 = 9 C.L.J. 597, 13 C.W.N. 217 = 9 C.L.J. 16 = 5 M.L.T. 274.]

(67)—*Decree in declaratory suit by nearest reversioner, judgment in suit admissible to explain—Subsequent suit by same reversioner.*—Plaintiff, the nearest reversioner to an estate, had previously sued as such for a declaration of his right to succeed after the death of the mother of the last male owner, and also for the



**Evidence—continued.****—4.—Decrees, Judgments and Proceedings in Suits—continued.**

declaration of the invalidity of certain alienations made by her, and had obtained a decree that such alienations were not binding on him. The mother having died since the suit, plaintiff again sued to obtain possession from her daughter who claimed to have succeeded her, and in such suit, the previous judgment was admitted in evidence to show what that suit had finally decided as to the plaintiff's title as reversioner. The decree, according to the Code of Civil Procedure, is only to state the relief granted, or other determination of the suit. The determination may be on various grounds, but the decree does not show on what grounds, and does not afford any information as to the matters which were in issue or have been decided. Consequently, in order to see what was in issue in a suit or what has been heard and decided therein, it is the judgment that can and must be looked at. **SRI RAJA RAU LAKSHMI KANTAIYAMMI v. SRI RAJA INUGANTI RAJA-GOPAL RAU**, 21 M. 344=25 I.A. 102, P.C.=7 Sar. 325. (15 I.A. 186=16 C. 173, R. & F.) [R., 8 O.C. 124; D., 17 M.L.J. 423, 9 C.W.N. 679.]

(68)—*Evidence—Proceedings of Small Cause Court—Admissibility.*—The record of proceedings in the Small Cause Court is not admissible in evidence, unless authenticated by the signature of the presiding Judge. Therefore, the summons-book kept according to the usual practice of that Court is not admissible in evidence, if not signed by the Judge. **QUEEN v. SHIBCHANDRA DAS**, 6 B.L.R. 730, Note.

(69)—*Evidence—Proceedings of Small Cause Court—Admissibility.*—The summons-book of the Small Cause Court, Calcutta, which is kept in accordance with the practice of the Small Cause Court and is the only record of that Court, is admissible in evidence, though it does not bear the signature of the presiding Judge. **QUEEN v. NAKUR SIRKAR**, 6 B.L.R. 729.

(70)—*Decree for possession—S. 9, Specific Relief Act.*—A decree for possession is some evidence, but not conclusive evidence, of dis-possession, by defendant, in a subsequent suit for mesne profits, against the same defendant. Such a decree made by a Court in a suit beyond the pecuniary limits of its jurisdiction is not *res judicata*. **JIAULLAH SHEIKH v. INU KHAN**, 23 C. 698. (11 W.R. 83, 6 C. 171, 12 C. 580, 13 C. 352, D.; 11 C. 301, R.)

(71)—*Res judicata — Admissibility in evidence of decree in previous suit.*—Where all that appears from a decree in a former suit is that the plaintiff in that suit had acquired a share in the same estate in which the plaintiffs in the subsequent suit say they have a share, and he sued defendants for their separate share of the rent of the same tenures as are in question in the subsequent suit, making the plaintiffs in the subsequent suit co-defendants, and they did not appear, held that the decree in the former suit was not a *res judicata* or even admissible

**Evidence—continued.****—4.—Decrees, Judgments and Proceedings in Suits—continued.**

as evidence in the subsequent suit, the test being mutuality. **SURENDER NATH PAL CHOWDHRY v. PROJO NATH PAL CHOWDHRY**, 13 C. 352, F.B. [F., 24 C. 330, 28 M. 457=14 M.L.J. 404, F.B., 10 C.W.N. 1084; Commented upon, 25 C. 522, F.B.=2 C.W.N. 501; D., 23 C. 693; R., 12 A. 1, F.B., 24 B. 591=2 Bom. L.R. 386, 6 C.L.J. 621, 3 C.W.N. 402.]

(72)—*Evidence Act, I of 1872, ss. 8, 9, 13, 40, 43—Judgment not inter partes—Admissibility—Res judicata—Judgment in criminal case—Admissibility of.*—A suit brought by a reversioner against a Hindu widow for a declaration of his right of inheritance on the widow's death and that a person put forward by her as her husband's son was not really so, was decided against him on the merits. On the death of the widow, he sued the son for possession of the property, alleging the same grounds as in the previous suit against the widow. Held, that the judgment in the former suit would not operate as *res judicata*, as the son did not claim through the widow, but that the whole record in that suit may be used by the son as evidence of an instance where the alleged right of the plaintiff to the property was claimed and disputed. (So held by the Full Bench, *Brodhurst, J., dissenting*). (6 C. 171, R.) [R., 24 B. 591, 25 A. 546=A.W.N. 1903, 137, 27 A. 37, P.C., 6 A.L.J. 693.] It was alleged by the plaintiff in the suit noted above that the defendant was one R, and the defendant in disproof thereof adduced as evidence a judgment in a prior criminal case wherein the defendant was prosecuted as R by a third party, and the Court found that R had expired sometime before the time of the alleged offence, and that the case was one got up by the present plaintiff who, however, was not the prosecutor on record. Held, that this judgment was inadmissible in evidence. So held by the Full Bench (*Straight, J., doubting* and *Mahmood, J., dissenting*). N.B.—The question as to when and how far are judgments relevant testimony under the Evidence Act elaborately discussed. **THE COLLECTOR OF GORAKHPUR v. PALAKH-DARI SINGH**, 12 A. 1, F.B.

(73)—*Decision of civil suit—Admissibility of evidence in a criminal case.*—A judgment in a criminal case cannot be received in a civil action to establish the truth of the facts upon which it is rendered. Similarly a judgment in a civil action cannot be given in evidence for such a purpose in a criminal prosecution, and the Magistrate ought to decide the question of the accused's criminality for himself, without reference to the decision of the civil Court.—*Per Rampini, J.* The decision in a civil suit may be admissible in evidence in a criminal case, if the main issue in both the cases is identically the same.—*Per Ghose, J.* **RAJ KUMARI DEBI v. BAMA SUNDARI DEBI**, 23 C. 610.

(74)—*Judgment in civil suit giving rise to criminal trial—Admissibility in evidence.*—The



**Evidence—continued.****—4.—Decrees, Judgments and Proceedings in Suits—concluded.**

judgment of a Munsiff who, disbelieving the genuineness of the signature of the executants of a bond on which a suit had been brought, directed the prosecution of the plaintiffs in the case for forgery is not legally admissible in evidence in a trial for the offence. *GOGUN CHUNDER GHOSE v. THE EMPRESS*, 6 C. 247=7 C. L.R. 74. [Cons., 23 C. 610.]

(75)—*Judgment in criminal case—Admissibility in civil action.*—A judgment in a criminal case, unless admissible as evidence in the nature of reputation, cannot be received in a civil action to establish the truth of the facts on which it was tendered. *DHOONDIRAJ v. KAZI MAHOMED KASSIM*, 2 C.P.L.R. 149.

(76)—*Act IV of 1840—Award—Intervenor—Evidence.*—Where an award, under Act IV of 1840, in a dispute between an intervenor and a third party has been made, it is no evidence against the plaintiff. *AMMERONISSA KHATOON v. JUGGURNATH ROY*, 11 W.R. 113.

(77)—*Act IV of 1840, Proceedings under—Litigants parties—Evidence of possession.*—Case where it was that proceedings under Act IV of 1840, to which both litigants were parties, was evidence on a question of possession. *MOHUNT RADHA CHURN DASS GOSAMEE v. AKRAN KHOOTEA*, 20 W.R. 420.

(78)—*Judgment in a criminal case, Admissibility of, in civil suit—Evidence Act, s. 43—Inspection of, under s. 138, Civ. Pro. Code, 1859.*—The judgment in a criminal case decreeing maintenance to the wife and showing that she left her husband owing to his cruelty may probably be inspected by the Court under s. 138, Act VIII of 1859, in a suit by the husband for the custody of his wife, where also she pleads cruelty. But such judgment is not conclusive. *FAKIR-UD-DIN v. MT. HOSEIN BIBI*, 32 P.R. 1874.

Sale certificate if necessary to be filed in suit for establishment of title by auction-purchaser—Decree against landlord, if admissible in evidence against the tenant—See *CERTIFICATE OF SALE*, 7 C.L.J. 384.

Hindu law—Custom—Judicial decisions recognising the existence of Jains—See *HINDU LAW—CUSTOM*, 27 C. 379.

See *RES JUDICATA—ADJUDICATIONS*, 3 W.R. 2.

See *SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL*, 24 W.R. 431.

See *ST. 11 AND 12 VIC., C. 21, SS. 72, 73, 9 B.H.O. 307.*

Prior judgments not *inter partes*, admissibility in evidence of—See *TRUSTS ACT, 1882, ss. 63, 64, 19 A. 277, P.C.=1 C.W.N. 265=24 I.A. 10.*

**Evidence—continued.****—5.—Hearsay Evidence.**

(1)—*Hearsay evidence—Admissibility.*—Hearsay evidence is not receivable when there is better evidence. There are certain subjects which cannot, possibly, from their very nature, admit of the production of immediate evidence, such as relationship, character, custom, prescription, and the like. Hearsay evidence is, more or less, admissible when it tends to explain an act done, and forms part of a particular transaction. *RAJNARAIN ROY CHOWDHRY v. OLIVIA ATKINS*, 5 W.R., Act X, Rul. 30.

(2)—*Hearsay evidence—Evidence in cases of pedigree, death and marriage.*—Hearsay evidence, though to be received with caution, is not admissible in questions of pedigree, and, by the Mahomedan law, is held to be good respecting death, descent and marriage. In India, in cases of such description, the declarations of illegitimate members of the family and also of persons who, though not related by blood or marriage to the family, are intimately acquainted with its members and state, is admissible in evidence after the death of the declarant, in the same manner and to the same extent as those of the deceased members of the family. *GHURREEB HOSSAIN CHOWDHRY v. USEEMONNISSA KHATOON*, 1 Hay 528.

(3)—*Hearsay evidence—Pedigree—Proof of birth—Evidence Act, 1872, s. 32.*—The rule which admits hearsay evidence in pedigree cases is confined to the proof of the pedigree, and does not apply to proof of the facts which constitute a pedigree, such as birth, death and marriage, when they have to be proved for other purposes. (*Haines v. Guthrie*, L.R. 13 Q.B.D. 818) It was held, in the case, that a statement by the deceased father of the defendant as to the latter's age would not be admissible in evidence to support a defence of minority. *BIPIN BEHARY DAW v. SREEDAM CHUNDER DEY*, 13 C. 42.

(4)—*Admissibility of hearsay evidence to prove date of birth—Evidence Act, s. 32, cl. 5—Admissibility of statements made to plaintiff by his relatives relating to date of his birth.*—When the Evidence Act was passed in India, the question of hearsay evidence was not definitely settled as it is now. Some of the text-books supported the contention that hearsay evidence was admissible to prove the date of birth, and looking at illustrations (k to m) of s. 32, Indian Evidence Act, it appears that that view was adopted by the Legislature. Where it was necessary to prove the date of the birth of the plaintiff, in order to determine a question of limitation, held, that statements made to the plaintiff and one of his witnesses by certain deceased relatives in regard to the date of the plaintiff's birth were admissible in evidence under s. 32 of the Indian Evidence Act. *RAM CHANDRA DUTT v. JOGESWAR NARAIN DEO*, 20 C. 758. [*F.*, 25 M. 183=11 M.L.J. 379; *R.*, 8 O. C. 94.]

(5)—*Admissions—Position of person in relation to property in dispute—Hearsay.*—The



*Evidence—continued.***—5.—Hearsay Evidence—concluded.**

admissions of a person whose position in relation to the property in dispute, it is necessary for one party to prove against another, are in the nature of original evidence and not hearsay, though he is alive and has not been cited as a witness. *ALI MOIDIN v. KOMBI*, 5 M. 239.

(6) — *Admissibility of hearsay evidence — Prosecution based on such evidence.*—In a case, the evidence for the prosecution consisted of the information given by one N to an Inspector of Police, which information was re-produced by the Inspector on behalf of the prosecution. The defence objected to the admissibility of such evidence on the ground that N was not examined as a witness in the case. The Magistrate, however, disposed of the objection by saying that "the information received from N was so complete as to bring all the circumstances of the case to light without any further evidence being called by the prosecution," that "the facts elucidated by the Police Inspector in his evidence are neither disputed nor disproved by the defence" and that "N seems to be one of the keepers of a common gaming house and as a general rule very little can be expected from such witnesses": *Held*, that the reasons given by the Magistrate were not sufficient for admitting the evidence of the Police Inspector, and that it lay on the prosecution to prove by legally admissible evidence the facts which were alleged to constitute the offences charged. *QUEEN-EMPRESS v. VIJUBHAI*, 1 Bom. L.R. 433.

See *ADMISSION — ADMISSIONS BY OR AGAINST THIRD PERSONS*, 25 P.R. 1871, 2 P.R. 1879.

See *TRANSFER OF PROPERTY ACT, 1882*, s. 107, 22 C. 752.

When joined with independent opinion is admissible to show family custom — See *WITNESS—MISCELLANEOUS*, 2 Bom. L.R. 831.

**—6.—Maps.**

(1)—*Defendant's evidence—Favourable to plaintiff—Procedure.*—In deciding a suit for the plaintiff a Judge may use evidence which the defendant may have adduced, but which appears to the Court to be favourable to the plaintiff. *ISSUR CHUNDUR SANTRA v. J.R. BELLILIOS*, 22 W.R. 271.

(2)—*Non-possession—Evidentiary value—Title, Loss of.*—Courts must be very careful before concluding that title has been lost merely by non-possession. *PROSONNO CHUNDER ROY v. THE LAND MORTGAGE BANK OF INDIA, LIMITED*, 25 W.R. 453. [R., 9 C.L.R. 305.]

(3)—*Map as evidence of matters in dispute.*—A Court need not receive a map, which has been acted upon by another Court as genuine and correct. *MAHOMED ALI AHMED KHAN v. IMDAD-OOR-ROHOMAN CHOWDHRY*, W.R. 1864, 323.

*Evidence—continued.***—6.—Maps—continued.**

(4)—*Map registered as part of bill of sale—Part of plaintiff's title deed — Evidence.*—A map which had been registered as part and parcel of a bill of sale, and was part of plaintiff's title-deed was held to be admissible as evidence. *KHETTER MOHUN NEOGY v. SREENATH DUTT*, 24 W.R. 188.

(5)—*Map drawn by Government Surveyor for a distinct purpose, not admissible in evidence for another purpose.*—The question in this case related to a certain extent of lands claimed, on the one hand, by the appellant, and, on the other hand, by the respondent. The right to the lands depended entirely upon the boundaries of certain lots of land granted by the Government about the year 1830. In 1840, a dispute had arisen with respect to the division of a plot of land adjacent to those in dispute, belonging to certain co-parceners or tenants-in-common. On that occasion, a Government Surveyor was called in, for the purpose of settling a dispute as to the partition of those lands. He was called in, not for the purpose of settling anything with respect to the boundaries in question, but to settle, as between the differing co-tenants, what were the proper limits of their respective properties. The map then drawn out by the surveyor was relied upon in this case but it was held that it could not, in the least, affect the rights to the property as between the present parties. That map had been drawn for a totally different purpose, and a purpose totally irrelevant to the subject of the present dispute. *JOHN KERR v. NUZZAR MAHOMED*, 2 W.R. P.C. 28.

(6)—*Map not stamped—Admissibility.*—A map is not admissible as evidence unless it is stamped. *KANUCK MONEE DOSSEE v. GOPEE MUNDUL*, 15 W.R. 180.

(7)—*Schedule map, Copy of—Both parties relying on map—Suit for fresh measurement and demarcation—Copy, Evidentiary value of.*—In the face of a copy of a schedule map relied upon and admitted on previous occasions by both the parties to a suit, the plaintiff cannot sue for a fresh measurement and demarcation, and the Judge is wrong in not considering the copy binding on the plaintiffs. *ROMANATH ROY CHOWDHRY v. KALLY PROSHAD ROY CHOWDHRY*, 18 W.R. 346.

(8)—*Suit to establish title—Amin's map—No objection—Duty of Court.*—Where in a suit to establish title to land, a Civil Ameen's map was not objected to by either party, the Court ought not to question its correctness. *BRIJONATH CHOWDHRY v. LALL MEAH MUNNEE-POOREE*, 14 W.R. 391.

(9)—*Nazir's report and map — Nazir not examined—Evidence.*—The report and map of a Nazir who was not examined in a case were held to be no evidence whatever. *GOBIND MUHTOO v. GOOPEE BHUGGUT*, 16 W.R. 4.

(10)—*Suit for possession—Land in Government resumed mahal—Maps and chittas made*



**Evidence—continued.****—6.—Maps—continued.**

*in boundary-dispute between zemindar and Government—Best evidence.*—If, in a suit for possession of land contained in a Government resumed *mehal*, the defendant applies for a comparison with the maps and *chittahs* made in a boundary-dispute between the zemindar and the Government, to show that the land belonged to the jungle-mehal, he proffers the very best evidence, and the Subordinate Judge should entertain the application. **RADHA CHURN GANGOOLY v. ANUND SEIN, 15 W.R. 444.**

(11)—*Collectorate maps—Opponent, No objection by—Recognition of boundary of suit lands—Conduct of parties.*—A Collectorate Map put in by the plaintiffs and not objected to by the defendants, who recognized the boundary indicated as that in regard to which the inquiry should be conducted must be taken as recognized by the parties to be correct and trustworthy. **RADHIKA MOHUN ROY v. GUNGA NARAIN CHOWDHRY, 21 W.R. 115.**

(12)—*Burden of proof—Limitation Act, 1877, Sch II, Arts. 142 and 144—Settlement records and maps, Value of as evidence—Separate ownership of land and of trees on land.*—In the absence of evidence to the contrary, settlement records and maps may be properly judicially received in evidence as correct when made. (5 C. 212, 15 C. 353, 7 C.W.N. 193, 16 C. 473, 14 B. 458, R.) There is nothing opposed to law in the ownership of things on land not being in the owner of the land itself. Ownership of land, and ownership of property on the same land, are legally distinguishable. **MAUNG YA GYWA v. MA NGWE, 2 L.B.R. 56.** [Appl., U.B.R. 1905, 4th Qr., Evidence 3; R., U.B.R. 1909, Evidence, 19, 3 L.B.R. 27.]

(13)—*Ss. 36, 83, Evidence Act, 1872—Map by: Officer of Government for a particular purpose.*—A map prepared by an Officer of Government, in the course of proceedings for the settlement of land forming the silted bed of a certain river, is not one admissible in evidence under ss. 36 and 83, Act I of 1872; but it is a map, whose accuracy must be proved by the party producing it, before it can be admitted in evidence. **KANTO PARSHAD HAZARI v. JAGAT CHANDRA DUTTA, 23 C. 335.** (5 C. 287, 9 C. 741, F.)

(14)—*Suit for possession—Survey map—*Where, in a suit for possession, the plaintiff had to prove, not title, in general to land, but that a piece of land formed part of a certain taluk at the time of the permanent settlement, a survey map showing the land to have been in the possession of a predecessor in title to the plaintiff would not be evidence, sufficient to justify a decree for the plaintiff. **MOHESH CHUNDER SEN v. JUGGUT CHUNDER SEN, 5 C. 212.** [Cons., 15 C. 353; R., 9 C.L.R. 305, 2 L.B.R. 56, 10 C.W.N. 835.]

(15)—*Boundary dispute—Survey map—Evidence.*—In a boundary dispute, a survey map, if not conclusive evidence, is valuable

**Evidence—continued.****—6.—Maps—continued.**

evidence which should be considered. **GUDADHUR BANERJEE v. TARA CHAND BANERJEE, 15 W.R. 3.**

(16)—*Boundary dispute—Ambiguity as to direction of boundary line—Conduct of parties—Settlement by any party—Evidence—Survey map.*—In a boundary dispute, if there is ambiguity as to the direction of the boundary line, the conduct of the parties since the line of pillars was decreed as the boundary must be considered as well as the survey map, if there is one, and the settlement, if any, made by one of the parties must also be taken into account. **RANEE RADHA CHOWDHRAIN v. GIREEDHAREE SAHOO, 20 W.R. 243.**

(17)—*Survey map, Evidentiary value of—Burden of proof—Rival ferries.*—A survey map is a piece of evidence like other evidence in a case, and can be of no effect in determining the burden of proof. A rival ferry cannot be set up so as to interfere with the proprietary rights in an existing ferry, that is to say, under circumstances involving direct competition with each ferry. **NARAIN SINGH ROY v. NURENDRO NARAIN ROY, 22 W.R. 296.** [R., 9 C.L.R. 305, 6 C. 608.]

(18)—*Survey maps—Possession—Title—Loazima and Thaka papers.*—Pencil memoranda on a Government survey map are admissible as evidence. Survey maps prepared under the authority of Government are evidence of possession, and therefore of title. Loazima and Thaka papers are legal evidence *quantum valeat*. **SHUSEE MOOKHEE DOSSEE v. BISSESSURE DEBEE, 10 W.R. 343.**

(19)—*Government survey maps—Act II of 1855, s. 13—Evidence.*—Under s. 13, Act II of 1855, Government survey maps are evidence as to the physical features of a country and the other circumstances, which the officers making them are specially commissioned to note down. **KOOMODINEE DEBIA v. POORNO CHUNDER MOOKERJEE, 10 W.R. 300.**

(20)—*Later Government survey map—Presumption of accuracy of earlier map.*—The fact of a later Government survey map having been prepared does not affect the presumption of accuracy, under the Evidence Act, of an earlier superseded map. **JOGGESSUR SINGH v. BYCUNT NATH DUTT, 5 C. 822=6 C.L.R. 519.**

(21)—*Map by officer of Government in private possession of property—Presumption of accuracy—Evidence Act, s. 83.*—A map prepared by an officer of Government, while in charge of a *thas mehal*; the possession by the Government being only that of a private proprietor, does not come under s. 83 of the Evidence Act, so as to raise a presumption of its accuracy. [Appl., 9 C. 741, R., 23 C. 335.] Such a map would, however, be admissible in evidence under s. 13 of the Act. **JUNMAJOY MULLICK v. DWARKANATH MYTEE, 5 C. 287=4 C.L.R. 574.**



*Evidence—continued.**—6.—Maps—continued.*

(22)—*Evidence—Survey map—Possession—Title.*—A survey map is not direct evidence of title, in the same way as a decree in a disputed cause is evidence of title, for the survey officers have no jurisdiction to enquire into or decide questions of title. A survey map is good evidence of possession according to the boundary demarcated thereupon, at the time of the survey being made. *NOBO COOMAR DASS v. GOBIND CHUNDER ROY*, 9 C.L.R. 305. [*Rel. on*, 7 C.W.N. 849; *R.*, 35 C. 621.]

(23)—*Evidentiary value of survey maps—Second appeal, Ground for.*—It cannot be said that in no case can the evidence of survey maps be sufficient evidence of title. Each case must be decided upon its own merits. A survey map is evidence of possession at a particular time, the time at which the survey was made; and although evidence of possession at one particular time might not be sufficient in itself to raise a presumption that the land belonged to the estate at the time of the permanent settlement, yet coupled with other evidence of possession it might be sufficient to raise that presumption. So where the land decreed to the plaintiff was included within his estate in two survey maps prepared at an interval of twenty years, this would be sufficient evidence from which to infer that the title lay with the plaintiff. [*R.*, 22 C. 252, 2 L.B.R. 56.] Where there were two survey maps in evidence, the fact that the lower appellate Court should have, but has not based its decree upon the latter map is no ground for second appeal. *SYAM LAL SAHU v. LUCHMUN CHOWDHRY*, 15 C. 353.

(24)—*Evidentiary value of survey maps—Right of fishery.*—In a dispute in respect of a right of fishery, held, that survey maps were not evidence of title. *THAKOOR BROMMA v. THAKOOR LULLITNARAIN DEO*, W.R. 1864, 120. [*D.*, 13 W.R. 50.]

(25)—*Survey map—Evidence of title—Evidentiary value of map, Rule as to—High Court—Special appeal.*—A survey map and proceeding may in certain cases be evidence of title; but it is not for the High Court, in special appeal, to lay down any rule as to the weight to be attached to such evidence. *OOMMUT FATIMA v. BHUJO GOPAL DOSS MOHUNT*, 13 W.R. 50.

(26)—*Suit for possession—Onus on plaintiff to prove title and dispossession—Survey maps, Evidentiary value of.*—Plaintiff averred that the land sued for had been demarcated in the Survey as of his village. It was found as a fact by the Court below that, till within six or seven years of the suit, the land was jungle waste. Both parties admitted this and admitted also that in a case under Act IV of 1840 an award had been passed in favour of defendant. The first Court decided that, under the award, the onus to prove title was on plaintiff and that the survey map which he produced was not sufficient proof *per se* of title, and dismissed the plaintiff's suit. The lower appellate Court reversed this order;

*Evidence—continued.**—6.—Maps—continued.*

and, on second appeal, the contentions of the defendant, the Collector, that he being in possession under the award of a competent Court (the Act IV award), it was for plaintiff to prove his title and dispossession, and that the survey map was not sufficient proof of title, were upheld by the High Court which decreed the appeal on the above pleas. The plaintiff's title rested on the survey map of demarcation, and on no award legally so called. This alone was not, according to the practice and precedents of this Court, such proof of title as would *per se* justify a decree setting aside defendant's possession. Government survey does not look to title but to possession only, and, consequently, the survey map on which the plaintiff relied was not sufficient, in the absence of other satisfactory title or of long antecedent possession, to establish plaintiff's right to the land, and to disturb the defendant's present possession. *THE COLLECTOR OF RAJSHAHYE v. DOORGA SOONDUREE DEBIA*, 2 W. R. 210. [*Appr.*, 5 C. 212; *Expl.*, 13 W.R. 50; *R.*, 9 C.L.R. 305, 15 C. 353, 35 C. 621; *D.*, 10 W.R. 343.]

(27)—*Suit to set aside survey-award—Dismissal—Survey map, Evidentiary value of.*—The dismissal of a previous suit to set aside a survey-award does not make the survey map conclusive evidence, or affect the Court's right to come to its own conclusion. *BEER CHUNDER JOOBRAJ v. TARINEE CHURN ROY*, 11 W.R. 46.

(28)—*Survey map, suit to set aside, maintainable by person in possession—Such map whether conclusive evidence of possession.*—Though the law requires the Revenue authorities to survey and make *thak* according to possession, yet, it may happen also that a party not in possession may succeed in obtaining a *thak* favourable to his interest and prejudicial to the party actually in possession, to set aside which, the latter must be obliged to sue in a Civil Court. Consequently, a survey map is not conclusive evidence of possession. In this case, the lower appellate Court, by holding the survey map to be of itself conclusive proof of possession by the defendant, had wrongly attached greater weight to it than it legally deserved. *MAHOMED MEHER CHOWDHRY v. SHEEB PERSHAD SURMAH*, 6 W.R. 267. [*Expl.*, 13 W.R. 50; *R.*, 9 C.L.R. 305.]

(29)—*Survey map—Limits of permanently settled estate.*—The Revenue authorities cannot go behind a survey map and question the boundaries of a permanently settled estate as fixed therein. *SARAT SUNDARI DABI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL*, 11 C. 784. [*R.*, 30 C. 291.]

(30)—*Evidence—Survey map—Ameen's report—Comparison.*—In a suit brought to set aside a survey map as in correct, the survey map may be used for the purpose of testing the correctness of an Ameen's report. *PUDDO-MONEE DOSSEE v. BISSESHUR DUTT CHOWDHRY*, 5 W.R. 33.



**Evidence—continued.****—6.—Maps—continued.**

(31)—*Certificated copies of survey measurement chittas, etc.—Evidence.*—Certificated copies of survey measurement chittas, field-books, and maps are admissible in evidence. *GOPEENATH SINGH v. ANUNDMOYEE DEBIA*, 8 W.R. 167.

(32)—*Survey and thak maps—Evidence of area.*—A survey map may be resorted to for assistance while appreciating the evidence of a thak map as to area and boundary. *MR. JAMES BURN v. ACHUMBIT ROY*, 20 W.R. 14.

(33)—*Thakbust map—No record of sub-tenures—Suit for determination of shikmee taluk's extent.*—A thakbust map is not a record of subordinate tenures, and is no evidence in a suit for the determination of the extent of a shikmee talook. *MOHIMA CHUNDER ROY CHOWDHRY v. WISE*, 23 W.R. 277.

(34)—*Decrees and judgments inter alios—Thakbust surveys as evidence.*—Case where it was pointed out that the Full Bench decision (7 W.R. 388) only refers to decrees or judgments *inter alios*, not to the admissibility or otherwise of thakbust surveys as evidence against persons not parties. *BABOO MOTEE LALL v. RANEE*, 8 W.R. 64.

(35)—*Thakbust map—Defendant no party—Evidence.*—A thakbust map to which the defendant is not a party is not admissible as evidence on behalf of plaintiff. *MAHOMED BUX v. ABDOL KUREEM*, 20 W.R. 458.

(36)—*Thakbust papers not regarded as evidence—Registration.*—Case where a suit was remanded for re-trial, because thakbust papers had not been regarded as evidence. *SHAIKH CHAROO v. MUSSAMUT ZOBEIDA KHATOON*, 23 W.R. 54.

(37)—*Thak maps.—Evidentiary value of, discussed.* *JOYTARA DASSEE v. MAHOMED MOBARUCK*, 8 C. 975=11 C.L.R. 399. [R., 10 C.W.N. 835, 35 C. 621.]

(38)—*Thakbust map—Evidence—Boundary.*—A thak map prepared in 1859 was held in this case to be good evidence of what the boundaries of the properties in dispute were at the time of the permanent settlement and also as to what they admittedly were in 1859. *SYAMA SUNDARI DASSYA v. JOGOBUNDHU SOOTAR*, 16 C. 188. [R., 22 C. 252, 30 C. 291, P.C.=7 C.W.N. 193, 7 C.W.N. 849, 35 C. 621.]

(39)—*S. 83, Evidence Act (I of 1872)—Thakbust survey map made by Amin—Thakbust survey maps—Statements recorded on.*—Where it was established that an Amin, making a thakbust map at a revenue survey, had no authority to determine what lands were debutter, but only to lay down and to map boundaries, held, that this map could not be treated as raising a presumption of correctness within s. 83 of the Indian Evidence Act, on the question as to the amount of debutter land in one of the villages mapped. [D., 10 C.L.J. 527, 13 C.W.N. 71.] Where statements as to what lands were debutter appeared on the face of the map to have been

**Evidence—continued.****—6.—Maps—concluded.**

made as pointed by agents on behalf of the proprietor of the mouzah and the principal tenants, in the presence of the agent of the holders of the estates in the neighbouring mouzabs, held, that s. 83 of the Evidence Act has not the effect of making those statements evidence. *JARAO KUMARI v. LALON MONI*, 18 C. 224=17 I.A. 143, P.C.=5 Sar. 628. [D., 13 C.W.N. 71.]

(40)—*Evidentiary value of thakbust map.*—The evidentiary value of the thakbust map is discussed in this case. *SATCOWARY GHOSH MONDAL v. SECRETARY OF STATE FOR INDIA IN COUNCIL*, 22 C. 252. (15 C. 353, 16 C. 186, R.) [R., 30 C. 291. P.C.=7 C.W.N. 193, 10 C.W.N. 835, 12 C.W.N. 273=3 M.L.T. 212=7 C.L.J. 414.]

(41)—*Accretion—Alluvial land, again formed after diluvion, ownership of—Thak and Survey maps.*—In a suit to recover possession of lands diluviated and subsequently re-formed, held without accepting the reasoning of the High Court, on the evidence, that the plaintiffs have established their ownership of lands once submerged and then re-formed, subsequent to the diluvion. *Thakbust map made before diluvion, and survey map made on the re-appearance of the land referred to.* *MON MOHUN DEBI v. WATSON & CO*, 27 C. 336, P.C.=27 I.A. 44=4 C.W.N. 113=7 Sar. 562.

(42)—*Thak or survey map, Binding effect of.*—Unless it can be proved that the person against whom a thak or survey map is attempted to be used expressly consented to the delineation or admitted the correctness of such map, it has no binding effect. *KRISTO MONI GUPTA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL*, 3 C.W.N. 99. D., 7 C.W.N. 849.]

(43)—*Thakbust map—Evidence of possession—Conclusiveness of evidence.*—Where thakbust maps are evidence of possession, they also contain evidence (though not conclusive) of title. *J.G.N. FOGOSE v. MOKOOND CHUNDER, SURMA SIRCAR*, 25 W.R. 36. [R., 9 C.L.R. 305.]

See EVIDENCE—SECONDARY EVIDENCE, 10 W.R. 333.

Nature of, required in cases ejectment—Evidentiary value of Revenue Survey Maps.—See POSSESSION—SUITS FOR POSSESSION, 12 C.W.N. 273=3 M.L.T. 212=7 C.L.J. 114.

See RIPARIAN PROPRIETORS, 24 W.R. 317.

Thakbust maps—Statement recorded in presence of parties—Evidentiary value. See THAKBUST MAPS, 35 C. 621.

**—7.—Miscellaneous Documents.**

(1)—*Documentary evidence—Proof of documents.*—A Court of justice is at liberty to admit the evidence of a defendant if favour of his co-defendant. The best evidence in support



*Evidence—continued.***—7.—Miscellaneous Documents—continued.**

of a deed of gift is that of witnesses to its execution or custody: no documentary evidence is necessary. *RAM KOMUL CHUCKERBUTTY v. NUND RAM COOLAL*, 10 W.R. 261.

(2)—*Old documents—Custody—Ejectment—Pleadings—Burden of proof.*—As to documents so old that they cannot be proved by direct evidence, proof of custody must be given. In a suit to recover possession where the allegation of previous possession and forcible ouster is denied by defendants, who set up a title of their own, the burden of proving ouster is on the plaintiff; and if the burden is well discharged, the defendants would have to prove the title on which they ousted the plaintiffs and so on. *GOUR PAROY v. WOOMA SOONDUREE DEBIA*, 12 W.R. 472. [R., 11 C. L.R. 133, 9 C. 39.]

(3)—*Old pottah and amulnamah in his possession filed by party—Natural custody—Documents, Evidentiary value of—Witness. Party cited as—Attendance of witness.*—On a plaintiff filing a very old pottah and amulnamah in his possession as their natural custodian, it is the duty of the Court to consider them as evidence, and, if one of the parties is cited as witness, to insist upon his attendance before deciding against plaintiff's evidence. *RAMDHUN GHOSE v. ESHAN CHUNDER GHOSE*, 17 W.R. 346.

(4)—*Documents—Proof of genuineness.*—It is not necessary for a party who desires to prove a document to call the writer of it, if alive, as a witness, so long as he can give other satisfactory proof of its execution. *GANGA NARAYAN DASS v. SARODA MOHAN ROY CHOWDHRY*, 3 B.L.R., A.C., 230 = 12 W.R. 30.

(5)—*Independent evidence as to the existence of a document—Proof of the document.*—Where a document is found on independent evidence to have been in existence before the institution of the suit and to be genuine, the testimony of subscribing witnesses is not needed. *MAHOMED FEDYE SIRDAR v. OOEEOODEEN*, 10 W.R. 340.

(6)—*Effect of admitting documents which are not legal evidence.*—It cannot be said that there has been a proper trial of a case where a Judge estimates parol evidence testimony by means of documents which ought not to be dealt with as evidence. *BOIDONATH PAROYE v. RUSSICK LALL MITTER*, 9 W.R. 274.

(7)—*Inadmissible evidence, Reception of—Reversal of decree—Remand.*—The objection that papers admitted as evidence are not legally admissible is not by itself sufficient ground for reversal of decree or for remand. *KENARAM SHAMUNT v. GOPEENATH GEEREE*, 10 W.R. 130.

(8)—*Forged document, mere absence of erasures in, not any ground for admission in evidence.*—In this case the Judge had, in deciding the question of limitation against the plaintiff, given special weight to a deposition of the plaintiff alleged to have been made by him in the

*Evidence—continued.***—7.—Miscellaneous Documents—continued.**

Fouzdaree Court. The circumstances were such that there was the strongest presumption that he could not have given any such deposition. The Judge, however, sent for the original deposition and, from the absence of any erasures or alterations in it, he concluded that it was quite certain that the plaintiff did make that deposition. The High Court observed that it was not enough for the Judge to have been found merely that the original deposition contained no erasure or alteration, but that he should have enquired where any such deposition was really made by plaintiff or not. The Judge was therefore directed to make careful personal enquiries into the question whether the plaintiff did actually make such a deposition or whether the alleged statement was fraudulently or by mistake inserted into the deposition. *RAM SUHAYE SINGH v. OODEET SINGH*, 4 W.R. 9.

(9)—*Suit against Collector to compel him not to interfere with plaintiff's execution of his decree—Document, Destruction of, by party—Omnia præsumuntur contra spoliatores.*—In a suit against a Collector to compel him to refrain from preventing the plaintiff executing his decree against certain land—the only question was, whether the land was the private property of the judgment-debtors, or Government service land. The plaintiff alleged that the land had been granted in free *inam* by a *sanad* which he petitioned the Mamlatdar of the pargana to search for, and send to the Collector; and, on a reference by the High Court, the District Judge found that “the Collector did destroy the document that purported to be a copy of a *sanad* such as the plaintiff petitioned the Mamlatdar to search for.” Held that the defendant was precluded from saying that the document was not such a one as could be legally admitted in evidence; and that the case came within the rule *omnia præsumuntur contra spoliatores*. *ARDESHIR DHANJIBHAI v. THE COLLECTOR OF SURAT*, 3 B.H.C. A.C. 116. [R., 26 B. 339 = 3 Bom. L.R. 910.]

(10)—*Bill of lading—Evidence of mercantile usage—Insufficient package—Damages.*—Where a certain steamer company by their bill of lading stipulated that they should not be responsible for damage to goods arising from insufficiency of package, and where the plaintiff shipped certain goods in the defendants' steamer in packages, which, though in fact insufficient, were packages of the kind ordinarily used for the conveyance of such goods from Hongkong to Bombay, but on their being landed in Bombay, it was found that packages were more or less broken, and that the contents were in some instances injured, and had to a small extent escaped from the packages, in a suit to recover damages in respect of such injury, it was held, that evidence of mercantile usage or of custom would be admissible to show that the words *insufficiency of package* should not be taken in their ordinary sense, but as meaning insufficient according to a



**Evidence—continued****—7.—Miscellaneous Documents—continued.**

special custom of the China trade. *Held*, also that evidence of these packages being ordinary China packages, and of such packages having been always carried by the defendants without objection, was not sufficient, in the absence of proof of negligence, to fix the defendants with liability for damage done to them, there being no proof that it had been the practice either of the defendants, or any other shipowners protected by a similar clause in their bill of lading, to make compensation for injury to goods contained in such packages. *P. AND O. STEAM NAVIGATION COMPANY v. MANIKJI NASAR-VANJI PADSHA*, 4 B.H.C., O.C., 169. [R., 5 B.H.C., O.C., 113.]

(11)—*Reg. III of 1793, s. 14—Acknowledgments and promises to pay money—Extension of limitation—Nature of evidence required.*—In this case, a question arose as to the nature of the evidence required to prove acknowledgments of indebtedness and, promises to pay money, sufficient to give the creditor the benefit of s. 14 of Reg. III of 1793. Mr. Justice Bayley was of opinion that the evidence sufficiently showed that certain payments alleged to have been made to the brother of the plaintiff, as on account of the joint debts due to them, and also certain acknowledgments of indebtedness to plaintiff, were duly and credibly proved. He came to the conclusion that the payments to the plaintiff's brother were on account of the joint debt, because it had not been shown that there was any debt on that account owing to the brother alone. There was reliable evidence as to the debt being a joint debt and there was clear evidence of acknowledgments and of proposals to pay plaintiff, made within the period of twelve years of the suit. These facts were held by him to suffice to bring the case within the purview of s. 14 of Reg. III of 1793, which was the law admittedly applicable to the case. Mr. Justice Phear, however, agreed with the lower Court in thinking that the evidence of the payments alleged to have been made by the defendant, with a view of bringing the matter within the period allowed by the statute of limitation was insufficient for that purpose. He determined accordingly, and such determination became final under s. 23, Act XXIII of 1861. *GOPEE KISHEN GOSSAIN v. BINDABUN CHUNDER SIRCAR CHOWDHRY*, 2 W.R. 221.

(12)—*Document subsequently added, Admissible in evidence when accepted as partially genuine.*—A review was admitted on production of fresh evidence, namely, a *kabuliyat*. The Court, on examination, found that matter had been subsequently added beneath the original *kabuliyat*, and that it could not be considered a document binding between the parties; but that, nevertheless, being in some decree accepted as genuine, it was evidence *quantum valcat*. Appellant objected to its reception in evidence and the High Court *held* that there was no reason in law to debar the lower Court admitting the document and weighing it as evidence. It was also urged that, inasmuch as houses

**Evidence—continued.****—7.—Miscellaneous Documents—contd.**

were built on the land with plaintiffs' knowledge, defendant was entitled to hold at a fixed rate, but the High Court *held* that the law protects perpetual leases for buildings, as held at a fixed rate, only where the rent has been fixed by the original leases; and in the present case the alleged lease at a fixed rate had been found to be a forgery. *SURBOMUNGULA DOSSEE v. MAHARAJAH SUTESH CHUNDER ROY*, 2 W. R. 231.

(13)—*Rough notes of depositions not recorded—Evidentiary value.*—Rough notes by an Assistant Collector of depositions not recorded are not evidence; neither has an opinion based on such evidence any legal validity. *BALA THAKOOR v. MEGHBURN SINGH*, 14 W.R. 269.

(14)—*Depositions of witnesses—Witnesses alive—Evidence.*—If the witnesses are alive still and their evidence can be procured, their depositions in a former suit are not admissible. *HARISH CHANDRA CHUCKERBUTTY v. TARA CHAND SHAHA*, 2 B.L.R. App. 5.

(15)—*Documents sent for by Court—Evidence.*—Case where it was held that documents put in by neither of the parties to a suit cannot be used as evidence between them, except for the cross-examination of witnesses in the Court of the first instance. *DWARKANATH SHAHA v. RAM LOCHUN BISWAS*, 10 W.R. 92.

(16)—*Value of share of an estate, how determined—Evidence.*—For determining the value of the share of an estate, deeds produced to prove instances wherein other shares in the same estate have been sold are good evidence. *SHEORUTTON SINGH v. NET LOLL SAHU*, 30 C. 1=6 C.W.N. 688.

(17)—*Wajib-ul-arz—Admissible evidence.*—*Wajib-ul-arzes* are admissible as official documents made in accordance with law. *GARU-DHWAJA PARSHAD SINGH v. SUPARAN-DHWAJA PARSHAD SINGH*, 10 M.L.J. 267, P.C.=23 A. 37=5 C.W.N. 33=27 I.A. 238=2 Bom. L.R. 831=7 Sar. 724.

(18)—*Wajib-ul-arz—Admissibility.*—A *wajib-ul-arz* is always admissible in evidence, being an official village record. Its weight may be very slight or may be considerable according to circumstances. *MUHAMMAD IMAM ALI KHAN v. HUSAIN KHAN*, 26 C. 81, P.C.=25 I.A. 161=2 C.W.N. 737=7 Sar. 432. [R., 44 P.R. 1907=82 P.L.R. 1903=111 P.W.R. 1907, 31 A. 457=13 C.W.N. 1073=11 Bom. L.R. 890=6 A.L.J. 767=10 C.L.J. 216.]

(19)—*Wajib-ul-arz—Recital of terms of old mortgage—Effect on claim for redemption under usury law.*—The recital of the terms of an old mortgage-deed of 1844 in the *wajib-ul-arz* prepared in 1862 does not amount to a new contract nor estop the mortgagor's claim for redemption under the old usury law. *RAO KURRUN SINGH v. MUSST. MEHTOB KOONWER*, 3 Agra 150.



**Evidence.—continued.****—7.—Miscellaneous Documents—contd.**

(20)—*Chakran land — Registers — Their nature — Limitation*—The allegation of the defendant, that the tanks in dispute had been in his possession for more than 30 years, in reply to the plaintiff's claim to recover possession, was held clearly to raise the plea of limitation, though the actual words, that the suit was barred by limitation, were not used. The Registers of chakran lands are public records supposed to contain a correct list of the chakran lands in existence at the time of the Decennial Settlement. **THE COLLECTOR OF EAST BURDWAN v. SHEIKH IMDAD ALI, W. R. 1864, 358.**

(21)—*Register of baptism, statement of date of birth in a. how far evidence of age—Attestation of sale deed, when operates as estoppel.*—A register of baptism, while evidence of that fact and of the date of it, furnishes, even if it states the date of a person's birth, no proof of the age of that person further than that, at the date of such ceremony, the person referred to was already born. Evidence regarding the date of a man's birth has been held under certain circumstances to be admissible under s. 32 (5) of the Evidence Act (25 M. 183, R.); but, in the case of an entry in the register in question, there is nothing to show by whom the statement entered was made, much less that the person making the statement had any special means of knowledge. Mere attestation of a sale-deed cannot always be held to work an estoppel; the principle on which the law rests is that it would be most inequitable and unjust to a person that if another by a representation made, or by conduct amounting to a representation, has induced such person to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted under it. Unless therefore, the representation of the party to be estopped has been really acted upon, the other party acting differently from the way in which he would otherwise have acted, no estoppel arises. The person deceived must not only believe the thing to be true, but he must also act upon such belief, 'so as to alter his own previous position' and where there has been no such belief, and no such action, there can be no estoppel. **MR. COLLIER v. MRS. L. BARON, 2 N.L.R. 34. (4 C.W.N. 283, 21 A. 316, F.)**

(22)—*Adversary's account books—Corroborative evidence.*—An adversary's account-book may be used as corroborative evidence, but not as independent testimony. **RAMESSUR SINGH v. AJOODHYA PERSHAD SINGH, 13 W.R. 294.**

(23)—*Evidence—Suit for rent—Rent-roll.*—In a suit to recover arrears of rent, the Court ought not to rest its decision solely on the entry in the rent-roll without any attempt to ascertain its accuracy or inaccuracy, or whether it accurate, the plaintiff is still entitled to demand the rent recorded in it. **SURFRAZ KHAN v. TASUWUR ALI, 2 Agra 253.**

**Evidence—continued.****—7.—Miscellaneous Documents—continued.**

(24)—*Paimash accounts — Evidence.*—Paimash accounts, which were never confirmed and never acted upon, are not public documents and should not be treated as evidence at all. **VENKATESWARA IYAN v. SHEKHARI VARMA, 3 M. 384, P.C.=8 I.A. 143=4 Sar. 259. [R., 11 M. 106.]**

(25)—*Account sales — Implication — Prima facie evidence of moneys realised by sale.*—In the case of goods consigned to be disposed of in a foreign market, it is an implied term of the consignor's agreement that the account sales furnished by the correspondents abroad shall be taken as *prima facie* evidence of what the goods realised. Even though the consignor objected to the correctness of the account-sales when furnished to him, this rule applied. **HODGSON ET AL v. RUPCHAND HAZARIMAL, 6 B.H.C. O.C. 39. [R., 16 M. 238.]**

(26)—*Evidence—Arrangement between parties to suit—Petition in suit—Recital of agreement in petition—Stamp—Suit on agreement — Admissibility of petition*—The parties to a decree entered into an agreement by which the defendants contracted to pay to the plaintiff a certain sum by annual instalments without interest, plaintiff in the event of failure in payment of three instalments to be at liberty to take out execution for a sum agreed on with interest at a certain rate. A petition was then put in Court informing the Court executing the decree of the terms on which the plaintiff had agreed to suspend the execution. Default was made in payment. Now the plaintiff sued to recover the amount due under the agreement. Held that the petition containing the recital as the agreement was admissible in evidence. The document could not of itself form the basis of a suit, but the agreement referred to in it was sufficient to support the suit. **RAMDYAL v. DHOUBEY JHAUNNAN LAL, 3 N.W.P. 14. [D., 2 A. 481; R., 3 A. 781.]**

(27)—*Recitals in documents—Recital in lease — Evidence of existence of mooktearnamah.*—The recital in a lease granted by a husband of his wife's property, that he was empowered by a *mooktearnamah* to manage her business generally, is not evidence against the wife that such a *mooktearnamah* existed. **BHIK NARAIN SINGH v. NECOT KOER, March 373=2 Hay 446.**

(28)—*Undivided family—Recital in mortgage deed—Separation—Evidence.*—Where a deed of mortgage, granted by one of two undivided brothers to a third party, recited that a division had taken place between the mortgagor and his brother, held that the recital was no evidence of separation as against the latter or his representatives. **GOPAL SANTU v. NARAYAN BIN TUKAJI, 1 B.H.C. 31.**

(29)—*Recital in deed—Consideration—Evidence.*—A Judge who considers evidence on the question whether the consideration, whose



**Evidence—continued.****—7.—Miscellaneous Documents—continued.**

payment is recited in a deed, has passed or not is acting properly. *LOLITTA DOSSIA v. RUTTON MOLLEE BHUTTACHARJEE*, 10 W.R. 208.

(30)—*Reports of officers under Reg. I of 1814—Evidence.*—Evidence *quantum valeat*, is under certain conditions, afforded by reports of officers appointed under Regulation I of 1814. *BHIKOO SAHOO v. TEIK ALI KHAN*, 9 W.R. 86.

(31)—*Jumma-wasil-bakee papers—Independent evidence.*—Jumma-wasil-bakee papers cannot be treated as independent evidence. *SHAIKH NEWAZEE v. L. LLOYD*, 8 W.R. 464.

(32)—*Jumma-wasil-bakee papers—Corroborative evidence—Presumption under Act X of 1859, s. 4—Effect—Act II of 1855, s. 43* Jumma-wasil-bakee papers are, by s. 43, Act II of 1855, relevant only for corroborative evidence and cannot rebut the presumption under s. 4, Act X of 1859. *RAM LALL CHACKERBUTTY v. TARA SOONDARI BURMONYA*, 8 W.R. 280.

(33)—*Evidence Act, s. 34—Jumma-wasil-bakee papers*—Jumma-wasil-bakee papers have no weight except as corroborative evidence. *SURNOMOYI v. JOHUR MAHOMED NASGO*, 10 C.L.R. 345.

(34)—*Jumma-wasil-bakee papers—Book—Course of business—Corroborative evidence—S. 43 Act II of 1855.*—Jumma-wasil-bakee papers afford corroborative proof, not independent testimony. *Quære*—Can jumma-wasil-bakee papers be dealt with as a "book," or be described as "kept in the regular course of business," within the meaning of s. 43, Act II of 1855. *BEEJOY GOBIND BURRAL v. BHEEKOO ROY*, 10 W.R. 291.

(35)—*Jumma-wasil-bakee papers—Evidence—Presumption under Act X of 1859.*—Jumma-wasil-bakee papers produced by zemindar at the citation of defendant himself, are sufficient evidence against the latter to rebut the presumption under s. 4, Act X of 1859. *SHIB PERSHAD DOBEY v. PROMOTHONATH GHOSE*, 10 W.R. 193.

(36)—*Jumma-wasil-bakee papers, Evidentiary value of.*—In a suit for enhancement of rent, a collection-account or a jumma-wasil-bakee filed many years previously by the plaintiff's predecessor in a suit, to which the defendants were not parties, is not *per se* evidence for the plaintiff that the defendant's predecessor held at the rates of rent mentioned therein. *Semble*: If proved to have been regularly kept in the way of business, the paper might have been put in as corroborative evidence under s. 43 of Act II of 1855, or might have been used by the writer thereof to refresh his memory under s. 45. *Semble*: If it were shown that the writer was dead or could not be found, the original might have been put in evidence under s. 39. *Semble*: Series of collection-accounts or jumma wasil-bakee papers appearing to be

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regularly kept may be evidence and entitled to credit on the same principle as other contemporaneous records made and kept by the party producing them in the ordinary course of his business. *KHEEROMONEE DOSSEE v. BEEJOY GOBIND BURAL*, 7 W.R. 533.

(37)—*Jumma-wasil-bakee and shushmahee papers—Evidence on oath before income-tax officers—Evidentiary value.*—Case where the judgment of a lower appellate Court was reversed because it ignored the defendant's evidence on oath before the income-tax officer as to the extent of his holding, and because it dismissed the plaintiff's claim to the cesses on account of a trifling difference between the jumma-wasil-bakee and shushmahee papers. *RHDHA PERSHAD SINGH v. BHEENUCK ROY*, 17 W.R. 391.

(38)—*Pattas and jumma-wasil-bakee papers, when receivable in evidence—Suit for kabuliati—Tender of patta—Act X of 1859, s. 9.*—Pattas and jumma-wasil-bakee papers are not receivable in evidence (when they are objected to by the other side) until some proof beyond mere conjecture is given of their genuineness and authenticity. The hearsay evidence of three witnesses cannot supply the defect. S. 9, Act X of 1859, does not require that a patta should be tendered before the institution of a suit for a kabuliati, but merely that the condition on which it is to be decreed is that a patta shall be given in exchange. *GOVIND CHUNDER ADDY v. MUSSAMMAT AULOO BEEBEE*, 1 W.R. 49. [*F.*, 3 W.R. 473.]

(39)—*Copies of pattas and jumma-wasil-bakee papers—Attestation or authentication.*—Though copies of pattas and jumma-wasil-bakee papers may be attested or authenticated, they cannot be accepted as evidence. *RAMJADOO GANGOOLY v. LUCKEE NARAIN MUNDUL*, 8 W.R. 488.

(40)—*Alteration of rent—Variation—Evidence—Zemindar's papers filed and attested by gumastahs—Jumma-wasil-bakee papers—Variation of rent.*—A mere alteration in the rates of rent on the part of a zemindar or person other than the tenant will not make out a variation unless it be shown that the tenant submitted to or paid that varied and enhanced rate. Papers of a zemindar filed or attested by gumastahs cannot incontestably prove variations in a ryot's jumma, unless it can be shown, not merely that the jumma-wasil-bakee and similar papers show a varying rate, but that the ryot has paid at a varying rate. *GOPAL MUNDUL v. NOBBO KISHEN MOOKERJEE*, 5 W.R. Act X, Rul. 83.

(41)—*Kabooleuts—Jumma-wasil-bakee and nekasee papers—Adverse title—Evidence.*—Attested kaboolets filed by the plaintiff though good evidence as between the plaintiff and tenants, cannot, in regard to a third party, be held as evidence. Jumma-wasil-bakee and nekasee papers, though corroborative evidence



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against tenants, are no testimony as against a party holding under an adverse title. *MOHEE-MA CHUNDER CHUCKERBUTTY v. POORNO CHUNDER BANERJEE*, 11 W.R. 165.

(42)—*Kabuliat, Admission in — Probative value.*—An admission in a kabuliat is certainly evidence as to the character of the land. The probative value of such evidence is a question of fact. *BHAGTU SINGH v. RAGHUNATH SHAI*, 9 C.L.J. 15=13 C.W.N. 135=1 Ind. Cas. 571. (1 C.L.J. 456, F.; 7 C.W.N. 400, D.)

(43)—*Kabuliat — Genuineness proved — Delay in filing — Value* — *Kabuliats*, the genuineness of which has been proved in the ordinary way, ought to be given due weight, even though not filed early in the litigation. *KASHEE CHUNDER TURKOBHOOSUN v. KALLY PROSUNNO CHOWDHRY*, 9 W.R. 452.

(44)—*Act VIII of 1859, s. 128—Act X of 1859—Admission of documentary evidence after first hearing.*—Assuming that s. 128 of Act VIII of 1859 is applicable to cases under Act X of 1859, it was held in special appeal that there appeared no reason why the second Court should throw out as evidence a kaboolcut admitted after the first hearing and considered by the first Court. *BHOOM NARAIN SINGH v. KURMOON ALI*, 1 W.R. 198.

(45)—*Evidentiary value of kabuliyats, chittas, accounts and receipts.*—*Kabuliyats, chittas, accounts and receipts* are valueless without proper oral evidence regarding them. *DINOMONI CHOWDHURANI v. BROJO MOHINI CHOWDHURANI*, 29 C. 187, P.C.=29 I.A. 24=6 C.W.N. 386=12 M.L.J. 83=4 Bom. L.R. 167=8 Sar. 224.

(46)—*Rent Act (X of 1859), s. 4—Uniform rent for generations—Jummabundee—Presumption.*—A tenant is entitled to the benefit of the presumption contained in s. 4 of the Rent Act, if the land had been held at a uniform rate for generations, by the tenant and his predecessors in title, and the pottah given to the tenant subsequently does not fix a rent different from that previously paid, but merely ascertains the rent the tenant is to pay during the term of the pottah. The jummabundee or rent-roll is material *prima facie* evidence; but if the sum mentioned in it is not shown ever to have been actually paid, it is of little or no weight. If the landlord or his agent have without dispute received for years rent less than that mentioned in the jummabundee, and if it cannot be shown that they have ever received the amount stated in it, the papers alone are not sufficient to justify a decree for the higher rent. *NOWLAS KOONWER v. MOONSHEE SHIVA SUHAI*, 1 Agra, Rev., 55.

(47)—*Jummabundee — Wasilat accounts — Mortgagee in possession—Evidence.*—The jummabundee is a proper basis for the settlement of *wasilat* accounts, that is to say, unless evidence be adduced to prove it untrustworthy, it may be taken as proof that the amounts

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entered in it are the amounts for which the mortgagee in possession may be called upon to account. *GUNGA PERSHAD SINGH v. MUS-SUMAT GUNGA KOONWER*, 2 Agra 410.

(48)—*Evidence—Act II of 1855—Suit for rent—Jummabundee papers—Corroborative evidence—Onus.*—In a suit for arrears of rent, the defence set up was that the defendant was not in possession of the quantity of land mentioned in the plaint and the rate of rent claimed was not the true rate. The only evidence was the statement of plaintiffs' agent which was as follows:—"I swear to the truth of the facts stated in the plaint, and to the authenticity of the jummabundee filed, which I wrote." The plaint was not read to the witness at the time he made this statement and he was not asked under what circumstances the jummabundee papers were prepared. *Held*, that the plaintiff had not proved his case and that the jummabundee papers might be only used as corroborative evidence, *viz.*, of the same value as that which is attached to books of account under Act II of 1855. *GAJJO KOER v. SYED ADALAY AHMED*, 6 B.L.R. App., 62=14 W.R. 474.

(49)—*Suit for arrears of rent—Entries in jummabundees, Evidentiary value of.*—A jummabundee, if it is shown not to have been acted on but to be a statement of that which is not in accordance with the facts, cannot be considered as evidence on which a decree should be based. *OOMED ALI v. MEHDEE HOSSEIN*, 2 N.W.P. 2.

(50)—*Jummabundee papers of year for which rent claimed—Papers made out by claimant's officers—Evidence—Patwari's evidence as to previous collections.*—Jummabundee-papers, for the year in respect of which rent is claimed, made out by the officers of the person claiming the rent, are not evidence; but the evidence of the putware, as to previous collections corroborated by the papers of those years, is conclusive in respect of the claim. *DHANOOKDHAREE SAHEE v. MR. GEORGE TOOMEY*, 20 W.R. 142.

(51)—*Jummabundee papers liable to objection filed—Adoption by each party of his own—Objection waived.*—Where two sets of jummabundee papers put in by the parties to a suit are such that either would be inadmissible, if objected to by the opposite party, each party, by insisting on his own papers, precludes himself from objecting to those of his opponent. *RASH BEHAREE LAL v. RAM PROSUNNO MISSER*, 18 W.R. 502.

(52)—*Jummabundee papers filed by malik in butwarra proceedings—Tenant no party—Evidence in rent suit.*—Jummabundee papers filed by a malik in certain butwarra-proceedings, to which a tenant is not necessarily a party are no evidence against the tenant in a suit for arrears of rent. *KISHOREE DASS v. PURSUN MAHTOON*, 20 W.R. 171.



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(53)—*Jummabundee under Reg. VII of 1822, a public document—Evidence Act, s. 74.*—A jummabundee, recording the acts of a Deputy Collector in making a settlement or even an enquiry under the provisions of Reg. VII of 1822, whether they be judicial or executive, is a public document within the meaning of s. 74, Evidence Act. [Cons., 16 C. 586; R., 25 C. 90.] Such a jummabundee does not depend, for its validity, upon its being assented to by the ryots who are affected by its provisions. *TARU PATUR v. ABINASH CHUNDER DUTT*, 4 C. 79.

(54)—*Khusrah papers on which suit based—Non-production within time—Rejection on subsequent production.*—If khusrah papers forming the essence of the action are not produced by the plaintiff within the time prescribed by law, the Court of first instance may refuse to admit them when subsequently tendered as evidence. *AMUR CHAND LOHATA v. RAM RUTTUN ROY*, 18 W.R. 515.

(55)—*Issumnuvissee papers — Evidence.*—Issumnuvissee papers when properly supported and proved, are only *prima facie* evidence, until rebutted. *W. FERGUSSON v. THE GOVERNMENT*, 9 W.R. 158.

(56)—*Evidence—Long possession — Bengal Reg. VIII of 1819—Ghatwal — Ism-nawisi papers.*—Suit by an auction-purchaser of a putni, sold under Ben. Reg. VIII of 1819 for possession of 3,000 bighas of land within his putni, and to enhance the rent against the ghatwal beyond the quantity of 100 bighas, held ghatwali, according to a return made by a former ghatwal. The only evidence of encroachment consisted of ism-nawisi returns made by the Thanadars to the Magistrates in the years 1811, 1812, 1813, from which it appeared, that the quantity of land the then ghatwal held ghatwali was 100 bighas. *Held*, that the evidence of the defendants of long uninterrupted possession of the 3,000 bights outweighed the effect of the ism-nawisi returns, which were, though *prima facie*, not conclusive evidence of the quantity of the land held ghawali; and further that though such returns were not objected to by the then ghatwal, it did not affect the rights of the ghatwal in possession. *WILLIAM FARQUHARSON v. DWARKANATH SINGH*, 18 B L R. 504, P.C. = 16 W.R., P.C., 29 = 14 M.I.A. 259.

(57)—*Information in issumnowissi papers—Absence of explanation — Suit to assess lands held in excess—Evidence—Act X of 1859, ss. 3, 4, 15 and 16—Permanent Settlement.*—Where the information in issumnuvissee papers is not satisfactorily accounted for, they are insufficient in a suit to assess lands said to be held in excess of tenure; and defendant maintaining uniform payment from the Permanent Settlement is, whether under ss. 3 and 4, or ss. 15 and 16, of Act X of 1859, not liable to enhancement of rent. *JAME ERSKINE v. THE GOVERNMENT*, 8 W.R. 232.

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(58)—*Thakbust papers—Evidence.*—Thakbust papers were held to be *prima facie* evidence against the proprietors of estates included in them. *KALEE TARA DEBIA v. NITTIANUND SHAHA*, 12 W.R. 90.

(59)—*Value of private butwara papers as evidence.*—Private butwara papers are evidence for the purpose of showing what lands are comprised in the estate at the time when the butwara was taken. *DWARKANATH ROY CHOWDHRY v. HURRONATH ROY CHOWDHRY*, W.R. 1864, 238.

(60)—*Butwara papers—Proportionate assessment payable after partition — Evidence.*—Butwara papers are only evidence of the proportionate assessment payable by proprietors after partition, and not evidence binding ryots. *DROBO MOYEE GOSMANEE v. DHURMO DOSS KOONDOO*, 10 W.R. 197.

(61)—*Butwarah papers between zemindars—Ryots not bound—Suit for possession of jote—Summary award, Setting aside of—Act XIV of 1859, s. 15.*—A butwarra between zemindars is not binding upon the ryots, and butwarrah chittas are no evidence in a suit for possession of a jote, and to set aside a summary award under Act XIV of 1859, s. 15. *GOPAL CHUNDER SHAHA v. MADHUB CHUNDER SAHA*, 21 W.R. 29. [R., 25 C. 90.]

(62)—*Measurement papers prepared at partition of zemindari, Evidentiary value of.*—The lands sued for were a number of small plots in several different villages; and as evidence that they were part and parcel of the zemindari, and not of the *Kharija* talooks, the plaintiff had put in the measurement papers of the zemindari made when the defendants were the proprietors of both the zemindari and the *Kharija* talooks, and many years before the plaintiff acquired his right to the zemindari. *Held* that the papers were evidence of the very first magnitude showing that the land which was the subject of the suit was measured with the zemindari, and that there was nothing to impugn but everything to corroborate the correctness of the measurement, and the correctness also of the subsequent investigation, which had ended in the identification of the land in dispute with the land comprised in the measurement. *ANUND CHUNDER ROY v. HURONATH ROY*, 4 W.R. 26.

(63)—*Measurement papers — Evidence.*—Measurement papers are not inadmissible as evidence, where the decisions of the lower Courts setting them aside have been reversed by the High Court. *GOBIND MUHTOO v. GOOPEE BHUGGUT*, 16 W.R. 4.

(64)—*Measurement papers—Circumstances of preparation, Proof of—Admissibility.*—Measurement papers are legally irrelevant in the absence of proof of the circumstances under which they were prepared. *JHAREE SAHOO v. BUNDHOO SAHOO*, 15 W.R. 218.



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(65)—*Suit for abatement of rent—Lands washed away—Measurement papers.*—In a suit for abatement of rent on the ground that part of the talukha had been washed away by a river, measurement papers prepared by the Revenue authorities, in a case between Government and the talukhdar, in respect of the share belonging to the Government in the zemindari of the zemindar, were held to be inadmissible as evidence against the latter, they being *res inter alios acta*. **AFZUROODDEEN v. SHOROSSHEE BALA DABEA, Marsh 558=2 Hay 664.**

(66)—*Entry of name in loazima papers of zemindar, whether sufficient evidence of payment of rent.*—The mere insertion of the name of the father of the defendant in the loazima papers of the zemindar, papers over which the zemindar has complete control, cannot be taken as any evidence that rent has ever been paid for the lands in dispute. **SHIBO SOONDUREE DEBIA v. RAM DHAMAIT KUNNEE, 6 W. R. Act X, Rul. 17.**

(67)—*Suit for possession—Miras pottah—Evidence—Lower appellate Court—Documents not on record.*—In a suit for possession under a miras pottah alleged to have been granted by the wife of a co-sharer whose rights and interests in the land are denied, a copy of a pottah stating the lessee to be in possession was held to render further proof unnecessary. A lower appellate Court not considering in its judgment documents not in the record, when that judgment is passed commits no error in law. **MAHOMED HAMIDOO LAH v. MODHO SOODUN GHOSE, 11 W. R. 298.**

(68)—*Jaghir pottah filed—Rejection owing to want of stamp—No instruction as to re-filing—High Court, Interference of.*—Where a jagheer pottah was filed as evidence, and returned because it was unstamped, without any order that it should be re-filed with stamp-fee and fine, the High Court interfered to allow defendant to file the unstamped pottah. **DEWAN KOONJO LALL v. THE COURT OF WARDS, 25 W. R. 116.**

(69)—*Survey proceedings held without regard to pending litigation—Evidence—Presumption of correctness—Corroboration, Rule as to.*—Survey-proceedings, if made without reference to litigation then pending, are not only evidence, but will be presumed to be correct, and the High Court cannot lay down any rule as to the corroboration of such documents. **RAM NARAIN DOSS v. MOHESH CHUNDER BANERJEE, 19 W. R. 202. [R., 9 C. L. R. 305, 15 C. 353.]**

(70)—*Settlement papers—Corroborative evidence only.*—Settlement-papers are only corroborative evidence, and are not sufficient legal evidence to prove the yearly rental. **BUNWARRY LALL v. J. FORLONG, 9 W. R. 239.**

(71)—*Settlement record—Proceedings—Reference to Collector by subordinate—Memorandum of evidence—Acquiescence.*—A memorandum of an order made or proposed to be

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made by a Collector upon a reference by his subordinate, found on a paper taken from the middle of a settlement record, and produced in Court in that form without explanation cannot be used as evidence of acquiescence, and cannot bind the Collector. **RUSSICK LALL SHAHA CHOWDHRY v. PREM DHUN BURAL, 24 W. R. 279.**

(72)—*Limitation Act, XIV of 1859, s. 1, cl. 6—Entry by Settlement officer—Award—Admissibility in evidence.*—An entry made by a Settlement officer on the report of a co sharer and on the strength of the report of the patwaree and Kanoongoe, in the absence of the party against whom it was made, was not an award within the provisions of s. 1, cl. 6 of Act XIV of 1859, though such entry as a record framed by a public officer was admissible as evidence of the fact recorded. **KINHAR DANSHA v. GOKURUN, 3 Agra 316.**

(73)—*Settlement proceedings—Entries in—Weight to be attached to.*—Although the Court does not hold entries in Settlement papers to be absolutely conclusive against cultivators unless it be shown that such cultivators were parties to the settlement proceedings, yet it is bound to treat such proceedings as the records of public officers, and, with respect to matters therein properly recorded, to hold that such proceedings are evidence of such matters evidence which may of course be rebutted by other more reliable proof if it be procurable. **DABEE LAL v. GOOLZARE RAE, 2 N. W. P. 394.**

(74)—*Questions relating to pergunnah rates and measurements—Evidentiary value of canoongoe papers and proceedings of Settlement officers.*—The issues in this suit for a kuboolat at an enhanced rate of rent related to the standard of measurement and the prevailing rates. On second appeal, it was stated that the lower appellate Court was wrong in having rejected the evidence furnished by the canoongoe papers and the settlement proceedings of the Government officers and the High Court held that the Judge was wrong in having set aside those papers. They were submitted in original to the Court of first instance by the record keeper of the Collectorate. They came from proper custody and were certainly of great weight in questions connected with pergunnah rates, standards of measurements, and other such like statistics. **NUND DUNTPAT v. TARA CHUND PRITHEEBAREE, 2 W. R., Act X, Rul. 13.**

(75)—*Canoongoe papers—Evidence.*—Old canoongoe papers, not satisfactorily proved, will be inadmissible in evidence. **DWARAK-NATH CHUCKERBUTTY v. TARA SOONDUREE BURMONEE, 8 W. R. 517.**

(76)—*Suit for declaration of title—Thak map, if evidence.*—In a suit for declaration of title to certain lands and recovery of possession of them, where the defendants claimed a portion of the lands as their lakhiraj and another



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portion as belonging to a talook owned and possessed by them, the thak map of the village (which showed no such *lakhiraj* lands) would be evidence in the case, if, at the time the thak map was made, it was necessary to show in such maps such *lakhiraj* lands as might be claimed. **RAJ KUMAR PAUL CHAUDHURI v. BASANTA KUMAR GUHA**, 7 C.W.N. 612. (18 C. 224, P.C., D., & Expl.)

(77)—*Thak and survey maps—Relative value of each as evidence—Principle to guide Court in following either—Local land-mark*—As a general rule thak and the survey maps should agree; where they differ, the one that more clearly agrees with the local land-mark is the one which should be followed. There is no general or definite rule making it incumbent upon the Court to follow either the one or the other; the Court may, if it considers the thak map reliable, follow it in preference to the survey map. **ABID HOSSEIN MANDUL v. DOWCURRY PAL**, 6 C.W.N. 629.

(78)—*Survey map—Evidentiary value*.—A survey map cannot be conclusive evidence as to the limits of a permanently settled estate. **FAHAMIDANNISSA BEGUM v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL**, 14 C. 67, F.B. (11 C. 784, overruled). [R., 30 C. 291, P.C.]

(79)—*Evidence, Admissibility of—Copy of map—Original not produced and not accounted for—No objection in first Court—Objection, if entertainable in appellate Court*.—An objection as to the admissibility in evidence of a copy of a document which is relevant should be taken at the earliest possible stage before the Court of first instance. Where no objection was taken to the report of the Commissioner (which was based upon a copy of map) before the trial began, four months after the filing of the report, it was not open to the party, against whom the copy was used, to contend in the appellate Court that the non-production of the original was not duly explained. **BASIR GAZI v. GRIJA NATH CHOWDHURY**, 13 C.L.J. 18=9 Ind. Cas. 211.

(80)—*S. 13, I.E.A.—Reports and maps referred to in orders under s. 145, Crim. Pro. Code, 1882, admissibility and value of, as evidence*.—Orders of Magistrates under s. 145 are admissible in evidence on general principles as well as under s. 13, I.E.A., to show the fact that such orders were made. This necessarily makes them evidence of the following facts all of which appear from the orders themselves, viz., who the parties to the dispute were; what the land in dispute was; and who was declared entitled to retain possession. For this purpose, and to this extent, such orders are admissible in evidence for and against every one, when the fact of possession at the date of the order has to be ascertained. If the lands referred to in such orders are described by metes and bounds, or by reference to objects or marks physically existing, these must necessarily be

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ascertained by extrinsic evidence, i.e., the testimony of persons who know the locality. If the orders refer to a map, that map is admissible in evidence to render the order intelligible; and the actual situation of the objects drawn or otherwise indicated in the map must, as in all cases of this sort, be ascertained by extrinsic evidence. Reports accompanying the orders or maps and not referred to in the order may be admissible as hearsay evidence of reputed possession. But they are not otherwise admissible, unless they are made so by s. 13, I.E.A. **DINOMONEY CHOWDHURI v. BROJO MOHINI CHOWDHURI**, 29 C. 187, P.C.=29 I.A. 24=6 C.W.N. 586. [R., 30 C. 155, F.B., 12 C.W.N. 739=9 C.L.J. 597, 35 C. 701=12 C.W.N. 657=7 C.L.J. 563; D., 7 O.C. 122.]

(81)—*Mouzadar's report—Civ. Pro. Code, 1859, s. 180—Rejection*.—A mouzadar's report may, under s. 180, Act VIII of 1859, be ignored by a Civil Court. **RAJARAM KALITA v. ROOPA KAGATEE KALITA**, 13 W.R. 113.

(82)—*Report of Sheristadar when evidence—Local investigation—Civil Court Amin*.—The report of a Serishtadar after a local investigation cannot be legal evidence unless a Civil Ameen was not available. **GOLUCK CHUNDER KOOL v. DOOKHEE RAM**, 12 W.R. 209.

(83)—*Road-cess return by share-holder—Ben. Act X of 1871—Schedule—Evidence against another share-holder*.—A road-cess return made by a share-holder under the Schedule of Act X (B.C.) of 1871, is not relevant as evidence against another share holder. **MUSSAMUT NUSSEERUN v. GOUREE SUNKUR SINGH**, 22 W.R. 192.

(84)—*Illegal ejectment—Absence of superior title in dispossessor—Prior occupation—Restoration to possession—Attestors of sale deed—Proof of sale deed by evidence other than attester's—Road-cess returns—Evidence quantum valeat—Evidence Act, s. 13*.—A person illegally evicted can claim, on proof of prior occupation, to be restored to possession, if the dispossessor cannot make out a superior title. Even where the witnesses to a deed of sale are alive, their testimony is not the only evidence by which it can be established. Under the Evidence Act, s. 13, road-cess papers and a deed of sale are evidence *quantum valeat*; so is a decree, although the person against whom it is treated as evidence was no party to it. **DAITARI MAHANTI v. JUGO BUNDHOO MOHANTI**, 23 W.R. 293. [R., 5 C.L.J. 55.]

(85)—*Order for local investigation—S. 180, C.P.C., 1859—Objection—Commissioner's report and depositions—Evidence*.—If an order for a local investigation under s. 180, Code of Civil Procedure, 1859, is not objected to by the opposite party at the time, the Commissioner's report and the depositions may be viewed as evidence. **RAMBUKHA ROY JEMADAR v. GOBIND DOSS BYRAGEE**, 15 W.R. 291.



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(86)—*Report of special Commissioner—Relevancy under Evidence Act—Written statement, Admissibility of.*—Case where it was held that the report of a special Commissioner was not admissible in evidence, as it did not come within any provision of the Evidence Act which would make it admissible. The principle upon which the admissibility of the statement of a party litigant is determined is whether it had been made under such circumstances as made it reasonable to suppose that it was done *bona fide* and the statements were true. If, taking the document as a whole, it is against the interest or the proprietary right of the person making it, it cannot be divided into parts, and the part in favour of the person making it rejected and that against his interest accepted. **RAJAH LEE LANUND SINGH v. MUSUMMAT LAKHPUTTEE THAKOORIN**, 22 W.R. 231. [Cons., 23 B. 63; R., 31 C. 965.]

(87)—*Civ. Pro. Code, 1859, s. 180—Evidence obtained by Ameen on local inquiry—Evidence.*—The report of an Ameen deputed to make a local inquiry, who obtains the evidence on oath of some persons, and statements of others deterred by religious prejudices from taking an oath, with the original depositions, is evidence under s. 180, Code of Civil Procedure. **DOLE GOBIND SINGH v. CHAMOO SINGH**, 10 W.R. 312.

(88)—*Local enquiry by Ameen—Report of Ameen and evidence recorded.*—The report of an Ameen and the evidence recorded on a local enquiry by an Ameen, are evidence in the suit, and if the parties choose to agree that the evidence shall be taken before the Ameen, and that the matters in dispute shall be referred to an Ameen for enquiry, there is no legal objection to such a course. **SARAT CHANDRA ROY KANUNGO v. THE COLLECTOR OF CHITTAGONG**, 2 B.L.R. App. 3.

(89)—*Duty of Court dealing with facts—Evidence to be considered as a whole—Ex parte decree, Objection to by passive defendant—Ameen's report based on butwarah.*—The duty of a Court which has to deal with facts is to take up the evidence, not *seriatim*, but in all its parts, to consider the bearing of the parts to one another, and to examine whether, as a whole, a case has not been made out. A defendant allowing an *ex parte* decree to be passed against him cannot afterwards object to such decree as no evidence. An Ameen's Report is not void *ab initio*, though it is based on butwara and resumption-proceedings which had been referred to him for comparison with the land in dispute. **CHUNDER COOMAR DUTT v. JOY CHUNDER DUTT MOJOMDAR**, 19 W.R. 213.

(90)—*Admissions, binding nature of—Ameen's report of measurement and value of land, onus on defendant's impeaching.*—This was a suit for the rent of certain lands claimed at an enhanced rate, after service of notice. The first Court gave the plaintiffs a decree, as

**Evidence—continued.****—7.—Miscellaneous Documents—continued.**

prayed for, acting on the report of an Ameen and recording the fact that a kaboolcut produced by the plaintiffs had been admitted by the defendant. The first appellate Judge reversed this decision holding that the kaboolcut was not proved in any way. The High Court held that the Judge had wrongly overlooked the fact that it was admitted in the first Court. In the absence of any objection that that record had itself been erroneously made, it cannot but be binding on the defendant, an admission once made being binding against the party making it for all the purposes of the suit. Also, the Judge should not have treated the Ameen's report as he did. With regard to that report, the onus lay on the defendants to impeach it and not on the plaintiffs to call evidence in its support. **GOUREE NARAIN MOZOOMDAR v. MODHOOSOODUN DUTT**, 2 W.R. Act X, Rul. 1.

(91)—*Amin's report, when valuable.*—The report of the Amin, however valuable in clearing up difficulties as to the identity and position of lands, is, speaking generally, of no value in determining questions connected with the possession of lands in dispute in past times. Such questions are more satisfactorily determined in Court, where the testimony of the witnesses examined can be subjected to a strict scrutiny, rather than in the Mofussil, where it is subject to no scrutiny at all. **BABOO PRANNAUTH CHOWDRY v. MIRNOMOYEE CHOWDRY**, W.R., F.B. 39.

(92)—*Survey award sought to be set aside, whether can be treated as evidence—Ameen's report, Evidentiary value of—Rejection of oral testimony, reasons to be given for.*—In this case, the plaintiff sued for confirmation of possession, and for reversal of the proceedings of the Survey authorities, who had demarcated the land as that of defendants. The High Court held, on second appeal, that the Sudder Ameen had erred in law in having treated as evidence the very survey award for the setting aside of which the suit had been brought, and in having failed to treat the Ameen's report as legal evidence for the insufficient reason that it was founded on no documentary evidence, and remanded the case for re-trial with reference to the said remarks. **ESHAN CHUNDER SEIN v. HURREE CHURN DEY**, 2 W.R. 278.

(93)—*Local investigation—Report of Ameen believed by Court, sufficient evidence to support decree.*—The report of an Ameen upon a local investigation is sufficient evidence to support a decree if it be believed by the Court. If the report so believed is sufficient to satisfy the Court without other evidence to corroborate it, it is competent to the Court to act upon such report by itself. **SEETARAM MOOKERJEE v. RAM NARAIN MOOKERJEE**, 6 W.R. 51.

(94)—*Evidence—Measurement and report by Ameen—Admissibility without oral testimony.*—There is no necessity for oral testimony being taken to effect a measurement or for depositions.



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to make an Ameen's report legal evidence. **CHUNDER MONEE DOSSEE v. NILAMBUR MUSTOFEE, 7 W.R. 43.**

(95)—*Civ. Pro. Code, 1859, s. 180—Ameen's report and deposition taken by him.*—Case where it was held that the report of, and deposition taken by a civil Ameen were admissible as evidence under s. 180, Act VIII of 1859. **SHAH NUTHOO v. GHUNESSAM SINGH, 8 W.R. 267.**

(96)—*Civ. Pro. Code, 1859, s. 180—Ameen, Evidence taken by—Duty of Court.*—Case where it was held that, under s. 180, Civ. Pro. Code, 1859, evidence taken by an Ameen must be noticed and pronounced upon. **JANNOBEE CHOWDHRAIN v. THE COLLECTOR OF MYMEN SINGH, 8 W.R. 287.**

(97)—*Act VIII of 1859, s. 180—Evidence—Ameen's report as to possession.*—The report of, and evidence taken by, an Ameen deputed by a Civil Court to enquire into a question of possession were held to be admissible under s. 180, Act VIII of 1859. **BHYRUB ROY v. NOBIN ROY, 9 W.R. 601.**

(98)—*Report of Ameen appointed Commissioner—Evidentiary value.*—The report of a Court Ameen appointed a Commissioner under the Civ. Pro. Code, would be evidence only on the point to which the commission refers. **SYUD ABDOOL ALI v. MULLICK SUDDERODDEEN AHMED, 11 W.R. 493.**

(99)—*Ameen's return to order of lower Court for local inquiry—Civ. Pro. Code, 1859, s. 180.*—The return made by an Ameen in pursuance of a lower Court's order for a local inquiry is legal evidence under s. 180, Act VIII of 1859. **RAJNATH PANDAH v. DOORGA LALL, 12 W.R. 136. [Appr., 15 W.R. 80.]**

(100)—*Ameen's report in partition proceedings—Effect—Duty of Court.*—The report of an Ameen in a partition-proceeding (which is a judicial proceeding under s. 180, Act VIII of 1859) must be treated in the same way as in an ordinary suit. The Court is not bound by the report, but should inquire further if necessary, and to examine witnesses. **AZIM SARUNG v. ALIMOODDEEN, 17 W.R. 270. [R., 26 C. 951, P.C.]**

(101)—*Ameen's report and map not to be sole guide—Other evidence, Consideration of.*—Case where a lower appellate Court was held to have erred in law in taking an Ameen's report and map as its sole guide, to the total disregard of the other evidence on the record. **BUSTEE SAHOO v. JEO NARAIN SINGH, 24 W.R. 338. [R., 7 C. 263.]**

(102)—*Ameen's report defective—Procedure—Duty of Court.*—Where a lower appellate Court finds an Ameen's report defective in any particular, it can send for that officer and examine him; but unless it sees reason to disbelieve his statements, or to differ from his conclusions as to the matter under investigation,

**Evidence—continued.****—7.—Miscellaneous Documents—continued.**

it must take those conclusions into serious consideration, and, if it rejects them where they were accepted by the first Court, it ought to give reasons for differing from that Court. **SHEO DYAL SINGH v. HODGKINSON, 24 W.R. 342.**

(103)—*Settlement Ameen, Proceedings of—Evidence.*—Case where it was held that the proceedings of a Settlement Ameen were no evidence against one not a party to those proceedings. **LALL SINGH v. BABOO MODHCO-SOODUN ROY, 8 W.R. 426.**

(104)—*Limitation, Plea of—Twelve years' possession, Proof of by Ameen's report.*—If a defendant pleads limitation, an Ameen's report is not sufficient to prove plaintiff's possession within 12 years of date of suit. **AMEENOOD-DEEN SHAH v. ASGUAR ALI, 8 W.R. 464.**

(105)—*Suit for enhancement of rent—Ameen's report—Evidentiary value.*—In a suit for the enhancement of rent, the report of an Ameen who did not give credit to defendant's witnesses on account of something he heard in the neighbourhood should not be given value to by the Judge, who should examine the witnesses himself. **JAMES TWEEDIE v. POORNO CHUNDER GANGOLEE, 12 W.R. 138.**

(106)—*Ameen's report based on copy of kaboolut—Title—Evidence.*—An Ameen's report based on a copy of a kaboolut is a very little or no evidence of title. **ISHUR CHUNDER DOSS v. JOOGUL KISHORE CHUCKERBUTTY, 17 W.R. 473, note. [R., 17 W.R. 472.]**

(107)—*Boundary dispute—Reformation on site of diluviated village—Thakbust proceedings—Local investigation—Privy Council, Appeal to—Identification.*—The question to be decided was whether certain plots, delineated on a map, belonged to appellant's zemindaree or to that of the respondent, in whose possession they had been since 1852, when, in certain thakbust proceedings, they were determined to lie within his estate of Bahur Bund in Zillah Rungpore, and not within the appellant's estate in Zillah Goalpara. The appellants sued to impeach the thakbust award, and to recover possession. The case was remanded by the High Court upon the issue, which of two given lines was the old bed of the river Sunkosh, when a Sudder Ameen was deputed to make a local investigation, which proved to be in favour of the appellant. The High Court in the end dismissed the case in appeal. On the case coming before the Privy Council, held that the report of the Sudder Ameen failed to establish the line of the old Sunkosh, and that, even if it had embodied conclusions from what had been found and observed on the ground, it would be reasonable to prefer the thakbust proceedings, which were an earlier local investigation, since which the features of the locality may have changed, and evidence of possession lost. **PROTAB CHUNDER BURROAH v. RANEE SUBNOMOYEE, 19 W.R. 361, P.C.**



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(108)—*Ameen going beyond prescribed duties—Report—Value.*—If an Ameen's duties be expressly confined to a comparison of the land with the chittas, any evidence taken by him contrary to his instructions cannot be looked at. *DOORGA CHURN SURMAH CHOWDHRY v. NEEM CHAND SURMAH CHOWDHRY*, 24 W.R. 208.

(109)—*Evidence—Suit for rent—Measurement of land—Report of Ameen in previous suit—Admissibility.*—When, in a suit for rent upon a jungleboori lease which provided that the area of jungle lands brought under cultivation should be ascertained by measurement, the only evidence of measurement was a report of an Ameen in a previous suit the accuracy of which report was not proved in the present suit, held that the report itself was not admissible in evidence. *DENOBUNDHU GHOSE v. NISTARINI DAS*, 12 C.L.R. 50.

(110)—*Mutation proceedings, Statement in—Relevancy.*—Case where it was held that a statement in a mutation proceeding was a document entitled to be admitted in evidence. *BUDREE LALL v. BHOOSHEE KHAN*, 25 W.R. 134.

(111)—*Confirmation of revenue award by Commissioner, omission to sue in reversal of award, Evidentiary value of.*—In this case, the Judicial Commissioner had decided that the fact of the first defendant not having brought a regular suit to obtain possession of the land in dispute in reversal of a previous revenue award, within three years of its confirmation by the Revenue Commissioner, rendered that award, conclusive evidence of title. But the High Court was of opinion that this view was incorrect. It would in no case be direct evidence of title but could only be regarded as affording evidence of the date of possession at the time when it was prepared. *SUNKUR NARAIN SINGH v. RAJA RAM TARUN DEO*, 4 W.R. 56.

(112)—*Written statement—Signature in a contested deed*—In a suit on a kobalah in which defendant relies on a deed of gift from a third party who is also vendor of the plaintiff, it is an error in law to look into a written statement made by the third party after defendant's deed in a case to which the latter was not a party, and to take for a standard a signature in a deed sought to be set aside as spurious. *PURAN CHUNDER CHATTERJEE v. GRISH CHUNDER CHATTERJEE*, 9 W.R. 450.

(113)—*Written statement—Unattested chittahs—Evidentiary value—Objection, Absence of.*—A written statement is not evidence even if the same penal consequences follow from it, if false, as from a false deposition, so unattested chittahs even though admitted by the lower Court without objection from the opposite party. *IJJUTOOLLAH KHAN v. RAM CHURN GANGOOLEE*, 12 W.R. 39. [*Cons.*, 15 W.R. 437.]

(114)—*Government chittahs—Chittagong.*—Case where it was held that Government chittahs are admissible as evidence in cases in

*Evidence—continued.***—7.—Miscellaneous Documents—continued.**

Chittagong. *MAHOMED FEDYE SIRDAR v. OZEEOODDEEN*, 10 W.R. 340.

(115)—*Government chittah—Admissibility.*—A Government chittah is admissible as evidence in a boundary dispute. *MOOCHEE RAM MAJHEE v. BISSAMBHUR ROY CHOWDHRY*, 24 W.R. 410.

(116)—*Chittahs—Boundary disputes—Evidence.*—In boundary disputes, chittahs are evidence of title, if they are properly accounted for, introduced and verified; they are inadmissible in evidence when, owing to lack of time, they are simply ordered to be filed; and they may be rejected or returned after inspection. *SOODUKHINA CHOWDHRAIN v. RAJ MOHAN BOSE*, 11 W.R. 350.

(117)—*Chittahs—Maps—Resumption.*—Chittahs and maps made in contemplation of resumption-proceedings in the presence of both sides, and signed by the parties are legal evidence. *SHAM CHAND GHOSE v. RAM KRISTO BEWRAH*, 19 W.R. 309.

(118)—*Chittah—Mal land—Oral evidence—Hearsay.*—Chittahs produced as evidence of land being mal are sufficiently attested by the deposition of the village-gomashta. The oral evidence of persons able to testify as to certain lands being mal is not to be rejected as hearsay. *DEBEE PERSHAD CHATTERJEE v. RAM COOMAR GHOSAL*, 10 W.R. 443.

(119)—*Public documents, chittah's prepared for distributing public revenue on a partition of an estate if—Revenue Sale Law (Act XI of 1859), s. 37—Protected interest—Portion of taluk existing at a Permanent Settlement but transferred and held under different names if protected.*—Chittah prepared for the purpose of distributing the public revenue on a partition of an estate is a public document and is evidence of the state of affairs then existing and admissible in evidence. When a portion of a taluk existing from before the time of the Permanent Settlement is transferred, and the said portion is subsequently held at a proportionate jama under a name different from the original taluk, but the subsequent transfers and descent thereof can be traced from the original taluk, the portion so transferred is also protected under s. 37 of Act XI of 1859. *NOBENDRA KISHORE ROY v. DURGA CHARAN CHOWDHURY*, 15 C.W.N. 513.

(120)—*Chittahs made during measurement of Government mehal—Inquiries relating to revenue—Public proceedings.*—Chittahs made in the course of measurement of a Government mehal stand on the same footing as chittahs made in inquiries relating to revenue; the proceedings as relating to a khas estate do not deprive them of the character of public proceedings. *TARUCK-NATH MOOKERJEE v. MOHENDRANATH GHOSE*, 13 W.R. 56.

(121)—*Hustabood—Reg. VIII of 1800.*—An authenticated copy of a hustabood, filed under



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Reg. VIII of 1800, is not proper evidence against third parties. **RAM NURSING MITTER v. TRIPOORA SOONDERY DASSIA**, 9 W.R. 105.

(122)—*Miscellaneous documents — Document receipt-book—Book kept by attorney—Receipt given by defendant for documents of title—Admission.*—A witness (an attorney) cannot refer to his documents receipt book in order to enable him to say whether a document of a particular character and date was in his possession on a particular day. A receipt by the defendant for documents relating to his title in a suit is receivable in evidence as being in the nature of an admission signed by the defendant. **MADHEB CHUNDER DUTT v. RAJ KISTO SETT**, Cor. 148.

(123)—*Consideration money—Admission of receipt—Ekrarnamah — Evidentiary value of ekrar.*—In a suit to recover a share in an estate from a certified purchaser on the ground of an ekrarnamah admitting receipt of the purchase-money of plaintiff's share covenanting to give possession to the plaintiff; held that, even if the ekrar fully admits payment, it would not be conclusive evidence as against defendant. **MUSSAMUT NEYNUM v. MUZUFFER WAHID**, 11 W.R. 265.

(124)—*Claim for rent—Written receipts—Whether necessary proofs—Whether primary evidence.*—In a suit for rent, written receipts for payments are important but by no means necessary as proof; nor are they of the nature of primary evidence, the loss of which must be shown in order to let in secondary evidence. **RAMESWAR KOER v. BHARAT PERSHAD SAHI**, 4 C.W.N. 18, P.C.

(125)—*Production of receipt and proof thereof.*—The production of a receipt, and proof that it is the document received on paying the money, tantamounts proof of payment of a debt or rent. **RAJ MAHOMED v. BANOORASMAH**, 12 W.R. 34. [Appr., 24 C. 251; R., 21 W.R. 133.]

(126)—*Receipt signed by landlord's agent—Rent, Payment of.*—Receipts signed by the landlord's agent, if authentic, are *prima facie* evidence of payment of rent, but they are not conclusive evidence. **SHAIKH AMEER BUKSH v. YUSUF ALI**, 22 W.R. 489.

(127)—*Enhancement of rent — Receipts — Proof.*—In a suit for enhancement of rent, where the defendant is not examined as to the genuineness of the receipts filed, held that the receipts were not proved. **LUCHMEEPUR SINGH DOOGUR v. WOOMANATH MUNDUL**, 10 W.R. 490.

(128)—*Suit for arrears of rent — Account books—Evidence—Precedents—Rent in kind—Uniform and fixed payments—Illegal cesses.*—In a suit for arrears of rent, where the account-books put in by the plaintiff to establish the rates claimed by him are held by the Courts below to be unreliable, the lower appellate

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Court is justified in accepting (according to its own knowledge) rates which were admitted and had been awarded in other cases. Payment not so much in the nature of cesses as of rent in kind, which are fixed and uniform and have been paid by the ryot from the beginning according to local custom, are not illegal cesses. **BUDHNA ORAWAN MAHTOON v. JEMADAR BABOO JUGGESSUR DOYAL SINGH**, 24 W.R. 4. [R., 1 A. 217, F.B.]

(129) — *Possession — Proof — Payment of revenue kist, how far evidence.*—The dakhilas of payment of Government revenue are not evidence of possession. The party, be he who he may, who pays in Government revenue, gets a receipt for the same; but this is no proof whatever of title or possession. **BURN DEO NARAIN v. RAM LALL CHOWDHRY**, 3 W.R. 133.

(130)—*Unattested sunnuds on plain paper—Relevant in former suit—Parties to suits—Receipts.*—Sunnuds on plain paper and unattested are not inadmissible, if their authenticity has been proved in a previous suit between the same parties. Nor should receipts similarly filed be rejected. **GUNPUT LALL v. BHUNJOO MAHTO**, 20 W.R. 304.

(131) — *Suit for rent — Acknowledgment of payment of old rents by plaintiff—Presumption.*—Where the plaintiff acknowledges in a former case that he has realised rents for 3 years, such acknowledgment may afford some presumption that the older items were satisfied, which, if unrebutted, might be an answer for an action in the older demand. **RAJA ENAYET HOSSEIN v. SHEIKH DEEDAR BUX**, W.R. 1864, Act X, Rul. 97.

(132) — *Dakhilas to prove a case — Their genuineness to be proved.*—Where a person puts in dakhilas to support his claim, they must be proved like any other document. They cannot be taken to be true merely from the fact that the landlord does not deny them. **KRITEEBASH MYTEE v. RAMDHUN KHARAH**, 7 W.R. 526.

(133)—*Evidence — Dakhilas or receipts for rents—Admissibility—Proof of handwriting or custody.*—Where dakhilas or receipts for rents purporting to have been given by the former owners of a jote are produced, they are not admissible in evidence without any proof whatever as to the handwriting of the parties who gave them or any satisfactory account of the custody from which they came. **WOOMESH CHUNDER MOOKERJEE v. SREEMUTTY BAMA DOSSEE**, 7 W.R. 15.

(134)—*Dakhilas—Evidentiary value of.*—In the absence of dakhilas and of the subscribers to them, the evidence of other witnesses swearing to the dakhilas is not worthy of any credit. **GHOLAM ALI v. ASGUR ALI**, 11 W.R. 105.

(135)—*Dakhilas — Authenticity, Proof of.*—The deposition of a party filing certain dakhilas to the effect that the amounts of rent he has



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paid are according to the sums entered in the dakhilas, does not prove the authenticity of the dakhilas. *KOYLASHNATH HALDAR v. OOMANATH ROY CHOWDHRY*, 11 W.R. 170.

(136)—*Dakhilas — Genuine evidence.*—Dakhilas may be admitted by a Civil Court as undisputed documents, when the opposite party is not prepared to deny their genuineness. *INDRO BHOOSUN DEB ROY v. GOLUCK CHUNDER CHUCKERBUTTY*, 12 W.R. 350.

(137)—*Fractional share of estate, Purchaser of—Separate account under s. 11, Act XIV of 1859 — Right acquired by purchasers—Dakhilas.*—The purchaser of a fractional share of an estate at a sale for arrears of revenue, for which share a separate account has been opened under Act XIV of 1859, s. 11, takes it subject to all incumbrances, and acquires no right not held by previous owners. The evidence of a tenant deposing to the genuineness of dakhilas, if not rebutted, is legally sufficient to prove them. *MADHUB CHUNDER CHOWDHRY v. RAJA PROMOTHONATH ROY BAHADOOR*, 20 W.R. 264. [Appr., 24 C. 251; R., 30 C. 1071.]

(138)—*Unattested dakhilas—Sufficiency of evidence.*—Unattested dakhilas without corroborative evidence are insufficient evidence of payment of rent. *KAZEE ODINT ZUMAN v. MOHIOODEEN AHMED alias MOGUL JAN*, 9 W.R. 241.

(139)—*Unattested dakhilas—Uniform payment of rent, Evidence of.*—Dakhilas unattested, or attested only by the evidence of a manager and mookhtear, are no legal evidence of uniform payment of rent. *REAZOONISSA v. BOOKOO CHOWDHRAIN*, 12 W.R. 267.

(140)—*Unregistered receipt for payment of mortgage debt produced by mortgagee, inadmissibility of, in evidence.*—Plaintiff and defendant were joint mortgagees and the suit was to recover possession of a portion of the mortgaged property. A receipt granted by plaintiff for the payment of mortgage-money towards the mortgage-debt, was tendered in evidence by defendant, and objected to on the ground of its not being registered. It was held inadmissible because of its having been tendered by the defendant to show that the interest of his co-mortgagee in the mortgage had been extinguished, although, if the question had been between the mortgagee and mortgagor, and an unregistered receipt were given in evidence by the latter, merely to show the state of the mortgage account, it could be admitted for such purpose, even though it be unregistered. *RAMAPA v. UMANNA*, 7 B. 123. [F., 6 A. 335 = A.W.N. 1884, 107; R., 103 P.L.R. 1905.]

(141)—*Unregistered receipt for earnest money comprising terms of conveyance—Admissibility in proof of contract of sale.*—Where an unregistered receipt for earnest money is expressed in such terms that, if registered, it would operate as a conveyance, it would be admissible as evidence of a contract of sale, though it has not

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been registered. *HIRA SINGH v. NARAIN GOND*, 10 C.P.L.R. 107. (5 B. 143, F.) [R., 13 C.P.L.R. 172; 2 N.L.R. 57; D., 1 N.L.R. 147.]

(142)—*Unregistered but compulsorily registrable document—Admissibility in evidence—Divisible and indivisible transaction.*—Where the transaction, evidenced by a compulsorily registrable document, is indivisible the document, if not duly registered would be inadmissible in evidence. But otherwise where the transaction is divisible; thus a document in the nature of a bond, securing the re-payment of money and further providing for the hypothecation of certain property as collateral security for the loan, would, if unregistered be admissible to prove the executants liability for the loan though not to prove the hypothecation. *KRISHTO LALL GHOSE v. BONOMALEE ROY*, 5 C. 611 = 5 C.L.R. 43. (2 C.L.R. 428, D; 4 B. L.R., F.B., 18, F.) [F., 11 C.L.R. 166; R., L.B.R. 1872-1892, 195, 13 M. 281, 15 M. 336; 4 C.L.J. 510.]

(143)—*S. 49, Registration Act—Unregistered bond—Pledging land as collateral security—Admissibility.*—An unregistered bond for money pledging land as collateral security may be received in evidence and it is not barred by s. 49 of the Registration Act. *WOODOY CHANDJANA v. NITYE MUNDUL*, 92 W.R. 111. [Appl., 10 W.R. 252; F., 6 B.H.C., O.C., 134, 12 W.R. 222, R., 7 B.H.C., O.C., 45.]

(144)—*Letter not registered—Admissibility—Evidence of agreement.*—A letter, on which the plaintiff relied, though not registered and therefore not an evidence of title, could be received as evidence of an agreement to convey. *KHUSHAL PATEL v. RESAL PATEL*, 5 C.P.L.R. 102. (12 M. 505, 1 B. 190, 5 M. 115, F.; 5 B. 232, 10 C. 315, R.)

(145)—*Registered document—Contemporaneous unregistered document varying the registered document—Sale—Mortgage.*—When a person sets himself up as an absolute purchaser when he is only a mortgagee by setting up as a contract an agreement which is not enforceable by law, even though registered, because both parties to that agreement did not intend when they entered into it that it should come into operation, evidence may be admitted for the purpose of defeating this fraud. *MAUNG ZIN v. SHIN AUNG TUN*, L.B.R. 1893-1900, 212. (L.B.R. 1893-1900, 154, F., 9 C. 898, R.)

(146)—*Act XVI of 1864, s. 51—Agreement—Record of Agreement by Registrar—Evidence—Proof of registration—Proof of signature of Registrar.*—S. 51 of Act XVI of 1864, in proving that the Registrar should record the agreement there spoken of does not require him to write such record entirely with his own hand. The signature of the Registrar is sufficient. Before enforcing any duly registered bond without an suit it is not necessary to prove the signature or handwriting of the Registrar. The document with the endorsement of registration and



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the agreement recorded therein becomes a record, and is of itself *prima facie* proof of the registration of such document and further agreement, without proof of the signature of the Registrar as to either matter, though it will be competent to the Court to require further evidence. **HOBEEBO SOBAIR v. MEER HOSSEIN ALI**, 5 W.R.S.C.C. Ref., 14.

(147)—*Entry in book recording extent of holding and rate of rent—Admissibility in evidence—Unstamped and unregistered document.*—An entry in a book by the lessor attested by the lessee, subsequent to the latter having entered into possession of the land under a verbal agreement, showing the extent of the holding and the rate of rent would not amount to a lease or an agreement for a lease, so that it might be used, as an admission, in evidence against the lessee in a suit for rent, although it might be neither stamped nor registered. **NARAIN COOMARY v. RAM KRISHNA DASS**, 5 C. 864 = 6 C. L.R. 286. (3 C. 322, F.)

(148)—*Unstamped document, Admissibility in evidence of for collateral purposes.*—Documents happening to be unstamped can be admitted, when tendered in evidence, not for the purpose of giving effect to the documents themselves directly, but for some other collateral purpose. **RUSTOMJI EDULJI CROOS v. CURSETJI SORABJI CROOS**, 4 B. 349.

(149)—*Unstamped account of advance.*—An account of advances made to, and part-payments made by, the defendant in his handwriting and signed by him need not be stamped, in order to be admissible in evidence. **BROJO GOBIND SHAHA v. GOLUCK CHUNDER SHAHA**, 9 C. 127. (4 C. 885, F.)

(150)—*Translations—Translation of document by Court interpreter, Authority of.*—Held that the translation of a deed by the interpreter of the Court must be accepted *prima facie* as correct and as evidence of the contents of the deed. **MUZHUR HOSSAIN v. DINO BUNDO SEN, Bourke**, O.C., 8 = Cor. 94.

(151)—*Copy of decree—Decree, Destruction of.*—After an appeal was filed, the decree was destroyed. Held that a copy in the possession of the appellant might be received upon evidence being given of its authenticity. **BISHEN DYAL SINGH v. KHADEEMA**, Marsh 213 = 1 Hay 584.

(152)—*Solehnamah—Parties to suit—Representatives.*—A solehnama was considered relevant as evidence against plaintiff, because his maternal uncles through whom he claimed, were parties to it. **MAHOMED ANWAR CHOWDHRY v. RAJ CHUNDER GHOSE**, 17 W.R. 521.

(153)—*Solehnamah—Defendant no party to it—Decision not to be based on it—Evidence of possession.*—Though no right or title can be decided adversely to defendant on the basis of a solehnamah, to which he was not a party, it would yet be evidence that, by an order passed

**Evidence—continued.****—7.—Miscellaneous Documents—continued.**

on it, plaintiff was put in possession. **SREEMUTTY DASSE v. PELA RAM DASSEE**, 15 W.R. 261.

(154)—*Dispute between ryots of same zemindar—Verified khyfut produced by zemindar—Admissibility of khyfut—Zemindar, Examination of.*—A suit between two ryots of the same zemindar was decreed by the first Court upon a verified khyfut put in by the zemindar; the lower appellate Court, holding that the khyfut was not admissible in evidence, dismissed the suit without enforcing the attendance of the zemindar. Held that the lower appellate Court ought to have enforced the zemindar's attendance and examined him. **KHETTUR MOHUN alias HARADHUN DUTT v. SOOBUL DOSS**, 17 W.R. 426.

(155)—*Evidence Act, s. 34, Documents relevant under—Exemption from tenant's ordinary liability.*—Though not alone sufficient to charge any one with liability, documents admissible as evidence under Act I of 1872, s. 34, are sufficient to answer a claim set up to exemption from what would be the ordinary liability of a tenant. **BELAET KHAN v. RASH BEHAREE MOOKERJEE**, 22 W.R. 549. [R., 10 O.L.R. 545.]

(156)—*Evidence—Sale—Government Gazette.*—In order to prove the actual conditions, on which a sale deed was executed, the Government Gazette advertising the sale and a printed paper containing the conditions of sale referred to in the Gazette, were admitted in evidence. **JOTENDRO MOHUN TAGORE v. RANEE BRIJOSOONDOORY**, W.R. 1864, 50.

(157)—*Evidence—Proceedings of Small Cause Court—Admissibility.*—The summons book of the Small Cause Court, Calcutta, which is kept in accordance with the practice of the Small Cause Court and is the only record of that Court, is admissible in evidence, though it does not bear the signature of the presiding Judge. **QUEEN v. NAKUR SIRCAR**, 6 B.L.R. 729.

(158)—*Evidence—Proceedings of Small Cause Court—Admissibility.*—The record of proceedings in the Small Cause Court is not admissible in evidence unless authenticated by the signature of the presiding Judge. Therefore the summons book kept according to the usual practice of that Court is not admissible in evidence if not signed by the Judge. **QUEEN v. SHIB CHANDRA DAS**, 6 B.L.R. 730, Note.

(159)—*Proof of decree of Small Cause Court.*—In a suit on a decree of the Small Cause Court, the record of the proceedings of the Small Cause Court could be proved by a copy of the record duly certified by the clerk of the Court, if it appears from such copy that the original has been duly authenticated by the Judge. **HARONARAYAN v. MANIK SING**, 7 B.L.R. App. 61.

(160)—*Proceedings under Act IV of 1840—Rejection as evidence.*—Held (by Markby, J.



**Evidence—continued.****—7.—Miscellaneous Documents—continued.**

that a Judge does not go further than his discretion in rejecting as evidence a proceeding under Act IV of 1840. *SYUD ABDOL ALI v. MULLICK SUDDEROODDEEN AHMED*, 14 W. R. 493.

(161)—*Proceedings of Criminal Court, no evidence—Civil Court to find facts for itself.*—It is improper to admit a proceeding of a Criminal Court as evidence, a Civil Court being bound to find the facts for itself. *KERAMUTOOLLAH CHOWDHRY v. GHOLAM HOSSEIN*, 9 W. R. 77. [D., 14 W. R. 339.]

(162)—*Claim to stolen notes—Verdict of Criminal Court—Evidence of ownership.*—The verdict of a Criminal Court with respect to the alleged theft of notes is no evidence of the ownership of such notes. *PANNA LAL v. GAPIRAM BAZURIAH*, 3 B. L. R., App. 2.

(163)—*Plea of guilty—Verdict of conviction—Evidence in Civil case.*—Though a plea of guilty in a Criminal Court may be considered in evidence in a civil case, but not a verdict of conviction. *SHUMBOO CHUNDER CHOWDHRY v. MODHOO KYBURT*, 10 W. R. 56.

(164)—*Documents exhibited in criminal case—Evidence of such documents in suit before Deputy Collector.*—Documents filed in a case under s. 318, Code of Criminal Procedure, 1861, are not relevant in a suit before a Deputy Collector. *CHOO LUN SINGH v. DHOORUB SINGH*, 11 W. R. 171.

(165)—*Criminal judgment in evidence—Admissibility.*—Suit for arrears of rent; the plaintiff, after allowing an abatement on defendant's allegation that a dacoity had taken place in her house, claimed full rents on finding from a judgment of the High Court that no dacoity had taken place. *Held* that the High Court's judgment was admissible to ascertain the truth of plaintiff's case. *RAJAH ENAYET HOSSEIN v. BEEBEE KHOOBUNNISSA*, 9 W. R. 246.

See ACKNOWLEDGMENT, 13 B. 614.

Value of thak and survey maps as evidence generally and also when question is as to land being included in permanent settlement—See ACT IX OF 1847, ss. 3, 5, 6, 30 C. 291, P. C.—30 I. A. 44=7 C. W. N. 193=5 Bom. L. R. 1.

Evidentiary value of road cess returns rendered under Ben. Act IX of 1880—Suit for enhancement—See BEN. ACT IX OF 1880, s. 95, sch. III, art. 2, 30 C. 1033, P. C.=30 I. A. 177=8 C. W. N. 1.

See BEN. ACT VIII OF 1885, ss. 153, 88, 16 C. 155.

Entries in *batwara papers* as to rent payable by tenant, whether evidence against tenants—See BEN. ACT V OF 1897, 13 C. W. N. 93=4 Ind. Cas. 316.

See PUN. ACT XXVIII OF 1868, s. 6, 11 P. R. 1880, 10 P. R. 1880, 16 P. R. 1880, 17 P. R. 1880, Rev.

**Evidence—continued.****—7.—Miscellaneous Documents—concluded.**

Note in Patwari's diary—See U. P. ACT XVIII OF 1873, s. 12, A. W. N. 1881, 166.

See ADMISSION — ADMISSIONS BY OR AGAINST THIRD PERSON, 25 P. R. 1871.

See CIV. PRO. CODE, 1908, O. XIII, rr. 1, 2, 1 B. L. R., A. C. 120=10 W. R. 179.

See CO-SHARERS—SUIT BY CO-SHARERS, 1 N. W. P. 244.

See CUSTOMS—PUNJAB—GENERAL, 8 P. R. 1892.

Plaintiff alleging that his *mukarraridari* rights were created by deeds executed by or on behalf of proprietary body owning *shamilat*—Deeds not registered—Deeds inadmissible in evidence—See CUSTOMS (PUNJAB—SHAMILAT LAND), 189 P. L. R. 1908.

See ENHANCEMENT OF RENT—ENHANCEMENT, GROUNDS OF, 22 W. R. 350.

See EVIDENCE ACT, 1872, s. 35, 25 A. 90=A. W. N. 1902, 207.

See HINDU LAW—ALIENATION, 8 W. R. 519.

See LANDLORD AND TENANT—TRANSFER OF TENANTS' INTEREST, 14 W. R. 211.

Incomplete proposal to grant lease—Admissibility in evidence without registration—See LEASE—MISCELLANEOUS, 7 C. 708=10 C. L. R. 127.

Entries in a chowkidar's register—See LEGITIMACY, P. L. R. 1900, 412.

See LOCAL INVESTIGATION, 8 W. R. 331.

Recital in mortgage-deed—Sale of mortgaged property—Admissibility of recital against purchaser—See MORTGAGE—SALE OF MORTGAGED PROPERTY, 13 C. P. L. R. 1.

See NEGOTIABLE INSTRUMENTS—CHEQUE, 2 N. W. P. 335.

See REGISTRATION, L. B. R. 1893-1900, 32.

See REGISTRATION ACT, 1908, s. 49, L. B. R. 1893-1900, 124.

Chitta—Admissibility in—See RES JUDICATA—COMPETENCY OF COURT, 8 Ind. Cas. 715.

**—8.—Parol Evidence.**

See SECONDARY EVIDENCE.

(1)—*Reliability.*—Because there may be a sort of general feeling of doubt as to the reliability of oral testimony in this country, a judicial officer is not justified, for that reason and without any materials to warrant his doing so, in dismissing as incredible and untrustworthy a large body of evidence taken upon oath before him, simply because it is oral evidence and because there is no written proof to corroborate it. The sworn testimony of witnesses should



**Evidence—continued.****—8.—Parol Evidence—continued.**

not be ignored and disbelieved unless discredited or broken down by contrary proof, or by matters elicited in cross-examination, which may tend to show that the persons giving such evidence have deliberately perjured themselves, or have made a false and concocted statement, or unless the evidence is, upon the face of it, so absurd or improbable that no person ought to believe it. *DURGA PRASAD v. RAMDIN SAHU*, A.W.N. 1887, 69. (18 W.R. 184, P.C., *Rel. on.*)

(2)—*Weight of oral evidence—Opinion of first Court.*—Evidence of witnesses, who though not independent, were not shaken in cross-examination, if believed in by the Court which heard them and watched their demeanour, should not be thrown out as worthless by the appellate Court on mere suspicion when their statement is not improbable. *MAQBULAN v. AHMAD HUSAIN*, 26 A. 108, P.C.=8 C.W.N. 241=6 Bom. L.R. 233=31 I.A. 38=5 Sar. 583.

(3)—*Appreciation of oral evidence—Discretion of Court—Material document not, produced notwithstanding denial of genuineness—Inference by Court against its genuineness.*—Where there are witnesses on both sides in a case and they contradict each other, it is for the Judge to decide which set of witnesses to believe. Where a document, the genuineness of which is denied, would be of material advantage to a party to the suit and is not produced by him, it is competent to the Judge to draw an inference against the genuineness of the document and trust the witnesses of the other party, who speak against its genuineness. *THAKUR MAHARAJ SING v. GOLA*, 4 C.P.L.R. 126.

(4)—*Survey award sought to be set aside, whether can be treated as evidence—Ameen's report, Evidentiary value of—Rejection of oral testimony, reasons to be given for.*—In this case, the plaintiff sued for confirmation of possession and for reversal of the proceedings of the Survey Authorities, who had demarcated the land as that of defendants. The High Court held, on second appeal, that the Sudder Ameen had erred in law in having treated as evidence the very survey award for the setting aside of which the suit had been brought and in having failed to treat the Ameen's report as legal evidence for the insufficient reason that it was founded on no documentary evidence, and remanded the case for re-trial with reference to the said remarks. *ESHAN CHUNDER SEIN v. HURREE CHURN DEY*, 2 W.R. 278.

(5)—*Oral evidence—Absence of support by documentary evidence—Value of parol testimony.*—It is not correct to hold that, for the determination of the merits of a case, oral testimony, unsupported by documentary evidence is of no value. *GIRDHAREE LALL SINGH v. MODHO ROY*, 18 W.R. 323.

(6)—*Non-existence of documentary evidence—Oral testimony of witnesses—First Court believing oral testimony—Appellate Court, Duty of.*—

**Evidence—continued.****—8.—Parol Evidence—continued.**

No Court, much less an appellate Court, is justified in ruling that, in the absence of documentary evidence mere parol evidence is not sufficient to prove the plaintiff's case, when it is supported by a number of witnesses, whose testimony is believed by the first Court. *MOHESH ROY v. BOODHUN MAHTOON*, 18 W.R. 314.

(7)—*Document, Execution of, denied—Oral evidence of denial.*—A plaintiff denying the execution of document may adduce oral evidence to prove his contention. *KHETTUR MOHUN AUDHIKAREE v. GIREEDHUR GHORRYE*, 20 W.R. 184.

(8)—*Old document—Execution, Proof of, impossible—Authenticity to be proved—Custody, Oral evidence of.*—Even if a deed or other document is so old that proof of the *factum* of its execution cannot be expected, its authenticity must be established in some reasonable way; the practice being to offer parol testimony as to the facts of its custody. *MUSSAMUT FUREE-DUNNISSA v. RAM ONOGRA SINGH*, 21 W.R. 19.

(9)—*Testimony of single witness—Act II of 1855, s. 28.*—The evidence of one witness, if reliable, is not insufficient to prove a fact. *ZALEM MISSER v. MUSSAMUT KUNDUN KOOR*, 11 W.R. 194.

(10)—*Evidence Act (I of 1872), s. 92, application of—Parol evidence admissible, when.*—S. 92 applies only to cases where the whole of the terms of the contract have been intended to be reduced into writing. This is shown by the words "adding to" which appear in that section. If it were not for those words, the Court should have been inclined to hold, that s. 92 only excluded evidence, contradicting, varying, adding to or subtracting from such of the terms of a contract as had been reduced into writing. If the parties have intended to reduce all the terms of the contract into writing, then no parol evidence is admissible; but if they intended only to reduce into writing, a portion of the terms of the contract, they are entitled to give parol evidence of the terms which they did not intend to reduce into writing. *JUMNA DOSS v. SRINATH ROY*, 17 C. 173, Note. [R., 114 P.L.R. 1901]

(11)—*Document purporting to be sale—Evidence Act, s. 92—Evidence to contradict when admissible and when not.*—It does not necessarily follow from s. 92 of the Evidence Act that subsequent conduct and surrounding circumstances may not be given in evidence, for the purpose of showing that an apparent conveyance is really a mortgage. This rule, however, turns on the fraud involved in the conduct of the person who is really a mortgagee, but who sets himself up as an absolute purchaser; and the rule of admitting evidence for defeating this fraud would not apply to an innocent purchaser, without notice of the existence of the mortgage, who merely brought from a person who was in possession of the title-deeds



*Evidence—continued.***—8.—Parol Evidence—continued.**

and was the ostensible owner of the property. *KASHINATH DASS v. HURRIHUR MOOKERJEE*, 9 C 898 = 13 C.L.R. 11. [*F.*, 13 M. 494, 2 L.B.R. 1; *R.*, 16 M. 80, L.B.R. 1893—1900, 85 and 154 and 212, U.B.R. 1902, 1903, Vol. II, Evidence, 1.]

(12)—S. 92, *I E.A.*, 1872—*Admissibility of evidence of conduct*.—Though s. 92 excludes in particular instances any oral agreement or statement, yet evidence of conduct, *e.g.*, return of a kabuliat, is admissible for proving that such return was due to an intention to make the kabuliyat inoperative. *SHYAMA CHARAN MANDAL v. HERAS MOLLAH*, 26 C. 160. (25 C. 603, *F.*)

(13)—*Unambiguous written contract—Construction—Evidence Act*, s. 92.—So long as there is no ambiguity about a written contract, evidence is not admissible to vary or contradict its terms; and the question whether it is illegal or not must be decided upon the terms of the contract itself. *JUGGERNAUTH SEW BUX v. RAM DYAL*, 9 C. 791. [*Overruled*, 32 C. 437 = 1 C.L.J. 155 = 9 O.W.N. 305, *F.B.*; *Diss.*, 12 B. 585, 17 M. 480, 85 P.R. 1898; *R.*, U.B.R. 1897—1901, Vol. II, 399.]

(14)—*Evidence—Oral evidence to contradict written instrument—Estoppel*.—Primarily or ordinarily, a solemn and formal deed cannot be set aside by parol evidence directly contradicting its terms, except in special cases where fraud, mistake, surprise and other grounds familiar to Courts of equity are alleged. Where the plaintiffs in a previous proceeding allowed certain property to be attached as theirs and defeated their creditors by allowing defendants to claim and obtain the property, *held*, they were estopped and barred from afterwards making an allegation to the contrary. *MESSERS. ERSKINE & CO. v. OKHOY CHUNDER DUTT*, W.R. 1864, 58.

(15)—*Written document—Oral evidence, Admissibility of*.—Oral evidence cannot be adduced to contradict the terms of a written document. The principle governing the admissibility of oral evidence when there is a written document is, "is the matter of the contemporaneous oral agreement so outside the scope of the written one that they can logically subsist together, so that the oral shall neither contradict nor modify the written document." *JAMES FISCHER v. ROBERT FISCHER*, 6 M.H.C. 393.

(16)—*Parol evidence to vary terms of written contract—Written instrument—Variation*.—A plaintiff cannot sue on a written instrument with a variation disputed by the defendant, excepting on allegations which, if true, would entitle him to obtain a rectification of the document and in a Court competent to grant such rectification. (10 B. 51, 9 C. 528, 4 B. 594, *R.*) A Small Cause Court is not competent to grant such relief. *KAILASH CHUNDRA KUL v. A. K. A. M. PALINEAPPA CHETTY*, L.B.R., 1872—1892, 588. [*R.*, L.B.R. 1893—1900, 154.]

*Evidence—continued.***—8.—Parol Evidence—continued.**

(17)—*Evidence Act (I of 1872), Proviso (4)—Oral agreement to rescind registered conveyance, Admissibility of*.—No oral agreement to rescind a registered conveyance is admissible in evidence under the Evidence Act (I of 1872), s. 92, proviso (4). *UMEDMAL MOTIRAM v. DAVU BIN DHONDIBA*, 2 B. 547. [*R.*, 2 O.C. 24, 26 C. 160].

(18)—*Suit for delivery of sale-deed after registration—Contract concluded—Consideration partially paid—Non registration of contract—Inadmissibility in evidence—Parol testimony irrelevant*.—In a suit to have a deed of sale given up to the plaintiff after being duly registered, where the plaintiff's case is that the contract was concluded, though a portion of the consideration remained to be paid, *held* that, as the contract was not registered, it cannot be received as evidence, and no parol evidence of it was admissible. *SHAIKH MAHOMED CHID v. KALEE PERSHAD SINGH*, 24 W.R. 320.

(19)—*Evidence Act*, s. 92, proviso 3—*Admission of parol evidence—Part performance of obligation under contract—"Any obligation" in the above section and proviso*.—The rule that, when at the time of written contract, it is orally agreed that the written agreement shall not be of any force or validity until some condition precedent has been performed, parol evidence of such oral agreement is admissible to show that the condition has not been performed, and consequently that the written contract has not become binding, has no application to a case where the written agreement had not only become binding, but had actually been performed as to a large portion of its obligation.—*Per Garth, C.J.* [*F.*, 25 O. 401; *R.*, 7 M. 19, L.B.R. 1893-1900, 154.] "Any obligation" in the above section and proviso is any obligation whatever under the contract and not some particular the contract may contain. *JUGTANUND MISSER v. NERGHAN SINGH*, 6 C. 433 = 7 C.L.R. 347.

(20 & 21)—*Oral evidence as to contents of document*.—A deed relied on by both the plaintiffs and the defendants, under which the defendants specially claim, was held to be binding on the defendants, who could not let in evidence to contradict such deed. *KHYROOLLAH v. ABDUL MUJEEB*, 11 W.R. 307.

(22)—*Contracts written and verbal—Evidence—Acts of parties*.—Evidence cannot be admitted in proof of a verbal stipulation to vary a written contract; nor is evidence admissible of the acts of the parties when it is given entirely and absolutely in support of such verbal stipulation. *MADHAB CHANDRA ROY v. GANGADHAR SAMANT*, 3 B.L.R.A.C., 83 = 11 W.R. 450. (5 W.R. 68, *R.*) [*Appr.*, 5 C. 300 = 4 C.L.R. 419; *R.*, 4 B. 594.]

(23)—*Evidence of conduct of parties to vary deed—Evidence Act*, s. 92.—The parties to a written contract are precluded, by s. 92 of the Evidence Act (with which the provisions of the



**Evidence—continued.****—8.—Parol Evidence—continued.**

Registration Act might be considered), from relying upon the evidence furnished by their conduct, which would be only of an oral contemporaneous agreement, for the purpose of varying, adding to or subtracting from its terms, *e.g.*, to show that an out-and-out sale was in reality intended to be only a mortgage. **DAIMODDEE PAIK v. KAIM TARIDAR**, 5 C. 300=4 C.L.R. 419. (11 W.R. 450, R.) [*F.*, 5 C.L.R. 487; *Diss.*, 4 B. 594, 9 C. 528; R., L. B.R. 1893—1900, 154, 9 C.W.N. 178.]

(24)—*Bill of exchange—Evidence Act (I of 1872), s. 92.*—The drawer of a bill of exchange cannot be allowed to set up an oral agreement that contradicts or operates in defeasance of its terms. Where, therefore, a Bank discounted bills drawn by a consignor of goods on his consignee against his consignments, and, having been unable to recover from the consignee who had accepted the bills, sued the consignor, the latter was not allowed to set up an oral agreement that the Railway-receipts for the consignments, sent through the Bank, were not to be delivered to the consignee before payment. **COHEN v. THE BANK OF BENGAL**, 2 A. 598. [*F.*, 25 C. 401.]

(25)—*Admissibility of oral evidence to vary written instrument.*—Oral evidence is inadmissible to prove that no consideration passed between the parties to a deed of sale, when it is solemnly admitted in the written instrument that such consideration had passed. **MUSSAMUT RAMDEE KOONWAREE v. BABOO SHIB DYAL SINGH**, 7 W.R. 334.

(26)—*Sale-deed — Consideration, Passing of — Parol evidence.*—Case where the High Court held that parol evidence was irrelevant in a regularly drawn up deed of sale, where consideration was admitted to have passed. **MUSSAMUT RAM DEYE KOOR v. BABOO BISHEN DYAL SINGH**, 8 W.R. 339.

(27)—*Document, a conveyance on the face of it — Parol evidence to show different operation.*—A party executing an instrument which is on the face of it a conveyance or deed of sale, cannot show by parol evidence that it was not intended to operate as a sale or conveyance. **SOOKNA MEDHEE v. GUNDHOO RAM MUNDUL**, 12 W.R. 264.

(28)—*Deed, Delivery of.*—Where a deed is delivered to the party in whose favour it is executed, evidence is not admissible to show that it was intended to operate as an escrow only. **MOSHUM ALLY v. BALASOO KOER**, 2 May 576.

(29)—*Evidence—Written agreement—Contemporaneous oral agreement—Parol evidence.*—Suit for pre-emption in respect of a sale. Held that oral evidence is not admissible to show that the parties did not intend that an absolute sale in writing should operate not as an absolute sale, but merely as a conditional sale,—and thus to defeat a right of pre-emption. *Norman and Pundit, JJ., contra.* **MALUK CHAND**

**Evidence—continued.****—8.—Parol Evidence—continued.**

**SURMA v. KARLU CHENDRA SURMA**, B.L.R., Sup. Vol. 399=5 W.R. 76.

(30)—*Deed of sale alleged to be a mortgage—Parol evidence not admissible.*—It is incompetent on the part of a Court and illegal to admit parol evidence to vary the direct words of a deed of sale and make it a mortgage-deed, and this not only as against a party to the deed, but also as against an innocent purchaser from the person in whose favour the deed was executed. **MAHOMED AZEEM v. RAESOODDEEN**, 6 W.R. 111.

(31)—*Oral evidence—Admissibility of evidence to set aside deed of sale.*—Held that oral evidence was not admissible to set aside a deed of sale, which, by its terms, is clearly absolute. **JUGOBUNDHOO MOOKERJEE v. LUCKHEE-SUREE DEBIA**, W.R. 1864, 388.

(32)—*Evidence — Written agreement—Contemporaneous oral agreement—Parol evidence.*—Verbal evidence is not admissible to vary or alter the terms of a written contract in cases in which there is no fraud or mistake, and in which the parties intend to express in writing what their words import—as for instance, to show that a deed of absolute sale was intended to operate as a mortgage. *Norman and Pandit, JJ., contra*:—Parol evidence is admissible to show that a bill of sale, though absolute in its terms, was a mortgage. **KASHI NATH CHATTEJEE v. CHANDI CHARAN BANERJEE**, B.L.R. Sup. Vol. 383=5 W.R. 68. [*Not F.*, 8 B.L.R. 89; *F.* 6 W.R. 267, 7 W.R. 334, 11 W.R. 450, 18 W.R. 256, 19 W.R. 333; *Appr.*, 8 W.R. 339, 9 W.R. 251, 14 W.R. 319, 9 C. 898=13 C.L.R. 11; R., 7 W.R. 408, 8 W.R. 152, 515, 1 B. 333, 4 B. 594, 9 C. 528=12 C.L.R. 287; *Cons.* B.L.R., Sup. Vol. 399=5 W.R. 76, 1 B.L.R., A.C., 37; D., 1 B.L.R., O.C., 28.]

(33)—*Indian Evidence Act (I of 1872), ss. 91, 92, 115—Parol evidence, Admissibility of, to prove a sale to be a mortgage.*—Though parol evidence may be inadmissible to prove directly that, simultaneously with the execution of a bill of sale, there was an oral agreement by way of defeasance, yet, the Courts will look to the subsequent conduct of the parties; and if it clearly appear from such conduct, that the apparent vendee treated the transaction as one of mortgage, the Court will give effect to it as a mortgage and nothing more. It cannot always be said that the acts of the parties are only indications of the unexpressed unwritten agreement between the parties. Conduct is evidence of the agreement out of which it arises; but, it may, however, be very much more in many cases, and may often amount to estoppel, and evidence of conduct will be admissible under s. 115 of the Indian Evidence Act. The terms of the section are sufficiently wide to cover the case of a grantor who has simply been allowed to remain in possession, on the understanding and belief that the transaction was one of mortgage. The rule, therefore, which may be laid down as a guide in such cases and as one



*Evidence—continued.***—8.—Parol Evidence—continued.**

most consonant, both to the statute law and to equity and justice, is this, viz, that a party, whether plaintiff or defendant, who sets up a contemporaneous oral agreement as showing that an apparent sale was really a mortgage, shall not be permitted to start his case by offering direct parol evidence of such oral agreement; but if it appear, from the conduct of the parties, that the transaction has been treated by them as a mortgage, the Court will give effect to it as a mortgage and not as a sale, and thereupon, if it be necessary to ascertain what were the terms of the mortgage, the Court will, for that purpose, allow parol evidence to be given of the original agreement. *PAKSULAKSHMAN v. GOVINDA KANJI*, 4 B. 594. [*Diss.*, 3 L.B.R. 100, F.B.; *F.*, 2 L.B.R. 1; *R.*, 9 C. 528=12 C. L.R. 287, 9 C. 898, 10 C. 764, 2 C.P.L.R. 125, 13 M. 494, 16 M. 80, L.B.R. 1872-1892, 588, L.B.R. 1893-1900, 154, 21 B. 704, 2 Bom. L.R. 1058, 72 P.R. 1901=114 P.L.R. 1901, U.B.R. 1902-1903, Vol. II, Evidence, 1, 3 N.L.R. 19, U.B.R. 1908, 2nd Qr., Evidence, 92, 15; *D.*, 9 C.W.N. 178.]

(34)—*Evidence Act (I of 1872), s. 92—Oral evidence of intention whether admissible to interpret deeds—Mortgage or sale.*—In deciding the question whether a particular deed is a mortgage by conditional sale or an out-and-out sale, oral evidence of intention is inadmissible under s. 92 of the Evidence Act for the purpose of construing the deed, nor can evidence of oral agreement at variance with the terms of the deed be admitted; but the case must be decided on a consideration of the contents of the document with such extrinsic evidence of other circumstances as may show in what manner the language of the document is related to existing facts. Where there were two documents, the first document reading like a sale-deed and the second deed containing the elements of a certain date fixed for the re-payment of the money, the addition to the original purchase-money of a sum of a money presumably for interest, the consolidation of the debt on a factories account with the principal sum mentioned in the deed, the giving the vendees the security on the properties comprised in the first document for the debt of the factories, and a provision that the vendor should not be competent to effect a sale until the payment of the estimate money relating to the factories, it was held that the two deeds construed together amounted to a mortgage by conditional sale and not an out-and-out sale. *BALKISHEN DAS v. W.F. LEGGE*, 22 A. 149, P.C.=4 C.W. N. 153=27 I.A. 58=2 Bom. L.R. 523=7 Sar. 601. [*F.*, 26 B. 252, F.B.=3 Bom. L.R. 778, 11 M.L.J. 370=25 M. 7; *F. & Expl.*, 5 C.W. N. 326=28 C. 289; *Expl.*, 28 C. 256=5 C.W. N. 351; *R.*, 2 Bom. L.R. 1058, 72 P.R. 1901=114 P.L.R. 1901, 3 L.B.R. 100, 30 C. 883, 2 L.B.R. 99, 2 N.L.R. 57, 8 O.C. 275, 27 A. 612=2 A.L.J. 360=A.W.N. 1905, 129; *D.*, 11 C.W.N. 400=6 C.L.J. 208, 10 C.L.J. 27, 11 C.L.J. 39=2 Ind. Cas. 13.]

*Evidence—continued.***—8.—Parol Evidence—continued.**

(34-a)—*Evidence Act (I of 1872), s. 92—Execution of sale-deed—Contemporaneous oral agreement—Admissibility of proof.*—In a suit on a sale-deed, where the execution of the deed is admitted, s. 92 of the Evidence Act renders inadmissible the proof of a contemporaneous oral agreement between the parties, inconsistent with the terms of the deed, e.g., an agreement to the effect that the sale-deed was to be only a security for the payment of a certain sum of money by the defendant to the plaintiff. *BANAPA v. SUNDARDAS JAGJIVANDAS*, 1 B. 333. [*F.*, 3 L.B.R. 100; *D.*, 4 E. 594, L.B.R. 1893-1900, 154, 1 P.R. 1904=41 P.L.R. 1904.]

(35)—*Presumption—Oral evidence to vary a deed of sale.*—Where there is no presumption of mortgage, oral evidence to vary the express terms of a deed of absolute sale will be irrelevant. *RADHA MOHUN SHAMEE v. RAM MOHUN SURMAH*, 9 W.R. 251.

(36)—*Evidence—Exclusion of oral by documentary evidence.*—Where, in a mortgage-deed, it was stipulated that the mortgage should not be redeemed "from 1287 to 1298 Fasli, for 12 years," held that evidence was improperly admitted to show that the "Fasli year" alluded to was not the Fasli year as commonly understood, but the agricultural year. *SHEOBARAN SINGH v. BISHESHAR DAYAL SINGH*, A.W.N. 1892, 236. [*R.*, 18 A. 388.]

(37)—*Evidence Act, s. 92—Admission of oral evidence.*—Where, after the execution of a deed of mortgage, it is orally agreed between the parties that, for fresh advance, if any, to be made by the mortgagee to the mortgagor, a first charge would be given for the season's crop, such agreement would be in defeasance of the mortgage and, as such, would be inadmissible in evidence under s. 92 of the Evidence Act. *MORAN v. MITTU BIBEE*, 2 C. 58.

(38)—*S. 92, I.E.A., 1872—Oral evidence showing "sale-deed," to be "deed of gift"—Admissibility.*—Under s. 92, no oral evidence is admissible to show that certain deeds of sale are not deeds of sale, but deeds of gift. *RAHIMAN v. ELAHI BAKSH*, 28 C. 70. (6 W.R. 267, 7 W.R. 428, 11 C. 486, *D.*) [*R.*, 6 C.W.N. 60; *Commented upon*, 27 M. 329; *Not F.*, 2 C.L.J. 338; *Diss.*, 28 A. 473=3 A.L.J. 314=A.W.N. 1906, 89.]

(39)—*Evidence Act (I of 1872), s. 92—Sale-deed, admissibility of evidence of oral agreement to re-convey.*—Where the words of conveyance in an apparent sale-deed formed only part of the real agreement between the parties, and the oral agreement to re-convey to the vendors which gave them a claim to equitable relief formed another part of the same transaction, it is in the eye of law a fraud to insist on the conveyance as being absolute, and parol evidence should therefore be admitted as for proving the fraud. Nor does s. 92 of the Evidence Act render evidence of the oral agreement inadmissible.



**Evidence—continued.****—8.—Parol Evidence—continued.**

for, if the real agreement were proved, it would invalidate the document as a deed of absolute sale within the meaning of the first proviso to the section, and constitute a ground for a Court of equity and good conscience giving effect to it only as a mortgage. *RAKKEN v. ALAGAPPU-DAYAN*, 16 M. 89. (13 M. 494, Cons.) [Diss., 72 P.R. 1901=114 P.L.R. 1901, 3 N.L.R. 19; R., L.B.R. 1893-1900, 154, U.B.R. 1902-1903, Vol. II, Evidence, 1.]

(40)—*Contract, Admissibility of parol evidence, to vary written evidence.*—Where the plaintiff in a suit for specific performance of a contract to sell a certain share of a house, set out a written contract, and alleged that, on its having been subsequently discovered that the share was less than it was originally believed to be, the price was reduced by verbal agreement, held that the written contract must be taken as intact save as to the price, and that no evidence could be given by the defendants in contradiction of the other terms of the document. *BROWN v. CUTTS*, 5 C.L.R. 487. (4 C.L.R. 419, F.)

(41)—*Limitation Act, 1877, s. 19—Contents of acknowledgment—Oral evidence inadmissible to prove—Acknowledgments prior to Act, not saved by Act.*—S. 19 of the Limitation Act (XV of 1877), says clearly that oral evidence of the contents of an acknowledgment may not be received; nor has the Act made any saving of acknowledgments received or given back before the Act came into operation. *ZIULNISSA LADLIM BEGAM SAHEB v. MOTIDEV RATANDEV*, 12 B. 268.

(42)—*Written instrument providing for joint tenancy—Oral evidence not admissible to show that separate specific contracts were entered into.*—Where a written instrument provides for a joint tenancy and joint contract by all the parties executing it to pay the whole rent of a village without any reference to the quantity of land in the holding of each, oral evidence is not admissible to show that separate specific contracts have been entered into by each of the parties, and it makes no difference that the evidence is put forward as evidence of a custom. *MR. G. LEE MORRIS v. PANCHANADA PILLAY*, 3 M.H.C. 135.

(43)—*Lease granted by two co-owners jointly—Whether one co-owner can give lessee notice to quit and sue in ejectment—Oral agreement as to option to renew lease, inadmissible under s. 92, Evidence Act.*—Defendant was lessee under a joint lease by K and P, co-owners of the premises. Plaintiff having purchased an undivided moiety from P, gave defendant notice to quit the moiety from the termination of the lease and sued for possession. The defendant set up an oral agreement giving him an option of renewal of the lease, but it could not be proved as being inconsistent with the terms of the lease, the reception of evidence in respect of it being barred by the provisions of s. 92 of the Evidence Act. The notice to quit

**Evidence—continued.****—8.—Parol Evidence—continued.**

given by plaintiff alone to the defendant-lessee was objected to as invalid, but it was held that it was not had either by reason of its having been issued by one only of the co-owners (the plaintiff), or because of its having been given before, and not after the expiry of the term as required by the lease itself. Plaintiff, one of the joint-lessors, had the right to give the notice to quit and himself to maintain the suit to eject the lessee. *EBRAHIM PIR MAHOMED v. CURSETJI SORABJI DE VITRE*, 11 B. 644. [Diss., 20 P.L.R. 1907; R., 29 M. 29, 35 C. 807=7 C.L.J. 483.]

(44)—*Specific performance—Contract subsequently varied by parol—Evidence Act, s. 92 (4).*—The plaintiff obtained a registered lease of the entire sixteen annas of a certain property, containing a stipulation that, on the expiry of the term, the lease would be renewed at the former rent for a like period. It was subsequently found that the lessor was entitled to a six annas share of the property only. Thereupon, the parties orally agreed that the rent should be reduced in proportion and that the stipulation as to renewal contained in the original lease in respect of the sixteen annas share should be regarded as applicable to the six annas share. On the expiration of the term the plaintiff sued for specific performance of the contract, as modified, for a renewal of the lease of the six annas. Held that s. 92 (4), Evidence Act, precluded any proof, by oral evidence, of a modification of the original contract, and that the plaintiff was not entitled to specific performance. *DWARKA NATH CHATTOPADHYA v. BHOGABAN PANDA*, 7 C.L.R. 577.

(45)—*Oral evidence—Admissibility—Evidence to contradict document—Evidence Act, I of 1872, s. 92.*—A, by a deed of sale absolute on its face, transferred certain land to B, for the sum of Rs. 379. A alleged that, at the time the transaction was entered into, it was understood and orally agreed that the sale was merely by way of security for the payment of Rs. 400, due to a third party, C, under a compromise made by A with C for the satisfaction of a decree for Rs. 832, which the latter held against A; and that it was at the same time orally agreed between A and B that, on the payment of the money by A to C, the deed of sale should be delivered to the former. Subsequently, A brought a suit against B for the return of the *kobala*, alleging that the whole of the money had been paid to A. Held that s. 92 of the Evidence Act, I of 1872, prevented the admission of the evidence of the oral agreement to contradict the deed of sale which had admittedly been contemporaneous. *RAMDOYAL BAJPIE v. HEERA LALL PARAY*, 3 C.L.R. 366. [R., 9 C. 528.]

(46)—*Written release—Oral agreement adding to terms of release—Admissibility—Evidence Act (I of 1872), s. 92.*—R and the defendants were members of a partnership and the business was carried on under the name and style of



*Evidence—continued.**—8.—Parol Evidence—continued.*

Nowroji Curstji & Co. R died on 8-11-1884 appointing P and B his executors. The accounts of the partnership business had remained unadjusted for many years prior to the death of R. In adjustment of such accounts, the executors, after examining the books, etc., of the firm, received from the defendant's a lump sum of Rs. 8,325-11-0 as the amount due to the estate of R, and executed a release deed on 9-11-1885 to the defendants in respect of the share and interest of R in the firm. By an assignment in writing, dated 7-4-1887, the executors assigned over to the plaintiff 1/16 of the share in the said firm. The present suit was brought by the plaintiff (as assignee of the 1/16 share) to declare his right to the said share. He also prayed that an account might be taken and his share of the profits paid over to him. The plaintiff alleged that the amount due to the estate of R had not been ascertained accurately at the time the release deed was executed. He also set up an agreement among the partners, at the time of the release, to the effect that, exclusive of the amount due under the release, the executors should receive a 1/16 share in the partnership. The defendants, who denied the plaintiff's right to any share in the partnership, contended that the share and interest of R and his estate in the partnership ceased on his death, and alleged that there was no agreement to give the executors a share in the partnership. They also relied on the release given by the executors and urged that, under s. 92 of the Evidence Act, no evidence can be given as to the alleged agreement made at the time of the release. *Held*, that under s. 92 of the Evidence Act, evidence of the agreement that the executors should continue to have a one anna share in the firm was inadmissible, because it was inconsistent with the written release. Under the release in consideration of a lump sum paid to the executors, the latter gave up all claims arising out of the partnership. The oral agreement added another term as the consideration of waiving all claims on the past accounts to wit,—the continuance of a one-anna share in the partnership. Such an agreement is an addition to the terms of a contract which had been rendered into writing and was inconsistent with those terms. **COWASJI RUTTONJI LIMBOOWALLA v. BURJORJI RUSTOMJI LIMBOOWALLA, 12 B. 335.**

(47)—*Evidence Act, I of 1872, s. 92, proviso 4—Meaning of "oral"—Acts and conduct—Registered lease—Reduced rent.*—The word "oral" in s. 92, proviso 4 of the Evidence Act, is used in the sense of "not committed to writing," and includes all unwritten agreements whether come to by word of mouth, or inferred from the acts and conduct of the parties. An agreement, therefore, by which the landlord agreed to accept a lower rate of rent than what was specified in the registered lease, and in pursuance of which he did accept such reduced rent for a number of years, cannot be proved in

*Evidence—continued.**—8.—Parol Evidence—continued.*

a suit for rent at the rate provided in the registered lease. **MAYANDI CHETTI v. OLIVER, 22 M. 261=8 M.L.J. 196.** [*F.*, 2 Ind. Cas. 160; *R.*, 6 C.W.N. 60, 26 M. 195, 129 P.W. R. 1908, 32 M. 281=19 M.L.J. 280=5 M.L.T. 84.]

(48)—*Admissibility of oral evidence to vary terms of deed—Additional damages—Act VI of 1862.*—Though undoubtedly a document may be explained by oral evidence, oral evidence cannot be admitted to vary the terms of the written instrument whose terms are, in themselves, clear and undoubted. The award of additional damages under Act VI of 1862 is discretionary and not imperative on the Courts, and before awarding these damages, the Court, in the exercise of its discretion, must look to the condition of the parties, and the particular hardship inflicted on the landlord by the omission of the under-tenant to pay rents. **BABOO RAMBUDDUN SINGH v. RANEE SREE KOONWAR, W.R. 1864, Act, X Rul. 22.**

(49)—*Penalty and liquidated damages—Stipulation to pay compound interest on failure to pay interest at due date—Intention of parties to treat clause in bond as penal—Oral evidence, Admissibility of.*—Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty; but where it is agreed that, if a party do or refrain from doing a particular thing, a sum shall be paid by him, then the sum stated may be treated as liquidated damages. A clause in a bond for payment of compound interest, on failure to pay interest annually, was held not penal, but to be in the nature of an agreement to pay liquidated damages and, consequently, enforceable by suit. [*R.*, 13 C. 164.] Oral evidence was held inadmissible to show that the clause mentioned above was intended by the parties to operate as a penal clause. **BEHARY LOLL DOS v. TEJ NARAIN, 10 C. 764.** (4 B. 594, 9 C. 528, *Appr. & D.*) [*R.*, 114 P.L.R. 1901=72 P.R. 1901.]

(50)—*Possession—Documentary evidence—Parol evidence.*—Case where it was held that bare oral testimony without any documentary evidence was insufficient to prove possession of land. **THAKOOR DEEN TEWAREE v. NOWAB SYUD ALI HOSSEIN KHAN, 8 W.R. 341,** on appeal, 13 B.L.R. 427=21 W.R. 340=1 I.A. 192.

(51)—*Boundary dispute—Oral evidence, if sufficient.*—Oral evidence, in a boundary dispute is, as a rule, quite insufficient to establish either the fact of possession or of title. **GOLUCK CHUNDER BOSE v. RAJAH SREEMUD RAJESHUREE BIDDIA DHUR SOONDEAH NURRENDER BAHADOORA, W.R. 1864, 136.**

(52)—*Bought and sold notes.*—Bought and sold notes together may form the contract in accordance with the custom of merchants in



**Evidence—continued****—8.—Parol Evidence—continued.**

Calcutta. So, parol evidence was not admissible to vary or add to the terms of the contract which had been thus reduced to writing. **JADU RAI v. BHUBOTARAN NUNDY, 17 C. 173.**

(53)—*Oral evidence to show alterations in a written acknowledgment.*—Where a written acknowledgment has its date unauthorizedly altered, oral evidence to prove that date is inadmissible under para 2 of s. 19 of the Indian Limitation Act, 1877. **GULAMALI v. MIYABHAI, 3 Bom. L.R. 574=26 B. 128.**

(54)—*Verbal contract—Parol evidence, if admissible to prove.*—Parol evidence can be admitted to prove a verbal contract. **RAM GUTTEE v. IBRAHIM ISMAILJEE SEEDAT, 7 W.R. 353.**

(55)—*Oral evidence, Admissibility of—Explanation of deed.*—It is quite legal to explain a written document by oral testimony. **CHUNDER NATH DEB v. GUNGA GOBINDO SINGH ROY, 1 W.R. 94.**

(56)—*Deed—Explanation by oral evidence.*—Case where it was held that parol evidence was admissible to explain a deed. **BABOO DHUNPUT SINGH DOOGUR ROY BHADOOR v. SHEIKH JOWAHUR ALI, 8 W.R. 152.**

(57)—*Commission — Execution—Attendance of witnesses—Production of telegraph messages—Sanction of Government—Verbal guarantee—Parol evidence.*—Where a commission was issued early in November 1869 and the suit was fixed for hearing on 10th January, 1870, held that the Judge allowed a reasonable time for the return of the commission. It is not the duty of the Court to see to the execution of the commission. It is the duty of the party who has obtained the commission to take such steps as may be necessary to secure the attendance of the witnesses he desires to examine before the commissioner. An officer in the telegraph department cannot, without the sanction of the Government, disclose the purport of a message which has been despatched or received through his office. If he does, he is liable to the penalties prescribed by the Act. When the parties require the production of such messages, it is for them and not for the Judge to obtain the necessary sanction. The Judge having no certain knowledge of the existence of the messages required and no information of their substance, was clearly right in requiring the defendants to take what further steps might be necessary to ascertain and procure sanction for the production of such messages as they conceived to be material to their defence. Although there is no Act in India similar to the Statute of France which requires that guarantees should be in writing, it is the duty of a Court when a parol guarantee is asserted, to require that it be supported by cogent and conclusive proof. **LEKHRAJ v. PALEE RAM, 2 N.W.P. 210.**

(58)—*Native purda ladies—Protection.*—A Hindu purda woman is entitled to receive in this Court that protection which the Court of Chancery in England always extends to a weak,

**Evidence—continued.****—8.—Parol Evidence—continued.**

ignorant and infirm person, and to persons who, for any other reasons, are specially likely to be imposed on by the exertion of undue influence over them. The undue influence is presumed to have been exerted, unless the contrary be shown. It is, therefore, in all dealings with those persons who are so situated, always incumbent on the person who is interested in upholding the transactions to show that its terms are fair and equitable. The most usual mode of discharging this onus is to show that the lady had good independent advice in the matter, and acted therein altogether at arm's length, from the other contracting party. The same burden of proof lies on any one who, standing before the Court, in reliance upon a contract made with any one, whether *puṛdana-shin* or other, towards whom he is in any fiduciary position relating to the subject of contract. **KANAI LAL JOWAHARI v. KAMINI DEBI, 1 B.L.R. O.C., 31, Note. [F., 1 B.L.R., O.C., 28; 22 W.R. 443; R., 26 C. 891=3 C.W.N. 670, 31 C. 233.]**

(59)—*Purda lady—Suit to set aside sale—Fraud—Parol evidence.*—Where a *purda* lady brought a suit to set aside a bill of sale obtained by a collusion and fraud, held that parol evidence was admissible to show that the bill of sale was intended by her to operate only as a mortgage, and to vary the rate of interest therein stipulated for. **MANOHAR DASS v. BHAGBATI DASI, 1 B.L.R., O.C., 28. [Appr., 8 B.L.R., O.C., 89.]**

(60)—*Extrinsic evidence—Identification of thing referred to in written agreement.*—Extrinsic evidence is admissible to identify the thing referred to in a written agreement; as for instance, in a contract to deliver a quantity of grain (*galla*) at a particular time, parol evidence is admissible under certain restrictions to show what kind of grain the contracting parties had in their view at the time the contract was made. **VALLA BIN HATAJI v. SIDOJI BIN KONDAJI, 5 B.H.C., A.C., 87.**

(61)—*Written agreement—Parol evidence to show true intention—Small Causes Court's power to amend agreement.*—Parol evidence proving that a written instrument does not correctly set forth the terms of the arrangement between the parties, will justify a Small Causes Court as a Court of equity in amending the agreement in a suit for the purpose. **WILLIAM THOMAS FREWIN v. L. J. PAUL, 12 W.R. 532.**

(62)—*Proof of agreement by oral evidence—Decree.*—Oral evidence is relevant, to prove the existence of an agreement, and, if sufficient, will justify the decreeing of a claim. **GOLUCK KISHORE ACHARJEE CHOWDHRY v. NUND MOHUN DEY SIRCAR, 12 W.R. 394.**

(63)—*Parol evidence—Explaining written instruments and intention of parties—Evidence to supply words in deed partially destroyed by insects.*—The lower Court received parol evidence to supply words in an old deed, lost in consequence of the parts on which they were



*Evidence—continued.**—8.—Parol Evidence—continued.*

written having been eaten by insects. *Held* that the parol evidence was properly admitted. **BENODHEE LALL ROY v. DULLOO SIRCAR**, Marsh 620.

(64)—*Evidence Act (I of 1872), s. 92—Bond—Contemporaneous oral agreement for discharge—Payment.*—In a suit on a bond, evidence is admissible of a contemporaneous oral agreement by which the parties agreed that the debt should be liquidated from the usufruct of certain property which was assigned by the obligor to the plaintiff at the time for that purpose. S. 92 is no bar to an inquiry as to the foundation of such a plea of payment. **GOVIND PROSHAD ROY CHOWDHRY v. ANUND CHUNDER CHOWDHRY**, 4 C.L.R. 274.

(65)—*Stipulation in document—Payments endorsed—Proof of payment by other evidence, not excluded.*—A stipulation in a document that no other payment except payments endorsed on the document itself shall be admitted does not exclude proof of payment by other evidence. **A. SASHACHELLUM CHETTY v. T. GOVINDAPPA**, 3 M.H.C. 451. [F., 3 M.L.J. 9, 3 Ind. Cas. 291; Appr., 1 B. 45.]

(66)—*Contemporaneous oral and written contracts—Collateral oral agreement.*—When the terms of a contract have been reduced to writing, but that contract is entered into by both parties on the distinct understanding that it is only to be enforced as a collateral contract, if the principal contract, an oral one, between the same parties is not carried out—the principal contract being one to supply paddy against advances received—or is only to be enforced on a specified contingency occurring, the principal contract being a loan of money with promise to re-pay it, oral evidence is admissible as to the contemporaneous oral agreement. This evidence is not excluded by s. 92 of the Evidence Act. **MAUNG THA ZAN v. MAUNG PU**, L.B.R. 1893–1900, 291. (L.B.R. 1893, 1900, 154, F.)

(67)—*Limitation Act (XIV of 1859), s. 15—Oral evidence admissible to determine subject or object of admission contained in document.*—There is nothing in s. 15 of the Limitation Act to warrant the inference that a document must be self-contained, and that nothing extra the document can be looked at to determine the subject or object of the admission. **PADMA-NABAN NUMBUDRI v. KUNHI KOLENDAN**, 5 M.H.C. 320.

(68)—*Stipulation in bond that payment of money due under it shall be endorsed on bond and that no other evidence of payment is admissible—Other evidence of payment not excluded.*—A stipulation in a bond that payments of money due under it shall be endorsed on it and the obligors shall not claim remission of payment not so endorsed does not preclude them from proving by other evidence a payment made. **SULTAN BIBI v. MAGATA SAHU**, 3 M.L.J. 9. (5 M.H.C. 451, 1 B. 45, 8 W.R. 316, R.)

*Evidence—continued.**—8.—Parol Evidence—continued.*

(69)—*Evidence Act (I of 1872), s. 92, cl. 2—Promissory note—No mention of interest—Subsequent oral agreement to pay interest.*—Where a promissory note is silent as to interest, s. 92, cl. 2 of the Evidence Act, does not preclude a party from setting up and proving a subsequent oral agreement to pay interest. **SOW-DAMONEE DEBYA v. A. SPALDING**, 12 C.L.R. 163.

(70)—*Evidence—Hatchitta—Contemporaneous oral agreement—Interest.*—In a suit upon a hatchitta, the Court, having regard to the informal nature of the document sued on, allowed evidence to be given of a contemporaneous oral agreement to pay the amount with interest even though no mention of interest was made in the hatchitta itself. **UMESH CHUNDER BANEYA v. MOHINI MOHUN DAS**, 9 C.L.R. 301. [R., 7 Ind. Cas. 721.]

(71)—*Suit for principal and interest under bond—Assignment of rent due to obligor in lieu of interest, interest not claimable by obligee—Oral assignment of rent in lieu of interest, not a subsequent oral agreement within s. 92 of the Evidence Act.*—In this suit to recover the principal and interest under a bond, the defendant pleaded, as to the claim for interest, that, subsequent to the making of the bond, a *jamog* was come to, by which the plaintiff agreed to take the rents of certain tenants in satisfaction of the interest and that he was therefore precluded from claiming to recover interest on the bond. The *jamog*, in effect, amounted to a novation, by which the landlord, the present defendant, assigned the rent to the creditors, and the tenants, from whom the rent was due, being parties to that arrangement, agreed that they would pay their rent to the creditor, and not to the landlord, and the creditor on his part agreed to accept the same in satisfaction of the interest which would otherwise be payable under the bond. The result of such a novation was that the right of the creditor to recover interest under the bond from the defendant was gone. (7 A. 256, R). The *jamog* set up by the defendant in the above case was held not to constitute a subsequent oral agreement rescinding or modifying a registered contract so as to fall within the prohibition in s. 92 of the Evidence Act. It had been accepted by the plaintiff in satisfaction of interest, and it would modify the contract no further than if the plaintiff had accepted a payment in discharge of the interest, and it was therefore competent to the defendant to give oral evidence of the same. **AUTU SINGH v. AJUDHIA SAHU**, 9 A. 249 = A.W.N. 1887, 27. [R., 129 P.W.R. 1908.]

(72)—*Promise of payment of interest—Ambiguity—Evidence.*—If a note of hand promises re-payment with interest at a given rate, without stating either per mensem or per annum, it must be construed with reference to previous transactions between the parties. **MAHOMED SUMSOODEEN v. MOONSHEE ABDOOL HUQ**, W.R. 1864, 379.



**Evidence—continued.****—8.—Parol Evidence—continued.**

(73)—*Discharge of obligation in writing—Proof by oral evidence.*—Oral evidence of the discharge of an obligation executed in writing is admissible. *RAMANADAMISARAIYAR v. RAMABHATTAR*, 2 M.H.C. 412.

(74)—*Samadaskat—Proof.*—Oral evidence may be employed to prove the payment of a debt due on a *samadaskat*. *GUMAN GALLUBHAI v. SORABJI BARJORJI*, 1 B.H.C. 11.

(75)—*Oral evidence, varying written contract, showing that part of consideration has been otherwise applied as agreed between parties—Admissibility.*—*Evidence Act, 1872, s. 92.*—Under proviso 1 to s. 92 of the Evidence Act, a party to a contract may prove a fact such as "want or failure of consideration"; but then, if a party to a contract under that proviso be allowed to prove want or failure of consideration, his opponent would not be bound by the recital in the contract, but would be competent, in answer to the case made by the other side, to adduce evidence, in order to prove that the "consideration" was different from that recited in the contract. (2 B.L.R. P.C., 44, *Appl.*) Held also that the defendant, in a suit to recover money under a deed of *putowa*, was entitled to set up a separate oral agreement, whereby the plaintiff was to refund half the sum stated in the deed, on account of a debt due from his relative, under proviso 2 to s. 92 of Evidence Act. Such an agreement would not be inconsistent with the terms of the written contract. *LALA HIMMAT SAHAI SINGH v. LLEWELLEN*, 11 C. 486. [*F.*, 18 A. 168 = A.W.N. 1899, 16, 5 C.W.N. 158, 10 C.L.J. 27; *D.*, 28 C. 70.]

(76)—*Indian Evidence Act (1 of 1872), s. 92—Extraneous evidence as to mode of payment of consideration.*—If s. 92 of the Indian Evidence Act does not preclude a party to a sale-deed from showing that, notwithstanding the recitals to the contrary in the deed itself, no consideration actually passed, or that the actual consideration was different from that stated in the deed, it is equally open to such a party to prove under what circumstances the payment of consideration was postponed and what was the mode agreed upon as to the payment of it. The admitting of such evidence is not allowing evidence to be given to vary or contradict the terms of the sale-deed, but only the receiving of evidence as to the mode in which the amount of consideration agreed upon in the sale-deed was to be paid. *INDARJIT v. LAL CHAND*, 18 A. 188 = A.W.N. 1896, 16; *Reversed on appeal*, *SAH LAL CHAND v. INDARJIT*, 27 I.A. 93 = 4 C.W.N. 485 = 22 A. 370 = 7 Sar. 702 = 2 Bom. L.R. 55. (3 B. 159, 11 C. 486, 9 A. 392, *R.*) [*R.*, 1 P.R. 1904 = 41 P.L.R. 1904, A.W.N. 1907, 181 = 4 A.L.J. 441, 10 C.L.J. 27, 2 Ind. Cas. 13, 11 M.L.J. 370, 25 M. 755, 27 A. 612 = 2 A.L.J. 360 = A.W.N. 1905, 129.]

(77)—*Deed reciting consideration as paid—Oral evidence to prove non-payment admissible—Parol evidence not admissible to vary deed.*—The lower appellate Court had relied on the

**Evidence—continued.****—8.—Parol Evidence—continued.**

evidence that, by an additional oral contract, it was agreed that the vendor should, at the time of the sale, only have a small portion of the consideration in the deed recorded as received in full, and that the right of the vendor to demand the rest was to remain in abeyance until the vendee should get a decree in a pending suit, and further that the rights of the vendor to recover any balance would cease and determine if that suit be decided ultimately against the vendee. This evidence, the High Court held, the lower Court should not have received, being oral evidence, to vary the original contract in one of the essential conditions, *viz.*, regarding the time and mode of payment of the major portion of the consideration money. *SHEEWAB SINGH v. SHAIKH ASGUR ALI*, 6 W.R. 267. [*R.*, 28 C. 70; *D.*, 7 W.R. 408, 8 W.R. 339.]

(78)—*Written instrument—Contemporaneous oral agreement—No consideration for instrument.*—Where a plaintiff attempts to enforce, as a contract of loan binding upon the defendant immediately upon its execution, an instrument, which he verbally agreed at the time should not so operate, and for which the defendant did not receive consideration, it is open to the defendant to adduce oral evidence in support of the agreement. *ANNAGURUBALA CHETTI v. KRISTNASAMI NAYAKKAN*, 1 M.H.C. 457. [*R.*, 6 C. 433 = 7 C.L.R. 347.]

(79)—*S. 92, Evidence Act—Proof of consideration.*—The provisions of s. 92, Evidence Act, do not prohibit the disproof of a recital in a contract as to the consideration that has passed, by showing that the actual consideration was something different to that alleged. *VASUDEVA v. NARASAMMA*, 3 M. 6. [*R.*, 11 M. 213; *F.*, 10 C.L.J. 27.]

(80)—*Suit for unpaid purchase-money—Admissibility of oral evidence to show how purchase-money had been apportioned.*—Where a vendor sues for unpaid purchase-money, oral evidence can be admitted to show how the purchase-money had been apportioned. *DOOKHA THAKOOR v. RAM LAL SAHEE*, 7 W.R. 408.

(81)—*Admissibility of oral evidence to prove non-payment of consideration.*—Oral evidence can be admitted to prove that no consideration was paid, or that it was not paid in full, notwithstanding a recital in the bond to the contrary. *SHAIKH WALEE MAHOMED v. SHAIKH KUMUR ALI*, 7 W.R. 428.

(82)—*Evidence Act (1 of 1872), s. 92—Consideration—Oral evidence.*—S. 92 of the Evidence Act prevents the admission of oral evidence for the purpose of contradicting or varying the terms of a contract, but does not prevent a party to a contract from showing that there was no consideration, or that the consideration was different from that described in the contract. Oral evidence may be adduced to show that the bond purporting to have been given for a ready money consideration was



**Evidence—continued.****—8.—Parol Evidence—continued.**

really executed for an existing debt. **HUKUM-CHAND v. HIRALAL**, 3 B. 159. [*F.*, 10 C L.J. 27=2 Ind. Cas. 953; *Appl.*, 11 M. 213; *R.*, 18 A. 168=A.W.N. 1896, 16, 15 C.P.L.R. 24, 9 Bom. L.R. 393; *D.*, 1 P.R. 1904=41 P.L.R. 1904.]

(83)—*Native bonds—Admission by debtor as to receipt of consideration—Oral evidence to prove partial failure of consideration.*—Where an ordinary simple bond executed by a native of India contained an admission that the consideration for the bond had been received by the obligor, it was still open to the latter to prove that only a part thereof had been received by him. **ZEMINDAR S. G. R. V. BOMAYA NAYIK v. VIRAPPA CHETTI**, 2 M.H.C. 174.

(84)—*Indian Evidence Act (I of 1872), s. 92—Admissibility of oral evidence in questions between persons who are not parties to document.*—Where there was a dispute between a father and his daughter about certain properties comprised in a sale-deed executed by a relation of theirs in favour of the daughter, the daughter contending that the transaction, though purporting to be a sale, was really a gift in her favour, and the father alleging that the document was really a sale and that it had been executed in favour of the daughter *benami* for himself, oral evidence by the daughter in support of the gift set up was held to be admissible and not barred by s. 92 of the Indian Evidence Act, for the question did not arise between the parties to the instrument, as, though both the father and daughter claimed through one and the same person, yet, so far as the present matter was concerned, they could not be treated as parties contracting with each other, or the oral evidence treated as let in to vary the terms of any written agreement between them. **PATHAMMAL v. SYED KALAI RAVUTHAR**, 27 M. 329. (28 C. 70, *Cons.*), [*F.*, 28 A. 473=3 A.L.J. 314=A.W.N. 1906, 89.]

(85)—*Evidence Act (I of 1872), s. 92—"Between the parties," meaning of—Exclusion of evidence of oral agreement.*—The words refer to the persons who on the one side and on the other come together to make the contract, and would not apply to questions raised by the parties on the one side *inter se*, and not affecting the other party to the contract, touching their relations to each other in the transaction. Plaintiff sued defendant for ejection from the premises, alleging that he alone was the real purchaser, and that defendant was only nominally associated with him in the sale-deed. *Held*, that the plaintiff might adduce oral evidence to show that he alone was the real purchaser, notwithstanding that the defendant was described in the deed as one of two purchasers. **MULCHAND v. MADAO RAM**, 10 A. 421=A.W.N. 1888, 127. [*R.*, U.B.R. 1892-1896, Vol. II, 354, 3 O.C. 260; *F.*, 25 A. 337.]

(86)—*Explaining written instruments and intention of parties—Evidence that bond was executed in different capacity from what appears*

**Evidence—continued.****—8.—Parol Evidence—continued.**

—It is competent to a party to show that a bond executed in favour of A was really in favour of B, and that A was a party to it merely in the capacity of gomastah of B. **SUHOODERA v. RAM RUTTON TEWAREE**, March 3=1 Hay 24.

(87)—*Document—Evidence—Use of one person's name benami for another, Admissibility of oral evidence to show.*—In this case plaintiffs urged on special appeal that the lower appellate Court should not have admitted parol evidence contrary to the terms of the deed filed in the case. The High Court *held* that the lower Court had not admitted parol evidence to alter the nature of the transaction entered in the written statement; it had admitted evidence merely to show that the name of the party used in it was only a *benami* for another person. And there is nothing to preclude the admission of verbal evidence for such a purpose. **TARA MONEE DEBIA v. SHIBNATH TULAPUTTUR**, 6 W.R. 191.

(88)—*Parties to written contract—Circumstances of transaction—Parol evidence.*—Parol evidence is admissible to prove circumstances connected with a transaction between the parties to a written contract. **PHELOO MONEE DOSSIA v. GREESH CHUNDER BUTTACHARJEE**, 8 W.R. 515.

(89)—*Evidence—Admissibility of parol evidence among Hindus to show benami character of conveyance.*—As between Hindus, where land is purchased and the conveyance taken in the name of one, but the purchase-money, altogether or in part, comes from another, a writing is not absolutely necessary to establish a trust in favour of the latter. **PALANIYAPPA CHETTI v. ARUMUGAM CHETTI**, 2 M.H.C. 26.

(90)—*Benami purchase—Purchase by husband in name of wife—Sale of property in action against husband—Claim by assignee from wife—Proof of collusion between husband and assignee—Validity of claim.*—A Muhammadan husband purchased property in the name of his wife, but the property was sold in an action against him. The wife's brother however claimed the property under an assignment from the wife and the Court found collusion between the husband and the brother. *Held* that it was competent to the Court to arrive at the finding that the property stood in the name of the wife. **SPECIAL APPEAL NO. 366 OF 1861**, 2 M.H.C. 27, Note. [*R.*, 2 M.H.C. 26.]

(91)—*Evidence Act, s. 92—Civ. Pro. Code, s. 317.*—By an agreement in writing, the defendant promised to convey to the plaintiff certain land, which it was alleged he had bid for at an execution sale on account of plaintiff, and for which the deposit had been made by him on plaintiff's account, and that plaintiff himself had paid the balance. In a suit by the plaintiff to recover the land, he is not precluded by s. 92 of the Evidence Act from proving that the defendant's purchase was not *benami* but



**Evidence—continued.****—8.—Parol Evidence—continued.**

was made on his own account, under circumstances, which would entitle the plaintiff to sue for the specific performance of a contract to convey. *KUMARA v. SRINIVASA*, 11 M 213. [F., 10 C.L.J. 27.]

(92)—S. 92, I.E.A.—*Agreement to reduce rent admitted by lessor*.—When the agreement to reduce rent is admitted by the lessor, the lessees can rely on it. S. 92, I.E.A., does not affect the case. *SATYESH CHUNDER SIRCAR v. DHUNPUL SINGH*, 24 C. 20. [F., U.B.R. 1897-1901, Vol. II, 379, 24 B. 609=2 Bom. L. R. 422; D., 6 C.W.N. 60; R., 10 C.L.J. 570.]

(93)—*Evidence of contemporaneous oral agreement—Fraud—Evidence Act, s. 92*.—In a suit to recover rent under a *katuliyat*, held that evidence of an oral agreement set up by the defendant, while admitting execution of the *kabuliyat*, was admissible for the purpose of proving the fraudulent character of the transaction between the parties. *KASHINATH CHUCKER BUTTY v. BRINDABUN CHUCKERBUTTY*, 10 C. 649.

(94)—*Suit for enhancement of rent—Rise in the value of produce*.—In a suit for enhancement of rent, on the ground, among others, of the rise in the value of the produce of the land, the evidence of cultivators regarding the prices in the locality for a number of years was held to be relevant and worthy of consideration. *HURO PROSAD ROY v. WOOMATARA DEBEE* 7 C. 263=3 C.L.R. 449.

(95)—*Proof of defendants mukdee kasht land and amount of rent—Pottah and kabuliat, if necessary—Oral evidence*.—A Judge maintaining that oral evidence is of no value, without a pottah and kubooleut to prove the quantity of defendant's *mukdee kasht* land and the amount of rent, misdirects himself in point of law as to what was necessary in deciding the facts. *DINOO SINGH v. DOORGA PERSHAD*, 18 W.R. 348.

(96)—*Obscure pottah—Evidence*.—An obscure pottah may be elucidated by oral testimony. *MOHUN LALL ROY v. UNNOPOORNA DASSEE*, 9 W.R. 566.

(97)—*Evidence Act (I of 1872), s. 92, provisos 2 and 3—Kabuliyat—Oral evidence—Admissibility*.—In a suit for rent due under a *kabuliyat*, the defence was that the tenant was not put in possession of all the villages and therefore he was not liable for the whole claim. Held, that a contemporaneous oral agreement is admissible in evidence to show that, at the time the *kabuliyat* was granted, it had been agreed between the plaintiff and the defendant, the title of the former being under dispute, that the whole rent payable under the *kabuliyat* should be payable in respect of such of the villages as should actually come into defendant's possession. In the absence of any express stipulation in the lease that the defendant should only pay rent on his being put completely in possession, such oral evidence is admissible. No doubt, as a general rule, the

**Evidence—continued.****—8.—Parol Evidence—continued.**

Court does not ordinarily enforce payment of rent unless the lessor puts the lessee in possession; but it is quite competent to parties to waive any such privilege. *RAM KISHORE LALL v. NUND RAM*, 4 C.L.R. 100.

(98)—*Claim to exclusive right to kunwa—Muntokhub khusrah, Reliance on where original khusrah contrary to it*.—If, as in a suit to establish an exclusive right to a *kunwa*, everything depends on the oral evidence, the Principal Sudder Ameen, in appeal, should record some opinion on the evidence; and he is wrong in relying on a *muntokhub khusrah*, which is contrary to an entry in the original *khusrah*. *RAMPUT TEWAREE v. SHEO SUHAYE SINGH*, 11 W.R. 159.

(99)—*Oral evidence, when admissible to defeat deed—Fraud*.—It is a maxim of law that oral evidence is admissible to defeat a written contract only where mistake or fraud is proved. So, oral evidence is not admissible to prove that an absolute deed of sale was intended to operate merely as a mortgage. *KASSIM MUNDLE v. SREEMUTTY NOOR BEEBEE*, 1 W.R. 76. [F., B.L.R., Sup. Vol., 383=5 W.R. 68.]

(100)—*Proof of real intention of parties by parol evidence*.—Oral evidence may be adduced to show that owing to the ignorance of the draftsman, a deed of sale did not truly express the real intention of the parties. *THAKUR ROHINI SINGH v. VISHWANATH BRAHMIN*, 13 C.P.L.R. 33.

(101)—*Indian Evidence Act, s. 92, proviso (1), scope of—Admissibility of oral evidence to prove mutual mistake of fact—Equity—Rectification of deed*.—It is open to the Court, having regard to proviso (1) to s. 92, Indian Evidence Act, to allow oral evidence of mutual mistake of fact to vary the terms of a deed. Where there is a mutual mistake of fact in a deed, a Court administering equity will interfere to have the deed rectified. Proviso 1 to s. 92 does not limit the admissibility of oral evidence to a suit to obtain a decree on the ground of mistake—*Per Banerjee, J.* *MAHENDRA NATH MUKERJEE v. JOGENDRA NATH CHOWDHURY*, 2 C.W.N. 260. [F., 3 L.B.R. 227.]

(102)—S. 92, *Evidence Act (I of 1872)—When oral evidence may be given*.—For the purpose of showing that a document does not, and was not intended, to contain the whole of the contract between the parties, oral evidence may be given. When evidence so given conclusively establishes that the whole contract is contained in the document or documents, no evidence will be admitted to contradict, vary, add to or subtract from its terms. That being so, to ascertain the intention of the parties, all the Court has to do, is to construe the written document or documents. *COHEN v. SUTHERLAND*, 17 C. 919.

(103)—*Writing not intended to contain whole agreement—Admissibility of verbal evidence to modify terms*.—Parol evidence is admissible to



**Evidence—continued.****— 8.—Parol Evidence—continued.**

modify the terms of a written contract, if the parties did not intend the writing to contain the whole agreement between them. *BEHAREE LALL DEY v. KAMINEE SOONDUREE*, 14 W.R. 319.

(104)—*Written contract—Oral evidence, Admissibility of—Waiver.*—Notwithstanding a paper writing which purports to be a contract may be produced, it is still competent to the Court to find upon sufficient evidence that the writing is not really the contract. And the right of groundless defence does not affect the rule itself, although it suggests caution in action on it. *Per Kernan, J.*—After an agreement has been reduced to writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement—and thus to make a new contract. *G. RUTHNA MUDALIYAR v. ARUMUGA MUDALIYAR*, 7 M.H.C. 189. [R., 1 B. 332, 9 C.W.N. 178.]

(105)—*Sale or mortgage—Oral evidence—Admissibility.*—Oral evidence is admissible to show that a deed which purports to be one of absolute sale, is in reality a mortgage. *KASHI-NATH ROY v. NOWCOWRY KOONDOO*, 1 W.R. 22.

(106)—*S. 92, Evidence Act—Oral evidence to prove that a sale deed was intended to operate only as mortgage.*—Oral evidence of the acts and conduct of parties, such as oral evidence that possession remained with the vendor, notwithstanding the execution of a deed of out-and-out sale, is admissible to prove that the deed was intended to operate only as a mortgage. *PREONATH SHAHA v. MADHU SUDUN BHUIYA*, 25 C. 693, F.B.=2 C.W.N. 562. [F., 2 O.C. 160, 28 C. 256=5 C.W.N. 351, 28 C. 289=5 C.W.N. 326; R., 72 P.R. 1901=114 P.L.R. 1901, 9 C.W.N. 178, 3 L.B.R. 100; Diss., 3 N.L.R. 19; D, 6 C.W.N. 60.]

(107)—*Contract in writing—Parol evidence—Mortgage—Sale.*—A contract in writing was admitted by the parties, but it was held that the defendant could give parol evidence to supplement the written contract and show that it was intended to be a mortgage and not an absolute bill of sale. *BHOLANATH KHETTRI v. KALIPRASAD AGURWALLA*, 8 B.L.R. 87. [R., 1 B. 333, 4 B. 594.]

(108)—*Evidence Act, s. 92.*—Where one party alleges that a transaction is a sale and the other contends that it is a mortgage, oral evidence is admissible to prove that the real transaction is a mortgage. *VENKATRATNAM v. REDDIAH*, 13 M. 494. [Cons., 16 M. 80; R., L.B.R. 1893-1900, 154, 114 P.L.R. 1901=72 P.R. 1901, 3 N.L.R. 19.]

(109)—*Oral evidence showing that document purporting to be a sale is a mortgage in reality—Evidence Act, s. 92.*—Oral evidence was held admissible to show that a certain document,

**Evidence—continued.****— 8.—Parol Evidence—continued.**

relied upon by the plaintiff, in a suit for recovery of property, was not an out-and-out sale but only a mortgage; evidence of the circumstances connected with its execution and of the conduct of the parties to the document going to show that it had all along been so treated was allowed to be let in. [F., 13 M. 494, 10 C. 764, 9 C. 898, 16 M. 80, L.B.R. 1872-1892, 588, L.B.R. 1893-1900, 154, 114 P.L.R. 1901=72 P.R. 1901.] Evidence Act, s. 92, made no alteration in the law as laid down in 5 W. R. 68, F.B. *HEM CHUNDER SOOR v. KALLY CHURN DASS*, 9 C. 528=13 C.L.R. 114. (B.L.R., Sup. Vol., 383, 4 B. 594, F.; 3 C.L.R. 386, 5 C. 300=4 C.L.R. 419, Diss.)

(110)—*Sale—Mortgage—Admissibility of evidence of conduct to prove document to be a mortgage.*—Where one party alleges a transaction to be a mortgage and the other alleges it to be a sale, the question arises for consideration whether or not there exists a debt from the former to the latter. So, even where the documents relied on by a defendant purported to convey the property to him absolutely, the form of the instrument is not by itself to be taken to be conclusive; so that, if it appear *aliunde*, as for instance, by the conduct of the apparent vendee himself that the deeds were intended as mere securities for money, and that he so treated them, it is competent to deal with them as such accordingly. *HASHA KHOND v. JESHA PREMAJI*, 4 B. 609, Note=P.J. 1878, 24. [R., 4 B. 594, 9 C. 528.]

(111)—*Evidence Act, s. 92—Mortgage—Contemporaneous oral agreement.*—Where the plaintiff executed a mortgage instrument to the defendant and the consideration recited therein was that the defendant was to pay certain debts, and the instrument was not signed by the defendant nor was there any promise in it that he would pay the debts, the promise by the defendant to pay debts being outside the instrument, does not come within the scope of s. 92, Evidence Act, and oral evidence may be tendered which varies, alters, or modifies the promise. *TIRUVENGADA v. RANGASAMI*, 7 M. 19.

(112)—*Indian Evidence Act (I of 1872), s. 92, proviso 4—Admissibility of oral evidence—Proof of discharge of mortgage-bond.*—The provisions of s. 92, proviso 4, of the Evidence Act, do not preclude the admissibility of oral evidence to prove the discharge and satisfaction of a mortgage-bond. *RAMLAL CHANDRA KARMOKAR v. GOBINDA KARMOKAR*, 4 C.W.N. 301.

(113)—*Hypothecation bond—Suit for money on—Oral agreement as to mode of repayment, admissible in evidence—Evidence Act (I of 1872), s. 92.*—Where in answer to an action on an instalment bond, the obligors set forth a contemporaneous oral agreement under which the plaintiff was given possession of part of the hypotheca, in lieu of the payment by instalments, and pleaded that the plaintiff had received the entire debt by means of such possession, oral evidence of such agreement was held admissible, as it only



**Evidence—continued.****—8.—Parol Evidence—continued.**

provided for means for repayment, without detracting from or adding to or varying the original contract. *RAM BAKSH v. DURJAN*, 9 A. 392 = A.W.N. 1887, 65. [F., 18 A. 168 = A.W.N. 1896, 16.]

(114)—*Existence of mortgage—Question not between parties to mortgage—Oral evidence of mortgagee, Value of.*—The oral evidence of a mortgagee as to the existence of the mortgage would be sufficient to prove the fact, without the production of the instrument, where the question does not arise between the parties to the mortgage. *AMJAD ALI v. MONIRAM KALITA*, 12 C. 32.

(115)—*Indistinct or vague document — Oral evidence—Indian Evidence Act, ss. 92, 95.*—Where a mortgage-bond does not indicate by name the property mortgaged, evidence may be adduced to prove what property was mortgaged. Evidence Act, ss. 92 and 95. *RAM LAL v. HARRISON*, 2 A. 332.

(116)—*Suit on mortgage—Denial of mortgage—Loss of original mortgage-deed—Evidence of witnesses.*—Where an alleged mortgage is denied by defendant, and plaintiff cannot produce the original mortgage deed, witnesses to speak to its contents may be called. *AJODHYA PERSHAD v. ESHAREE DYAL*, 10 W.R. 219.

(117)—*Conveyance by lease and release in fee—Reconveyance decreed.*—A conveyance, by lease and release in fee, in the circumstances, was held to be subject to a parol defeazance, and to be in the nature of a mortgage, with a power of re-purchase on the footing of redemption; and a re-conveyance decreed. *MUTTYLOLL SEAL v. ANNUNDOCHUNDER SANDLE*, 5 M.I.A. 72.

(118)—*Mortgage—Condition for re-payment in money—Subsequent oral agreement to receive money's worth—Evidence.*—Although a deed of conditional sale contemplates a re-payment in money, it is clearly competent to the parties to make an arrangement substituting for a money payment another mode of payment and satisfaction. If the mortgagee is content to accept payment in money's worth instead of in coined money, he may bind himself to do so, and this orally, notwithstanding that the mortgage-debt is created by a written obligation. The mode in which an obligation may be discharged and satisfied by payment is a distinct matter from the obligation itself. *DURYA v. MOHUR SINGH*, 2 Agra 163.

(119)—S. 92, I.E.A., 1872 — *Conveyance, mortgage, or conditional sale—Oral evidence.*—Where a party wishes to show that an ostensible conveyance is in reality a mortgage by conditional sale, he may adduce oral evidence of the acts and conduct of parties, such as, evidence of the re-payment of the loan, the return of the deed and the exercise of acts of possession by the vendor. S. 92, I.E.A., does not exclude such evidence. (25 C. 603, R.). 25

**Evidence—continued.****—8.—Parol Evidence—continued.**

C. 603, F.B., has not been in any way overruled by 22 A. 149, P.C. *KHANKAR ABDUR RAHMAN v. ALI HAFEZ*, 28 C. 256 = 5 C.W.N. 351. [Expl., 6 C.W.N. 60; Diss., 25 M. 7 = 11 M.L.J. 370, 3 N.L.R. 19, 3 L.B.R. 100, F.B.]

(120)—S. 92—*Mortgage or out-and-out sale—Oral evidence—Admissibility.*—Oral evidence as to the acts and conduct of parties is admissible for showing that a certain deed is, as it purports to be, an out-and-out sale or a mortgage. (25 C. 603, R.) Oral evidence as to the mere intention of the parties is not admissible. *MAHOMED ALI HOSSEIN v. NAZAR ALI*, 28 C. 289 = 5 C.W.N. 326. (22 A. 149, P.C., F.) [Diss., 25 M. 7 = 11 M.L.J. 370, 3 N.L.R. 19, 3 L.B.R. 100, F.B.]

(121)—*Written contract of sale—Admissibility of oral evidence to get rid of effect of such contract.*—Oral evidence is relevant in equity, where, by way of defence, it is sought to get rid of a written contract of a sale of land by showing that it is not the contract really entered into by the parties; but the evidence must be very satisfactory to induce the Court to believe that the terms expressed are not the real ones. Evidence of a contemporaneous oral agreement to suspend the operation of a written contract of sale until an agreement for a resale is executed, is relevant as defence even in a Court of Law. *DADA HONAJI v. BABAJI JAGUSHET*, 2 B.H. C. 36.

(122)—*Evidence Act (I of 1872), s. 92, proviso 4—Oral agreement transferring rights under registered sale-deed.*—As regards the alternative defence set up by the defendant in this case, not only claiming the property as a preferable heir but also setting up an oral agreement whereby she alleged she had acquired it by transfer to her of the rights of the plaintiffs under their sale-deed, held that proviso 4 of s. 92 of the Evidence Act was no bar to an inquiry into the merits of the latter defence based on the agreement; for, the object of the alleged oral agreement was not to rescind the original transaction, as effected between the plaintiffs and their vendor, but to transfer any right acquired by the plaintiffs to the defendant. The agreement was an entirely new transaction which it was perfectly competent to the parties to enter into, even though the sale-deed executed to the plaintiffs was registered. *RAKHMABAI v. TUKHARAM*, 11 B. 47. [R., 14 B. 472, 129 P.W.R. 1908.]

(123)—*Sale advertisement referring to shares of elder brothers in a joint family—Liability of minor brother's share—Admissibility of parol evidence to alter written contract.*—Where a sale advertisement referred solely to the rights and interests of the elder brothers in a joint family, held that the share of a minor brother was not liable, because the elder brothers did not represent the younger brother. Extrinsic evidence is not admissible to alter a written contract, or to



*Evidence—continued.***— 8.—Parol Evidence—continued.**

show that its meaning is different from what its words import. Where there is a "latent" ambiguity in the wording, parol evidence is admissible to explain it. *RAM LOCHUN SHAHA v. UNNOPOORNA DOSSEE*, 7 W.R. 144.

(124)—*Specific performance of an agreement in writing—Admission of parol evidence.*—In a suit for specific performance of an agreement in writing, setting forth, *inter alia*, that the defendant had agreed to sell, etc., under "certain conditions as agreed upon," parol evidence was held admissible to show what was meant by the clause "certain conditions as agreed upon." *Per Pontifex, J. (Garth, C.J., dissenting).*—The evidence is admissible under proviso 1, s. 92 of the Evidence Act. *Per Garth, C.J.*—Proviso 1 to s. 92 of the Evidence Act is not applicable. That proviso seems to apply to cases where evidence is admitted to show that a contract is void, or voidable, or subject to reformation upon the ground of fraud, duress, illegality, etc., in its inception; and not to cases where the agreement, being in itself perfectly valid and free from any taint of that kind, one of the parties attempts to make a fraudulent use of it as against the other. *G. M. CUTTS v. T. F. BROWN*, 6 C. 328 = 7 C.L.R. 171. [R., 114 P. L.R. 1901.]

(125)—*Contract of sale of goods—Parol testimony.*—In India, a contract of sale of goods can be proved by parol. *DURGA PRASAD v. BHUJAN LAL*, 6 Bom. L.R. 498.

(126)—*Evidence—Adjustment of accounts—Admissibility of oral evidence.*—Oral evidence is admissible to prove an adjustment of accounts. *KAMPILIKARIBASAVAPPA v. SOMASAMUDDIRAM*, 1 M.H.C. 183.

(127)—*Adjustment of account—Verbal evidence.*—The adjustment of an account or the acknowledgment of its correctness may be proved by verbal evidence, in the same manner as any other fact. It need not necessarily be in writing signed by the party to be bound. *PURNIMA CHOWDRAIN v. NITTANAND SHAH*, B.L.R., Sup. Vol. 3 = W.R., F.B., 82.

(128)—*Contract for purchase and sale of goods—Plea of wagering contract—Oral evidence, Admissibility of—S. 92, proviso 1, of Evidence Act (I of 1872)—Act III of 1865 (Bombay).*—Under proviso 1, s. 92 of the Indian Evidence Act (I of 1872), oral evidence is admissible to prove that a contract for the purchase and sale of goods deliverable on a certain day was in reality a wagering contract on the ground that neither party intended that there should be an actual buyer and seller, but only that the difference between the price when the bargain was made and the price at the time fixed for delivery should be paid by one or other of the parties. Such contracts are null and void under Act III of 1865. *ANUPCHAND HEMCHAND v. CHAMPSI UGERCHAND*, 12 B. 585, [Appl., 32 C. 437 = 1 C.L.J. 155 = 9 C.W.N. 305; R., U.B.R. 1897-1901, Vol. II, 399.]

*Evidence—continued.***—S.—Parol Evidence—continued.**

(129)—*Evidence Act, s. 92—Oral evidence.*—Oral evidence is admissible to show that an agreement in writing to sell Government promotes is really an agreement made by way of wager on its market price on a future day. *ESHOOR DOSS v. VENKATA SUBBA RAU*, 17 M. 480. (12 B. 585, F.; 9 C. 791, Diss.) [F., U.B.R. 1897-1901, Vol. II, 399, 85 P.R. 1898; Appl., 32 C. 437, F.B.; Affirmed, 18 M. 306, F.B.]

(130)—*English Law—Brokers' notes—Evidence—Bought and sold notes.*—Brokers' notes, as a memorandum, may satisfy the statute of frauds, but not exclude parol evidence. Bought and sold notes, unobjected to, may be evidence of the contract, but they do not necessarily constitute the whole contract. *JUMNADOSS v. SRINATH ROY*, 17 C. 173, Note.

(131)—*Contract of sale—Variance between bought and sold notes—Parol evidence.*—In a suit for damages for breach of contract where the Statute of Frauds did not apply, and there had been an interchange of bought and sold notes, the plaintiff is at liberty to prove by parol evidence the existence and terms of a contract on which he can maintain the action. There may be a complete binding contract if the parties intend it, although bought and sold notes are to be exchanged or a more formal contract is to be drawn up. If the bought and sold notes do not agree, they cannot be used as evidence of the contract; but the fact of their differing and not being returned is not conclusive evidence that, at the conclusion of the negotiations, the parties did not agree. *CLARTON v. SHAW*, 9 B.L.R. 245 = 18 W.R. 414.

(132)—*Boundaries—Proof.*—Boundaries may be proved by oral evidence. *RANEE SURUT SOONDUREE DEBIA v. RAJENDUR KISHORE ROY CHOWDHRY*, 9 W.R. 125.

(133)—*Oral evidence and possession—Act II of 1855, s. 43—Jumma-wasil-bakee papers.*—Oral evidence, when credible and pertinent, is sufficient to establish the fact of possession. It is doubtful whether, under section 43, Act II of 1845, jumma-wasil-bakee papers are admissible as corroborative evidence. *SHEO SUHAYE ROY v. GOODUR ROY*, 8 W.R. 328.

(134)—*Possessory suit alleging sale under deed—Execution of deed denied by defendant—Fact of execution proved—Transaction, Nature of, doubted—Oral evidence.*—Where the plaintiff sues to recover possession of premises alleged to have been sold to him by the defendant under a deed, whose execution the latter denies, and the first Court though satisfied as to the fact of execution doubts the nature of the transaction, and examines a witness thereon: Held that the oral evidence is properly admitted. *NUNDO LALL MITTER v. PROSUNNO MOYEE DEBIA*, 19 W.R. 333.



**Evidence—continued.****—8.—Parol Evidence—continued.**

(135)—*Possession—Oral evidence.*—Oral evidence may suffice to prove possession. *DINO-BUNDHOO SUHAYE v. MR. JAMES FURLONG*, 9 W.R. 155. [R, 11 W.R. 347.]

(136)—*Title by prescription, Proof of, by oral evidence.*—Oral evidence, if credible, would be sufficient to prove a title by prescription. *MEHARBAN KHAN v. MUHBOOB KHAN*, 7 W.R. 462.

(137)—*Title—Proof by parol.*—Case where it was held that oral testimony was sufficient, without documentary evidence to establish a question of title. *RAM SOONDUR MUNDUL v. AKIMA BIBEE*, 8 W.R. 366.

(138)—*Parol evidence, Value of, in various cases—Pedigree, Question of—Proof of native pedigree.*—In proving a native pedigree, the oral statements of deceased relatives will be admitted in the absence of any registers of births and deaths. *MOHEDEEN AHMED KHAN v. MAHOMED*, 1 Ind. Jur. O.S. 132 = 1 M.H.C. 92.

(139)—*Money paid by agent—Statement that money received from principal—Discrepancy.*—It is no valid reason to disbelieve the evidence of a witness who swore that he had received the amount of a decree from the plaintiff, when the money was paid by the plaintiff's agent. *LALLA MAHODEO PERSHAD v. SUTTANUND MISSEER*, 17 W.R. 502.

(140)—*Defendant not deposing—Defendant's agent's evidence.*—The evidence of a defendant's agent in the absence of defendant's own deposition is legal evidence. *RICHARD DECOURCY v. MEGHNATH JHA*, 15 W.R. 157.

To prove date, is inadmissible, where it is altered in a written acknowledgment—See *ACKNOWLEDGMENT*, 3 Bom. L.R. 574 = 26 B. 128.

See *ARBITRATION—REFERENCE TO ARBITRATION*, U.B.R. 1897-1901, Vol. II, 5.

See *BOND*, 1 B. 45.

See *CONTRACT—MISCELLANEOUS*, 20 C. 854.

Contract containing a promise to do a certain thing within a specified time, construction of, by Court—See *CONTRACT ACT*, 1872, s. 55, 2 L.B.R. 99.

Oral, admissibility of, to show that person signing bond signed both for himself and as agent of his partner—See *EVIDENCE ACT*, 1872, ss. 91, 92, 18 M.L.J. 1 = 3 M.L.T. 259 = 31 M. 45.

Admissibility of oral, between parties to a suit or their representatives in interest to prove that a deed purporting to be a mortgage was intended to be a sale—See *EVIDENCE ACT*, 1872, s. 92, 11 O.C. 95.

Oral, inadmissibility of, to show that a debt bond was an assignment of future rent—See *EVIDENCE ACT*, 1872, s. 92, 4 O.L.J. 402.

**Evidence—continued.****—8.—Parol Evidence—concluded.**

*Limitation Act*, XIV of 1859, s. 4—Writing to contain within itself an admission of debt—Oral evidence not admissible to add to its meaning—See *LIMITATION ACT*, 1908, s. 19, 5 M.H.C. 90.

See *MAHOMEDAN LAW—CONTRACT*, 5 B.H.C., A.C., 37.

See *MESNE PROFITS—MISCELLANEOUS*, 6 W.R. Mis. 39.

Bai-bil-wafa form of mortgage—Two documents of same date for sale and re-conveyance—Admissibility of parol evidence to show real intention to create mortgage—See *MORTGAGE—FORM OF MORTGAGES*, 19 A. 434 = A.W.N. 1897, 109.

Endorsement and signature of a promissory note by one member of a firm—Whether signature was on behalf of a firm—Admissibility of oral evidence—See *NEGOTIABLE INSTRUMENTS ACT*, 1881, 15 M.L.J. 384 = 28 M. 544.

See *PARTIES TO SUITS—GENERAL*, 1 M.H.C. 452.

See *REGISTRATION ACT*, 1908, ss. 17, 49, 1 A. 412.

See *RELINQUISHMENT OF TENURE*, 7 E.L.R. App. 11 = 15 W.R. 454.

See *SHERIFF*, 4 B.H.C. O.C. 139.

See *SUCCESSION ACT*, 1865, s. 128, 15 C. 83.

**—9.—Practice.**

See *PRACTICE AND PROCEDURE*.

(1)—*Conclusion on facts by competent Judge—Interference—Fallibility of native evidence—Probabilities.*—A conclusion on facts come to on the weight of evidence by a Judge observed to be very careful should not, unless the conclusion is clearly shown to be a mistaken one, be disturbed by the High Court. In this country, where native evidence as a rule is fallible, the probabilities of a case must be considered. *MUSSAMUT EDUM v. MUSSAMUT BEECHUN*, 11 W.R. 345.

(2)—*Damages—Plunder of property—Credibility of witnesses—Defendants declining to give evidence.*—Where it was found as a fact that a number of persons in pursuance of a common object, plundered the property of A, it was held that all that was necessary, in a civil suit by A for damages, was to identify the persons who were present co-operating in that common design, and that each and every person co-operating to any extent in the plunder was responsible to recoup A for the loss he had sustained. Where two witnesses identified some of the defendants as having been present at the plunder, and these defendants did not think fit to avail themselves of the opportunity they had of exculpating themselves by their own evidence from the charge against them, it was held that their reluctance to give evidence justified the



*Evidence—continued.**—9.—Practice—continued.*

Court in relying on the unopposed testimony of the two witnesses. *GANESH SINGH v. RAM RAJA*, 8 B.L.R., P.C., 44=12 W.R. 38, P.C. [R., 11 C.L.J. 503=6 Ind. Cas. 69.]

(3)—*Illegitimacy of defendant, plaintiffs' heirship dependent on—Burden of proof.*—The lower Court was wrong in not having allowed sufficient weight to the circumstance that the respondents (the plaintiffs) were the party who had to make out the case. They had not only to prove their relationship, which was not disputed, but their heirship which depended upon the illegitimacy of the appellant; and they were bound to give sufficient general evidence to throw upon the defendant the onus of proving his legitimacy. The case was therefore remitted to the Sudder Court, with directions that that Court shall send it back to the Zillah Court to receive such further evidence as either party may offer, and to proceed afterwards to the regular hearing and adjudication of the cause. *KHAJAH MAHOMED GOUR ALI KHAN v. ASHRUFFOONISSA*, 2 W.R., P.C., 13=9 M.I.A. 492 and 504. [Apr., 9 W.R. 190, F.B.]

(4)—*Witness named but not examined—Non-production of witness*—When witnesses are named but not examined, or when either party produces no witnesses, the record should show the reason. *MA YON v. MAUNG HMUN*, U.B.R. 1897-1901, Vol. II, 373. (U.B.R. 1892-1896, Vol. II, 350, 579, R.)

(5)—*Conflict between Judge's memoranda and depositions—Procedure.*—In cases of conflict between a Judge's memoranda of evidence and the recorded depositions of witnesses, the Court must be guided by the latter. *MAHARANEE HEERANATH KOOERE v. BABOO BURM NARAIN SINGH*, 15 W.R. 375.

(6)—*Putnee talook alleged to be purchased benamee—Plaintiff's possession of title-deeds—Proof of mode of coming by such possession essential.*—In this suit to recover a putnee talook, the question arose whether the purchase of the talook was a benamee transaction, i.e., whether it was bought with the money of, and in trust for, the deceased H, plaintiff's husband. Plaintiff relied on the possession of the title-deeds by her but the Judicial Committee was of opinion that the mode by which plaintiff alleged she acquired possession of those documents was not satisfactorily established by her, and so the simple possession of them could not be taken as outweighing the other circumstances of the case which preponderated in favour of the defendant. The circumstance that no suit had been instituted for a period of nine years after the sale had taken place was taken to go strongly against the claim of the plaintiff, especially as the person, on whose account alone the matters were alleged to have been kept secret had died within a few months after the sale, and H had thereby been released from the fear of his making any claim to the talook, the apprehension of which was said to have been the sole cause of the benamee.

*Evidence—continued.**—9.—Practice—continued.*

The Privy Council further took into consideration another circumstance connected with the lapse of time, viz., that the suit was not instituted until after the death of two individuals who could have spoken positively to the truth of the case, and whose evidence was of the greatest value in the determination of it. On the above considerations, and also because the appeal was from the unanimous decision of the Courts below on a question of fact in which they had the opportunity of seeing and testing the mode in which such witnesses as appeared before them gave evidence, the Judicial Committee were of opinion that the decision of the lower Court ought to be affirmed and recommended the dismissal of the appeal. *KRIPAMOYEE DRBIA v. ROMANATH CHOWDHRY*, 2 W.R. P.C., 1.

(7)—*Evidence—Existence of probabilities in favour of transaction, duty of Court to consider.*

—The sole question in this case was whether the appellant had produced adequate proof that a document upon which he relied was a true and genuine instrument. It was not denied on the part of the respondents that, if the document were genuine, the effect of it would be to exonerate the appellant from the demand made against him; nor was it said on the part of the appellant that he would not be liable if not protected by the document in question. The Judicial Committee agreed with the following arguments among others, urged for the respondents, viz., that considering the habits and customs of the natives of India, their well-known propensity to forge any instrument which they might deem necessary for their interest, and the extreme facility with which false evidence is procurable from witnesses, the probability or improbability forms a most important consideration in ascertaining the truth of any transaction relied upon. The Committee expressed their opinion that the whole of the transaction under consideration was perfectly consistent with probability; and, in support of the genuineness of the document relied on, there was the evidence of witnesses against whose veracity no solid objection had been raised beyond the general observation that oral evidence in India is untrustworthy; and held that where the probabilities are thus in favour of the transaction, the Court should not conclude against it solely because of the general fallibility of native evidence; such an argument would go to an extent not maintainable in any Court, for, it would tend to establish a rule that all oral evidence must be discarded, and it is manifest that, however fallible such evidence may be, however carefully to be watched, justice never can be administered in the most important causes without recourse to it. In this case, their Lordships also observed that, however much they may lament the great latitude with which documentary evidence is received in the Courts in India, it would be contrary to justice in any particular case, to visit upon an individual penal consequences.



**Evidence—continued.****—9.—Practice—continued.**

merely because the administration of justice was not more strictly conducted with reference to the admission of evidence. *BUNWAREE LAL v. HETNARAIN SINGH*, 4 W.R., P.C., 128 = 7 M.I.A. 148.

(8)—*Documents consisting of living person's statements—Documents not be used as evidence.*—Case where it was held that documents should not be used as evidence, where they are at best statements made by a person who is alive, and who may be called as a witness. *SHUM-SHERE NARAIN SINGH v. BABOO RAJ-KISHORE*, 22 W.R. 213.

(9)—*Documents not forming part of record—Decision of case on such documents.*—A Judge ought not to decide a case on documents not forming part of the record. *J. P. WISE v. MUSST. RUBAA KHATOON*, 19 W.R. 299.

(10)—*Evidence—Alteration of document—Effect—Appeal to Privy Council—Case depending on facts—Practice—Statement of fact by Court.*—If a plaintiff produces an instrument which appears to have been altered, the Court will not receive it or act upon it till it is most satisfactorily proved by all the subscribing witnesses at the least, and other evidence that the alteration was made antecedently to the signature. In a case coming before the Privy Council depending upon facts which have received the judgments of two Courts in India, the Privy Council ought not to set aside the last judgment unless it can see very clearly that that judgment is wrong. When a Court of Justice states a fact, that fact is conclusive in the case. *PETAMBER MANIKJEE v. MOTEECHUND MANIKJEE*, 5 W.R., P.C., 53 = 1 M.I.A. 420.

(11)—*Document registered by officer having no jurisdiction—Admissibility in evidence.*—Where a Court finds that a document has been registered by an officer who had no jurisdiction to register it, it will refuse to receive it in evidence on the ground that it has not been duly registered. The observations of the Privy Council in 15 B.L.R. 228, upon which the decision in 7 O.L.R. 223 proceeds, are not applicable to this case, as in the former case the document in question was registered by an officer that had jurisdiction to register it. *BENI MADHAB MITTER v. KHATIR MONDUL*, 14 C. 449. [Rel. on, 29 C. 654; Appl., 1 N.L.R. 112; D., 6 C.W.N. 329; E., 16 C.P.L.R. 141.]

(12)—*Plaintiff denying genuineness of acknowledgments—Duty of Court to pronounce opinion on defendant's evidence.*—Where the plaintiff denies the genuineness of a letter acknowledging payment, the lower Court is bound to pronounce a distinct opinion on the evidence of the defendant. *RUNPAL SINGH v. MAHARAJAH JOY MUNGUL SINGH*, 11 W.R. 106.

(13)—*Originals not proved to have been searched—Copy—Secondary evidence.*—Copies of documents, for the originals of which no proof was given of search, cannot be received as

**Evidence—continued.****—9.—Practice—concluded.**

secondary evidence. *MEERUSDOOLAH v. MUSSUMAT BEEBY IMAMAN*, 5 W.R., P.O., 26 = 1 M.I.A. 19.

(14)—*Mortgage-deed containing no separate admission of debt or promise to repay it—Not divisible and cannot be admitted in.* Where the mortgage-deed contains no separate admission of the debt or promise to repay, it is not divisible and could not be admitted in evidence, at all. *MAUNG PE v. ME KIN U*, U.B.R. 1897-1901, Vol. II, 375. (L.B.R. 1872-1892, 195, F.)

(15)—*Improper admission of evidence—Effect.*—The improper reception of evidence does not make it no evidence, and does not justify the reversal of the lower appellate Court's decision if warranted by sufficient evidence independently of the evidence improperly admitted. *MAHARAJAH JUGUT INDUR BUNWAREE v. BHUBO TARINEE DOSSEE*, 14 W.R. 19.

(16)—*No objection to admissibility of evidence in first Court—Right to raise objection in appellate Court.*—If no objection be taken in the first Court to the admissibility of evidence on the ground of improper reception, such objection cannot be raised in appeal. *DALCHAND v. GANGA SINGH alias GANGOLAY*, 15 C.P.L.R. 123. (4 C. 66, 11 B. 320, 28 C. 142, R.)

(17)—*Procedure—Trial of suit—Absence of defendant—Plaintiff tendering only sufficient evidence to establish claim—Appeal—Right of plaintiff to be allowed to adduce all his evidence.*—Where, at the trial of a suit, the plaintiff tenders only enough evidence to establish his claim owing to the absence of the defendant, and obtains a decree, and on appeal the appellate Court reverses the first Court's decree on the ground that the plaintiff had not sufficiently proved his case, the appellate Court, before dismissing plaintiff's suit, should give him an opportunity of putting on record the additional evidence which he had filed in Court but which he abstained from tendering owing to the defendant's absence. *VALLIAMMAI ACHI v. MARANEN PILLAI*, 7 Ind. Cas. 494 = 8 M.L.T. 360.

See FUN. ACT XXVIII OF 1868, ss. 2, 11, 2 P.R. 1880.

Suit on covenant in compulsorily registrable, but unregistered, mortgage deed—Inadmissibility in evidence—See REGISTRATION ACT, 1908, ss. 17, 49, 4 C. 83 = 2 C.L.R. 428.

Promissory note bearing uncanceled stamp—See STAMP ACT, 1899, ss. 12, 35, 36, 61, 2 L.B.R. 103.

**—10.—Secondary Evidence.**

See EVIDENCE ACT, 1872, ss. 65, 91, 92.

(1)—*General principles—Secondary evidence of contents of document—Condition of right to give.*—By the English Law of evidence, which has been, with respect to deeds, made the law



**Evidence—continued.****—10—Secondary Evidence—continued.**

of India in a great measure, the first condition of the right to give secondary evidence of the contents of a document is the accounting for the non-production of the original. *BHUBA-NESWARI DEBI v. HARISARAN SURMAMOI-TRA*, 6 C. 720=8 C.L.R. 337, P.C. [R., 5 C. W.N. 393.]

(2)—*Secondary evidence, when admissible.*—Secondary evidence of a document should not be admitted unless the absence of the original is sufficiently accounted for. *RAKHALDAS BUNDOPADHYA v. INDRA MONEE DEBI*, 1 C.L.R. 135.

(3)—*Secondary evidence of contents of documents—When admissible.*—Secondary evidence of the contents of a document is inadmissible, unless the non-production of the original is first accounted for so as to bring it within one or other of the cases provided for in s. 65 of the Evidence Act. *KRISHNA KISHORI CHAUDH-RANI v. KISHORI LAL ROY*, 14 C. 486=14 I.A. 71, P.C.=5 Sar. 13. [R., 31 C. 155.]

(4)—*S. 65, Act I of 1872 (Evidence)—Contents of document, Secondary evidence of—Evidence of search for the originals—Practice.*—There must be evidence of search for the originals, before copies or other secondary evidence are admitted. Whether or not sufficient proof of search for, or loss of, an original document, to lay a ground for the admission of secondary evidence, has been given, is a point proper to be decided by the Judge of the first instance, and is treated as depending very much on his discretion. His conclusion should not be overruled, except in a clear case of miscarriage. *HARRI-PRIA DEBI v. RUKMINI DEBI*, 19 C. 438, P.C.=19 I.A. 79=6 Sar. 177. [R., U.B.R. 1897-1901, Vol. II, 382. 32 B. 111, F.B.=9 Bom. L.R. 789=2 M.L.T. 414.]

(5)—*Evidence copies of documents—Admissi-bility.*—Copies of documents for the originals of which no proof was given of search, cannot be received as secondary evidence. *MEER USU-DOOLLAH v. BEEBY IMAMAN*, 5 W.R., P.C., 26=10 M.I.A. 19.

(6)—*Reason for non-production of original to be explained.*—Plaintiff filing copies of documents bound to explain why originals have not been filed. *RAMJOY SURMA v. RAJAH PRAN-KISHEN SINGH*, 2 W.R. 80.

(7)—*Secondary evidence when alone admis-sible.*—Until a party has exhausted all the means prescribed by law for compelling a witness to come in and produce a document known to be with him, secondary evidence cannot be admitted. A copy cannot be admitted so long as the original is procurable or its loss not satisfactorily accounted for. *ROOPMON-JOOREE CHOWDHURANEE v. RAMLALL SIR-CAR*, 1 W.R. 144 [D., 6 W.R. 303.]

(8)—*Document not alleged to be destroyed or lost—Time for production—Notice—Powers of Court of special appeal—Civ. Pro. Code, 1859, ss. 351, 354, 355—Remand.*—Secondary evidence is inadmissible where an original document is not

**Evidence—continued.****—10.—Secondary Evidence—continued.**

said to be lost or destroyed. In case of difficulty, the Court should give more time for its production, or give the opposite party notice to produce it, if under the latter's control. A Court of special appeal, in respect of a wrong order passed by a lower appellate Court, has indirectly the same powers as a Court, of regular appeal under ss. 351, 354, 355, Act VIII of 1859. *WUZEER ALI v. KALI COOMAR CHUCKER-BUTTY*, 11 W.R. 228.

(9)—*Secondary evidence—Conditions of admis-sibility—Denial in pleading—Procedure—Ad-missibility*—A copy of a document should not be admitted in evidence, until all legal means have been used to obtain the original; and a party's denial in pleading of the possession of the document will not justify the omission of the processes the law provides for his testimony, and his being called upon to produce the original deed. Where an original pottah relied on cannot be produced, secondary evidence is admissible; but the Court ought to be satisfied that it gives a true version of the contents of the document, and that there is sufficient evidence of its execution. *SOOKRAM SOOKUL v. RAM LALL SOOKUL*, 9 W.R. 248.

(10)—*Copy of document, when admissible—Copy to be proved to be correct.*—Case where it was held that the non-production of an original document from a record must be satisfactorily accounted for before a copy can be looked at; and that such copy should be shown to be accurate before it can be used. *ROHEE LALL v. DINDYAL LALL*, 21 W.R. 257.

(11)—*Secondary evidence when admissible—Kind of secondary evidence admissible—Sale deed, Certified copy of.*—Secondary evidence of the contents of a document may be received where the Court is satisfied that the original is lost; it may in such a case receive parol evidence and need not insist on the production of a certified copy. The law does not allow a certified copy of a sale-deed to be given in evidence. *HURISH CHUNDER MULLICK v. PROSUNNO COOMAR BANERJEE*, 22 W.R. 303.

(12)—*Suit for rent and damages—Onus on plaintiff to prove payment in past years—Nature of evidence required.*—Where the amount of rent payable is itself in issue in a suit for rent, it is incumbent on the Judge to require the plaintiff to show that in past years defendant has paid what he, plaintiff, is now demanding, and, for the purposes of proving these past payments, the best evidence both documentary and oral, is requisite, and secondary evidence is not admissible until the absence of primary is satis-factorily explained. *RAM JEEBUN LOLL v. NOND LOLL*, 2 W.R. Act X, Rul. 48.

(13)—*Copy of will when admissible—Original will to be filed.*—For a copy of a will to be admissible in evidence, the party in whose possession the will is, ought to file the original. *PROSUNNO COOMAR PAL v. CHUNDER COOMAR ROY*, 23 W.R. 241.



**Evidence—continued.****— 10.—Secondary Evidence—continued.**

(14)—*Best evidence to be produced—Second-hand evidence useless—Finding of fact by lower Court and appeal.*—The best evidence producible, and not second-hand evidence, should be brought forward to establish the facts necessary to be proved. The reasonable finding of a lower Court on a point of fact should not be disturbed in appeal without substantial grounds. *MA NYEIN HLA v. MA YIN, U.B. R., 1897—1901, Vol. II, 363.*

(15)—*Defendant's right to insist on plaintiff producing best evidence—Ticca lease.*—Case where the Court held that the defendant had the privilege to insist on the plaintiff proving his right by the best available evidence, *e.g.*, a ticca lease on which the claim was alleged to depend entirely. *MAN SINGH MAHTOON v. BHAIR NARAIN MAHTOON, 19 W.R. 210.*

(16)—*Document mentioned as the best—Production of other evidence—Explanation for failure to produce the best.*—If a document is named by the plaintiff to be the best evidence in his favor, he ought not, in its absence, to be permitted to adduce any other evidence until that document is accounted for. *ASMAN SINGH v. DOORGA ROY, 21 W.R. 262.*

(17)—*Copy of disputed document, when evidence—Admission.*—A copy of a disputed deed cannot be taken as evidence without proof that the original is out of the power of the person producing the copy. Admitting the existence of the original is not admitting the correctness of the copy. *MUSSAMUT BEEBEE KURUM v. RUTTUN BHUGGUT, W.R. 1864, 186.*

(18)—*Secondary evidence—Map—Title—Possession.*—A copy of a document will be inadmissible in evidence, unless the absence of the original is duly accounted for. A map, though prepared by the gomashtras of both plaintiff and defendant, is not evidence of title, but only of possession. *SREEMUTTY GOUR MONEE v. HUREE KISHORE ROY, 10 W.R. 338.*

(19)—*Execution and destruction of deed to be proved before admitting secondary evidence—Contingent decree.*—If a Judge is satisfied that a document had actually been executed but was lost or destroyed, then he might receive secondary evidence of the contents, either documentary or oral. It is not essential that the witnesses called for this latter purpose should be attesting witnesses. A Judge would be altogether wrong if he drew up a decree which directed that "if the plaintiff at the time of the execution of the decree would prove the greater quantity of the mesne profits by good and strong evidence, then he would obtain the same. At present, the mesne profits would be awarded according to the rate admitted by the defendant." *SYUD LOTFOOLLAH v. MT. NUSEEBUN, 10 W.R. 24.*

(20)—*Evidence Act, s. 65, cls. (e) and (f)—Secondary evidence when original is destroyed.*—S. 65 of the Evidence Act, which provides

**Evidence—continued.****— 10.—Secondary Evidence—continued.**

that "in case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible" applies to a case in which the public document is still in existence on the public records, and not where it is destroyed. *KALANDAN v. KUNHUNNI, 6 M. 80. [R., 3 O.C. 371.]*

(21)—*Proof of document—Secondary evidence.*—A Court ought not to allow a party to give secondary evidence of the contents of a document, the original of which is in his custody, without itself looking at the document. A party relying on a document must produce it, or adduce satisfactory reasons for not producing it, in which case he may give secondary evidence of its contents in the manner allowed by law. A judgment turning upon the construction of such document, in which there may be references to it, is not secondary evidence of the contents of the document, especially when it appears that it is itself based on secondary evidence of the document given by a party who had the original with him. *HIRA LAL v. GANESH PRASAD, 4 A. 406, P.C. = 9 I A. 64 = 11 C.L.R. 109 = 4 Sar. 342 on appeal from 2 A. 415. [R., 14 M.L.J. 379, 488.]*

(22)—*Evidence on commission beyond jurisdiction—Admission of secondary evidence of document—Evidence Act, ss. 65 and 66.*—No proof of notice to produce the original of document, nor of a refusal to produce it, is necessary for the admission of secondary evidence of its contents before Commissioners in a place beyond the jurisdiction of the Court issuing the Commission. *RALI v. GAN KIM SWEE, 9 C. 939.*

(23)—*Secondary evidence—Lost deed—Correct copy.*—A copy of a deed which has been proved to be lost should not be received in evidence and is of no value as evidence even when admitted, unless it has first been proved that the copy produced is a correct copy of the lost deed. *LUCKIMONI DAS v. KORUNA KANT MOITRA, 3 C.L.R. 509.*

(24)—*Written document—Contemporaneous oral agreement—Equitable principles.*—Where a written document is alleged to be governed by a contemporaneous oral agreement or statement of intention which must be inferred from the surrounding circumstances, the Court must be guided by s. 92 of the Evidence Act; and the Court cannot have recourse to those equitable principles which enable the Court of Chancery to give relief in those cases of which *Alderson v. White* (2 De G. & J. 98) and *Lincoln v. Wright* (4 De G. & J. 16) are examples. *DATTOO v. RAMCHANDRA, 7 Bom. L.R. 669 = 30 B. 119.*

(25)—*Document, Construction of—Oral evidence to ascertain the intention of parties passing a document—Fraud—Want or failure of consideration.*—Ordinarily oral evidence is not admissible for the purpose of ascertaining the



**Evidence—continued.****—10.—Secondary Evidence—continued.**

intention of the parties in interpreting language used in a written document which is clear and unambiguous. Unless the Court is able to assume some oral agreement, it would be impossible to regard the contemporaneous or subsequent conduct of the party, as in itself evidence to establish the intention of the parties at the time of the execution of the document. Such extraneous intrinsic evidence would necessarily be of value, only as a ground for inferring an oral agreement whereof evidence is excluded by s. 92 of the Indian Evidence Act 1872. The fraud, which under proviso 1 of s. 92 may be proved, must be fraud which would invalidate the document and therefore subsequent fraud in respect of the document not such as to invalidate it could not be a ground for admitting extraneous oral evidence under proviso of s. 92. The real effect of admitting such evidence would not be to prove fraud in the execution of the document but the existence of different intention than that which appears on the document itself. In other words, it would be an attempt to prove a different contract from that expressed in the document without proving any fraud in the preparation of the document which would invalidate it. The "want or failure of consideration" contemplated by the proviso 1 to s. 92 is a complete failure of consideration. Proviso 6 to s. 92 does not cover facts which are intended to show that the language of the document meant the exact opposite of what it purports to mean. There is no necessity for the explanation of the language used in relation to existing facts. The only object or use of such evidence, if admitted, would be to show that the language was intended to mean something which is utterly incapable of being expressed by that language. *KESHAVRAO v. RAYA*, 8 Bom. L.R. 287.

(26)—*Written document—Oral evidence for construing the document—Oral evidence permissible to show that contract was obtained fraudulently—Dekhan Agriculturists' Relief Act (XVII of 1879).*—Evidence of intention cannot be given for the purpose merely of construing a document. And s. 92 of the Evidence Act, subject to the proviso therein contained, forbids evidence to be given of any oral agreement or statement for the purpose of contradicting, varying, adding to, or subtracting from the terms of any contract, grant or other disposition of property, the terms of which have been reduced to writing as mentioned in that section. While there are the restrictions on the admissibility of oral evidence referred to above, s. 92 in its first proviso recognizes that fact may be proved by oral evidence which would invalidate a document or entitle any person to any decree or order relating thereto. And where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is in a Court of Equity considered as having been obtained fraudulently. *Per Jenkins, C. J.*—

**Evidence—continued.****—10.—Secondary Evidence—continued.**

"The frequency of the complaint that agriculturists are entrapped into the execution of document of sale in the belief that the right to redeem still remains with them, leads us to express the hope that there may be early legislation which will enable the Courts, at least where an agriculturist is concerned, to investigate and determine the real nature of the transaction, unfettered by s. 92 of the Evidence Act, and to award such relief as the justice of the case may require." *ABAJI v. LUXMAN*, 8 Bom. L.R. 553 = 30 B. 426.

(27)—*Copy of document on record—Proof of execution of original.*—In order to give legal proof of the fact of the execution of a document a copy of which only is on record, a witness must not only depose that a document of that nature was executed, but the purport of the copy must be read to him, and he must be asked whether the original of the same was what he executed. *MUSSAMAT MAMOOLA KHANUM v. KHAJAH MAHOMED EASA KHAN*, 13 W.R. 429.

(28) — *Court's power to send for records of case from another Court — Copies inadmissible under law of evidence — Evidentiary value — Rejection of copy — Receiving original — Discretion.*—A Court before which a suit is pending may send for the records from any other Court where they may be, the ordinary rules of that other Court notwithstanding. It is but proper to throw out copies inadmissible under the Law of Evidence; and a Court has absolute discretion, in rejecting a copy, to allow the party to file the original. *HUREEHUR MOJOONDAR v. CHURN MAJHEE*, 22 W.R. 355.

(29)—*Custody of document—Proof.*—Sworn testimony as to the custody from which a document has come must be adduced before it can be put in as legal evidence. *KALI TARA DEBIA v. NITTIANUND SHAHA*, 12 W.R. 90. (1 W.R. 331, 6 W.R. 82, 10 W.R. 1, 239, F.)

(30)—*Lost document more than thirty years old—Secondary evidence, Admissibility of—Ss. 65, 90 of the Evidence Act.*—Secondary evidence of the contents of a document, shown to have been lost in proper custody, and to have been lost, and more than thirty years old, is admissible without proof of the execution of the original. *KHETTER CHUNDER MOOKERJEE v. KHETTER PAUL SREETERUTNO*, 5 C. 886 = 6 C L.R. 199. [F., 22 A. 294; R., 21 B. 528 25 M. 674.]

(31)—*Person present at execution of document—Failure to subscribe document—Secondary witness.*—A person, who, though he might not be a subscribing witness, swore that he was present at the execution of an instrument, could not be set down as a secondary witness. *SUN-KUREE DEBEA v. ANUND MOYEE DASSIA*, 18 W.R. 245.

(32)—*Secondary evidence, Admissibility of.*—The question as to the admissibility of secondary evidence is one which is proper to be



**Evidence—continued.****—10.—Secondary Evidence—continued.**

decided by the Court of first instance and its discretion cannot be disturbed by a Court of appeal unless a failure of justice is occasioned thereby. *NINGAWA v. RAMAPPA*, 5 Bom. L.R. 708=28 B. 94.

(33)—*Evidence—Agreement, plain and unambiguous—Admissibility of evidence to explain away words.*—If the words of an agreement are plain and unambiguous, they must not be explained away by extrinsic evidence and still less by mere reasoning from probabilities. *ALAGAIYA TIRUCHITTAMBALA v. SAMINADA PILLAI*, 1 M.H.C. 264.

(34)—*Secondary evidence, Inadmissibility of—Suit for redemption—Previous decree for foreclosure, Evidence of—Secondary evidence—Evidence Act (I of 1872), s. 63.*—In this suit to redeem a mortgage, the Courts below found that a decree for foreclosure, in respect of the mortgage, had previously been passed. The foreclosure decree was not itself forthcoming, and the only evidence that such a decree was ever passed consisted of a reference to a copy of the decree in a judgment passed in another suit and a statement by one of the mortgagees, since dead, that the mortgage had been foreclosed. The High Court, disagreeing with the lower Courts, held that the above reference in the judgment to the copy of the foreclosure decree was not sufficient evidence of the contents of the original decree. A written statement of the contents of the copy of a document, the original of which the person making the statement has not seen, cannot be accepted as an equivalent of that which s. 63 of the Evidence Act renders admissible, namely, an oral account of the contents of a document given by some person who has himself seen it. *KANAYALAL v. PYARABAI*, 7 B. 139. [*F.*, 8 B. 182; *R.*, 27 B. 452.]

(35)—*Written instrument—Sale-deed or mortgage—Representation that a sale-deed would not be enforced as a sale-deed—Construction of document.*—Where at the time of executing a document, a representation is made that the document, though in form a sale-deed, will not be enforced as against the executant as a sale-deed, and where on the faith of that representation the executant executes the document, the sale-deed cannot be upheld as a sale-deed as against him. *NAVALBAI v. SIVUBAI*, 8 Bom. L.R. 761.

(36)—*Lotbundee not to be used for sale certificate—Conditions under which lotbundee admissible.*—A lotbundee cannot be admitted as secondary evidence in substitution of the certificate of sale, except where the absence of the certificate is well accounted for, and no better evidence could be had. *MUSSAMUT USTOORUN v. BABOO MOHUN LALL*, 21 W.R. 333.

(37)—*Oral evidence varying the terms of a deed—Intention of parties cannot be such evidence—Sale—Exchange—Limitation Act (XV of 1877), art. 97—Money paid upon an existing consideration which afterwards fails.*—

**Evidence—continued.****—10.—Secondary Evidence—continued.**

On the 17th April, 1892, the defendants passed a sale-deed of certain lands at Gadag to plaintiff for Rs. 500. On the same day, the plaintiff sold some lands at Topinkatti to the defendant's sister for Rs. 500. No money passed under any of these transactions, the one being a consideration for the other. In 1898 the plaintiffs were dispossessed by a person deriving title from a purchaser at a Court sale on the 6th June, 1885 of the Gadag lands in execution of a decree against the defendants, who had somehow remained in possession. The plaintiffs thereupon filed a suit against defendants to recover the possession of the lands at Topinkatti, or in the alternative for compensation for the loss sustained by him by reason of his dispossession. *Held*, (1) That the two deeds professed to be deeds of conveyance; and the mere fact that they were mutual deeds of conveyance would not make the transaction an exchange. Whatever might have been the intention of the parties, having regard to s. 92 of the Evidence Act, it was impossible to treat the transaction of 1892 as one for exchange. (2) That the plaintiff was entitled to recover money paid upon an existing consideration which afterwards failed: Art. 97 of the limitation Act, 1877. *HANMANT v. GOVIND*, 8 Bom. L.R. 283.

(38)—*Copies of documents—Admissibility in evidence—Limitation.*—Where the plaintiffs, who took nearly ten years to institute a suit for possession, being unable to produce the original deed of purchase or a copy thereof (which they produced only at the first hearing), tendered a copy of a sale-deed in evidence, *held*, that the copy was inadmissible. Peaceable possession by a vendor for 15 years before the date of suit bars any enquiry into the title of one who derives his title under the purchase. *ANUNDO MOYEE DOSSEE v. MR. J. MACKENZIE*, W.R. 1864, 5.

(39)—*Court-copy of title-deed—Secondary evidence—Objection not raised at the time of filing—Estoppel.*—A Court-copy of a title-deed was filed without objection on behalf of the plaintiff; but objection was taken during the argument that the plaintiff had not shown any of the statutory grounds for the admission of such secondary evidence. It was *held* that the defendant's allowing the copy to be marked without objection would not estop him from afterwards objecting to it. The copy should not have been marked until evidence had been given which made it receivable. *KISTNA DOSS v. MUKTAMALA SANTANI*, 3 M.L.T. 297.

(40)—*Suit for rent—Plea of mokurraree right of defendant—Appeal, to whom lies—Copies of income-tax returns.*—The appeal in a suit for rent, where the defendant pleads a mokurraree tenure, lies to the Judge. Copies of income-tax returns are not admissible in evidence. *LALLA GOOROO SAHOY SINGH v. BROMO DEONARAIN*, W.R. 1864, Act X, Rul. 105.

(41)—*Secondary evidence—Kabuliat—Counterpart—Indian Evidence Act (I of 1872), s. 6*



*Evidence—continued.***—10.—Secondary Evidence—continued.**

—A let lands to B who sublet to C, a royt. C. sued for possession of part, after an alleged dispossession, making A a party defendant to the suit. At the hearing, C, in order to prove that the lands in dispute were part of those let to him by B, tendered in evidence the kabuliat given by him to B. *Held*, that C should have produced the patta given him by B and the grant from A to B, or sufficiently accounted for their absence, and that, as he did not do either, the kabuliat (which was merely secondary evidence of C's patta) was inadmissible even though it was produced from the possession of the landlord A. **SURJO NARAIN GHOSE v. HARI NARAIN MOLLO, 1 C.L.R. 547.**

(42)—*Evidence—Copies of depositions in other suits—Admissibility of—Act X of 1859, s. 77—Revenue Court—Decision determining question of title—Effect of.*—Copies of depositions taken in other suits are not ordinarily admissible in evidence. A decision of a Revenue Court determining a question of title which, under the provisions of s. 77, Act X of 1859, it was not competent to try, must be treated as a nullity. **NEYPAL SINGH v. GUYADUT, 3 Agra 311.**

(43)—*Kazee's deposition in former case—Defendants not parties—Kazi alive—Admissibility of deposition.*—A copy of the deposition of a Kazee in a previous suit, in which the defendants were not parties, is not admissible as evidence, where the Kazee is admittedly alive and can be examined. **MUSSAMUT MYEEDUN v. MUSSAMUT BINTUL FATIMA, 24 W.R. 472.**

(44)—*Copy of Kazee's register whether admissible.*—A copy of a Kazee's register was not receivable in evidence. The register itself should have been produced or proof given of its loss, and the particular entry should have been verified. **JAFFREE KHANUM v. IMDAD HOSSEIN, 2 N.W.P. 314.**

(45)—*Copy of record-keeper's report—Magistrate's proceedings—Evidence—Judgment of appellate Court—Admissions of executors of a donor.*—A copy of the report of the record-keeper can, by no possibility, be legal evidence either for or against the genuineness of the deed in dispute; nor is a copy of a 'roobakaree' of a Magistrate in a suit regarding "some other properties covered by the deed in dispute." If an appellate Court is dissatisfied with the finding of the Court of first instance "that the genuineness of a deed has been established by the testimony of witnesses," some better reason for that dissatisfaction must be stated than is contained in the remark, "it does not appear that the said deed has been proved by testimony of reliable witnesses." Admissions of the executors of a donor treated as the admissions of the donor. **DWARKANATH BOSE v. CHUNDI CHURN MOOKERJEE, 1 W.R. 339.**

(46)—*Evidence—Copy of deed of partition—Hindu Law—Inheritance—Step-brother and uterine brother—Preference.*—A copy of an alleged deed of partition set up to defeat an ordinary rule

*Evidence—continued.***—10.—Secondary Evidence—continued.**

of Hindu law with respect to succession, and taken from the record of a miscellaneous proceeding, without any suggestion as to what has become of the original, is not admissible in evidence. A step-brother cannot inherit in preference to an uterine brother. **ISHEN CHUNDER CHOWDRY v. BYRUB CHUNDER CHOWDRY, 5 W.R. 21.**

(47)—*Absence of original not accounted for—Copy inadmissible—Remand—Grounds for remand—Omission to decide material issue—Mortgage—Redemption—Redemption after expiry of time.*—Suit by A to recover a moiety of certain ancestral land which he claimed, first by right of inheritance, and secondly under a deed of settlement executed by the other half sharer, B, since deceased. The widow of B answered that the whole of the land had been assigned for the support of a mosque by B's father; and the lower appellate Court found it to be true, and reversed the decree of the Munsif, who had allowed A's claim. *Held*, on special appeal (No. 115 of 1865), that the document relied upon as creating an endowment had been improperly admitted in evidence, for it was only a copy, and the absence of the original was not accounted for; the Court observing that the document only purported to be a mortgage, and did not create any religious endowment. And, on the suit being remanded the lower appellate Court found no reason to alter its former decree; the absence of the original mortgage-deed, executed in A.D. 1834 having been accounted for; and a second deed, bearing date A.D. 1846, having been produced, by which B's father assigned the whole of the land in dispute to the *jamat* of the community as trustees of the religious property. *Held*, on a second special appeal (No. 840 of 1865) that the deed of 1846, being unstamped, was inadmissible in evidence, and that the deed of 1834 being only a mortgage, the equity of redemption was not lost, though there was a failure of the condition that the property was to be considered as sold, if the mortgage debt was not paid before A.D. 1846. (1 B.H.C. 119, F.) On finding that the lower appellate Court had not determined material questions of law and fact necessary for the decision of the suit, the High Court framed certain issues for its guidance, and again remanded the case. **MAHUMMAD VALAD ABDUL MULNA v. IBRAHIM VALAD HASAN, 3 B.H.C., A.C., 160.** (1 B.H.C. 119, F.) [R., 9 B.H.C. 69.]

(48)—*Evidence—Copy of translation—Admission of liability—Hindu Law—Debts—Non-heir—Liability to pay debt of deceased.*—A copy of a translation of what a Magistrate was supposed to have said in English in a proceeding under Act IV of 1840 was no evidence of an admission of liability which could bind the person concerned. Under the Hindu Law, a person who is not the heir cannot be rendered liable to pay the rent due by a deceased. **RAMJEE LAL v. MR. GEORGE ANDERSON, 7 W.R. 141.**



**Evidence—continued.****—10.—Secondary Evidence—continued.**

(49)—*Statements of living person—Admissibility in evidence—Statement of deceased person—Personal knowledge or belief.*—Written statements of a person who was living at the time when the party relying on them closed his case, could not be admitted in evidence, and the fact that similar documents have been admitted on the other side is no reason why the rules of evidence should be violated. Where a deceased person had filed a genealogical table in support of his claim as heir and it was exhibited on his behalf, *held* that (1) personal knowledge and belief must be found or presumed in any statement of a deceased person which is admissible in evidence, and (2) that the genealogical table above referred to was not admissible since it was not proved to have been prepared under the personal knowledge and belief of the deceased person. *JAGATPAL SINGH v. JAGESHAR BAKSH SINGH*, 25 A. 143, P.C. = 30 I.A. 27 = 7 C.W.N. 209 = 8 Sar. 367. [R., 8 O.C. 94.]

(50)—*Indian Companies Act (VI of 1882)—Evidence as to membership—Register of members, Evidentiary value of—Notice of allotment, necessity of communication of—Contract Act, s. 4—"Put in course of transmission" proper meaning of—Proper address of letter of acceptance, necessity of proof of, to admit secondary evidence.*—The appellant in this case objected to his having been placed in the list of contributories prepared in the course of the liquidation in a company. The official liquidator put in evidence a register of members which was held to afford *prima facie* evidence that the appellant was a member holding shares in the company. But, however, the liquidator, who, after putting the register in evidence might have waited, until the appellant had met the *prima facie* evidence afforded by the register, did not do so, but chose to put in evidence certain letters written by the objector and the replies thereto, which had the effect of impugning the *prima facie* evidence afforded by the register, notwithstanding the absence of any rebutting evidence on the part of the appellant. (3 A. 333, R.) Where a letter of acceptance despatched to a proposer is not proved to have been properly addressed to him, no inference could be drawn, as from the ordinary course of business, of its having been posted with the proper address on. Under s. 4 of the Indian Contract Act, the communication of acceptance is complete as against the proposer, only when it is put in a course of transmission to him; and a communication to a proposer contained in a letter not proved to have been correctly addressed to him, could not, although posted, be said to have been "put in a course of transmission" to him within the meaning of the said s. 4. In the absence, therefore, of evidence as to the communication contained in the letter having reached the proposer, a press-copy of such a letter could not be admitted as secondary evidence of its contents. *RAM DAS CHAKARBATI v. THE OFFICIAL LIQUIDATOR*

**Evidence—continued.****—10.—Secondary Evidence—continued.**

COTTON GINNING COMPANY, LTD., CAWNPORE, 9 A. 366 = A.W.N. 1887, 34. [R., 7 C.L.J. 251.]

(51)—*Mahomedan Law—Suit for dower—Failure to prove alleged written contract—Effect.*—Where a suit by a Mahomedan wife for dower was brought upon a written contract and nothing else, but the written contract was not produced, and there was not evidence enough to establish its execution, the Court would not be justified in decreeing the suit upon the basis of an oral contract neither alleged by the plaintiff, nor admitted by the other side. *KHAJA MAHOMED ASGHUR v. MANIJA KHANUM*, 14 C. 420. [R., 129 P.L.R. 1904 = 2 P.R. 1905.]

(52)—*Civ. Pro. Code, s. 525—Non-production of award—Procedure.*—Where, by reason of the award having been lost, it cannot be produced and filed in Court, the special procedure, by which a decree can issue upon an award filed in Court, becomes impossible, and, a regular suit to enforce the terms of the award is the only remedy, it being not competent for the Court to receive secondary evidence of the contents of the lost award and to proceed to pass a decree thereon. *GOPI REDDI v. MAHANANDI REDDI*, 12 M. 331. [D., 1 S.L.R. 167.]

(53)—S. 65, I.E.A., 1872—*Secondary evidence to prove contents of letter.*—Oral evidence to prove the contents of a letter (neither produced nor called for) is inadmissible on the ground that it involves the giving of secondary evidence of the contents of a document without satisfying the conditions required to be fulfilled by s. 65, I.E.A. (*Per Banerjee and Rampini, JJ.*). *KAMESHWAR PERSHAD v. AMANUTULLA*, 26 C. 53 = 2 C.W.N. 649.

(54)—*Suit upon bond—Secondary evidence, Admissibility of—Evidence Act (I of 1872), s. 65, cl. (c).*—Where, in a suit by the transferee of a bond, against the executant and obligee thereof, the obligee did not produce the document, though a notice had been served on him, and the obligee was not examined, nor was evidence given of its loss or destruction, secondary evidence was held not admissible. *WOMESH CHUNDER GHOSE v. SHAMA SUNDARI BAI*, 7 C. 88 = 8 C.L.R. 489. [R., 10 C.P.L.R. 59, 12 C.P.L.R. 117, 13 C.P.L.R. 94.]

(55)—*Evidence Act (I of 1872), s. 91—Terms of contract reduced to writing, oral evidence inadmissible to prove.*—In this case, the question also came up whether the Judge in the Court below, having excluded the document as unstamped, should have admitted oral evidence of the contract, and it was held that the terms of the contract having been put in writing, by reason of s. 91 of the Evidence Act, no evidence except the documents themselves could be given in proof of it. In this case, the broker in the first instance negotiated the terms of the contract with the defendant, but having no power



**Evidence—continued.****—10.—Secondary Evidence—continued.**

to make a binding contract between the parties, he caused those terms to be put in writing, and two documents were prepared one of which was signed by the vendor and given by the buyer while the other was signed to the buyer and given to the vendor. There was no doubt, therefore, that whatever the contract was, it, was reduced to writing. *S. A. RALLI v. CARA-MALLI FAZAL*, 14 B. 102.

(56)—*Unstamped instrument—Notice to produce.*—Secondary evidence tendered to prove the contents of an instrument, which is retained by the opposite party, after notice to produce it, can only be admitted, in the absence of evidence to show that it was unstamped when last seen. *SENNANDEN v. KOLLAKIRAN*, 2 M. 208. [R., U.B.R. 1892-1896, Vol. II, 631.]

(57)—*Stamp—Penalty—Secondary evidence of a document.*—Secondary evidence of the contents of a document, which was liable to stamp duty but was unstamped, cannot be admitted on payment of a penalty. *KOPASAN v. SHAMU*, 7 M. 440 [F., U.B.R. 1892-1896, Vol. II, 631, 17 M. 473; R., 23 M. 49.]

(58)—*Insufficiently stamped hundis—Stamp Act, XVIII of 1869, ss. 5, 8, 19, 20, 26, 28.*—The payment of penalty under s. 20 of Act XVIII of 1869 does not enable a party to tender insufficiently stamped hundis in evidence. *MOTHOORA MOHUN ROY v. PEARY MOHUN SHAW*, 4 C. 259=2 C.L.R. 409.

(59)—*Evidence—Stamp Act, I of 1879 (Stamp Act), s. 24—Document not duly stamped—Secondary evidence of contents of document not admissible.*—Where the original document would be inadmissible as not being sufficiently stamped, secondary evidence of the contents of such document is also inadmissible. *BALDEO DAS v. JAI RAM*, A.W.N. 1899, 210. (2 Barn and Ald., 478 21, R.R. 363, R.)

(60)—*Promissory note—Suit for original consideration—Promissory-note, the only contract between parties—Note inadmissible—Effect.*—When a cause of action for money is once complete in itself, whether for goods sold, or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person. In such cases, the bill or note is said to be taken by the creditor on account of the debt, and if it is not paid at maturity, the creditor may disregard the bill or note and sue for the original consideration. [Expl., 23 C. 851; Expl. & F., 26 A. 178; F., 82 P.R. 1891, 28 P.L.R. 1903=7 P.R. 1903, 28 A. 298=A.W.N. 1906, 9=3 A.L.J. 25, 29 M. 111=15 M.L.J. 484; R., 7 M. 112, U.B.R. 1897-1901, Vol. II, 391, U.B.R. 1907, 3rd Qr., Evi. 5.] But when

**Evidence—continued.****—10.—Secondary Evidence—continued.**

the original cause of action is the bill or note itself, and does not exist independently of it, as for instance, when, in consideration of A depositing money with B, B contracts by a promissory note to re-pay it with interest at six months' date, here there is no cause of action for money lent, or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other. In such a case, the note is the only contract between the parties, and if for want of a proper stamp or some other reason the note is not admissible in evidence, the creditor must lose his money. *SHEIKH AKBAR v. SHEIKH KHAN*, 7 C. 258=8 C.L.R. 528. [Appl., 12 B. 443; F., 8 C. 721=11 C.L.R. 310. L.B.R. 1893-1900, 122, 42 P.R. 1895, 17 M.L.J. 126; R., 10 M. 94, 18 B. 369, 24 B. 360, 9 O.C. 315.]

(61)—*Unstamped or defectively stamped document—Non production—Secondary evidence.*—Secondary evidence of unstamped or insufficiently stamped document, which has not been produced, is not admissible. *MA EIN U v. MAUNG AUNG HMWE*, U.B.R. 1897-1901, Vol. II, 365. [26 I.A. 262, 23 M. 49, Rel. on.] [F., U.B.R. 1897-1901, Vol. II, 367; R., U.B.R. 1897-1901, Vol. II, 556, U.B.R. 1907, 4th Qr., Execution-Signing, 5.]

(62)—*Unstamped document. Secondary evidence of—Non-production—Inadmissibility.*—Secondary evidence of a document not produced, which ought to have been, but was not, stamped, is inadmissible. *MAUNG NET v. MAUNG HMO ZAN*, U.B.R. 1897-1901, Vol. II 367. (U.B.R. 1897-1901, Vol. II, 500, overruled; U.B.R. 1897-1901, Vol. II, 365, F.)

(63)—*Promise to pay balance due in instalments—Agreement embodied in promissory note—Agreement entered in account book—Admissibility—Inadmissibility of promissory note as being insufficiently stamped—Suit on original debt—Successive suits for instalments.*—Where an agreement to pay, by instalments, the balance due on accounts settled between two parties, is embodied in a promissory note, and interest at the same time by the promisor in his own account-book, it can be proved only by means of the former, and not by the latter. If, under the above circumstances, the promissory note be inadmissible in evidence, owing to being insufficiently stamped, the promisee can sue only for the whole debt, and not for the instalments, the agreement in respect of which cannot be proved. [R., U.B.R. 1897-1901, Vol. II, 391; D., U.B.R. 1907, 3rd Qr., Evidence, 5=14 Bur. L.R. 179.] Where, in the above circumstances, the promisee, finding that he could not sue on the inadmissible promissory note, sued for some instalments accrued, due on the basis of the entry made by him in his account-book, the circumstance that he obtained a decree in such suit cannot preclude the Court from considering, in a subsequent suit by him for subsequent instalments, the question of the maintainability of the suit on



**Evidence—continued.****—10.—Secondary Evidence—continued.**

the basis of the entry in the account book, and holding that the claim for instalments must be dismissed, based as it was on the promissory note which could not be proved. *Held*, further, that the suit was barred by s. 43 of the Civ. Pro. Code, as the plaintiff, being thrown back on the whole debt, sued only for a portion in the former suit (*Spankie, J.*)—That s. 43 had no application, as the second suit was for instalments not accrued due as the time of the first suit (*Oldfield, J.*) **BENARSI DAS v. BHIKHARI DAS, 3 A. 717 = A.W.N. 1881, 47.**

(64)—*Contemporaneous unstamped agreement in contradiction to a stamped agreement inadmissible.*—An unstamped memorandum of agreement varying the terms of a stamped agreement and contemporaneous with it, is not admissible in evidence. **KHURHO v. BOOTA SINGH, 23 P.R. 1870.**

(65)—*Suit on improperly stamped hundi.*—The hundi is the only legal evidence of the obligation created by it, and if it is insufficiently stamped and has been altered in a material particular, no suit can be brought on it by the person altering it. **VAJIAPPA v. MAHOMMED KHASIM, 5 M. 166. [F., 17 M. 262; R., U.B.R. 1907, 3rd Qr., Evidence, 5]**

(66)—*Accounts stated—Bond for balance—Substitution of new contract—Bond impounded as insufficiently stamped—Suit on accounts stated.*—Where accounts between a creditor and his debtor are stated, and it is intended to consolidate and secure the debt by means of a bond, which is to supersede the contract or obligation arising from the statement of accounts, then in the event of the bond being inadmissible on account of its not being properly stamped, the creditor cannot fall back on the accounts stated. **SIRDAR KUAR v. CHANDRAWATI, 4 A. 330 = A.W.N. 1882, 55. [D., 11 A. 13.]**

(67)—*Stamp Act (I of 1879), s. 34, proviso 1—Unstamped promissory note, Suit on—Sustainability—Secondary evidence—Evidence Act (I of 1872), ss. 65, cl. (b) and 91.*—A sued B to recover Rs. 38 due on an unstamped note. B admitted execution and receipt of consideration in respect of Rs. 37 in the shape of paddy, but alleged that the amount had been paid off. He also objected to the admissibility in evidence of the note, the same being unstamped. The plaintiff offered to pay stamp duty and penalty, under s. 34 of the Stamp Act (I of 1879), contending that the note sued on was a bond. There was a recital in the suit note to the effect that the amount due thereunder would be repaid within three months from the date of its execution. The Subordinate Judge referred the following two questions to the High Court, viz.—(1) Whether the document sued on was a promissory note, and (2) Whether the admission by the defendant of the consideration therefor would entitle the plaintiff to maintain the suit notwithstanding the inadmissibility of the

**Evidence—continued.****—10.—Secondary Evidence—continued.**

document. *Held, per Jardine, J.*, that the document sued on was a promissory note and that the suit having been brought thereon as the original cause of action, the admission of the contents of the document made by the defendant in his written statement did not avail the plaintiff, the document itself being inadmissible in evidence for want of a stamp. *Per Birdwood, J.*—The plaintiff could not recover irrespectively of the promissory note, because he did not seek to prove the consideration otherwise than by the note, which is inadmissible in evidence (for want of a stamp), and because the admissions contained in the written statement of the defendant did not amount to an admission of the claim as for money lent. The case was not one in which any secondary evidence would be admissible for proving the contents of the unstamped promissory note, the primary evidence—the document itself—being forthcoming. Moreover, no other evidence can, under s. 91 of the Evidence Act, be given to prove the terms of the contract between the parties, of which the note was intended to be the evidence. The plaintiff's suit must be dismissed as he did not offer any independent evidence of the advance alleged by him, and the defendant did not in his written statement admit that any money was lent to him, as alleged by the plaintiff, but set up an entirely different transaction, in respect of which he admitted no remaining liability. **DAMODAR JAGANNATH v. ATMARAM BABAJI, 12 B. 443. [F., U.B.R. 1907, 3rd Qr.; Evidence 5; R., 18 B. 369, 24 B. 360, 4 Bom. L.R. 912.]**

(68)—*Unstamped acknowledgment of debt, inadmissibility of, in evidence—Stamp Act (I of 1879), sch. I, art. 1 and s. 34—Limitation Act (XV of 1877), s. 19.*—An acknowledgment fulfilling the conditions of art. 1 of sch. I of the Stamp Act (I of 1879) cannot, if unstamped, be given in evidence "for any purpose." The words of s. 34 of Act I of 1879 clearly prevent an instrument which is chargeable with a one-anna stamp, and which cannot be admitted on payment of a penalty, from being admitted in evidence "for any purpose" including the purpose of saving limitation. **MULJI LALA v. LINGU MAKAJI, 21 B. 201, F.B. [Rel. on, 66 P.R. 1906 = 73 P.L.R. 1907; R., 30 C. 687, 31 C. 195 = 8 C.W.N. 168.]**

(69)—*Evidence Act, s. 91—Unstamped promissory note—Suit for money lent—Cause of action.*—Where the terms of the contract were settled and the rate of interest and date of repayment were agreed upon in the morning, but later in the day an unstamped promissory note specifying these terms was passed from the defendant to the plaintiff, the plaintiff cannot bring a suit as for money lent, when he finds that the promissory note is inadmissible in evidence. **POTHI REDDI v. VELAYUDASIVAN, 10 M. 94. [F., 17 M.L.J. 126; R., U.B.R. 1907, 3rd Qr., Evidence, 5 = 14 Bur. L.R. 179; D., 23 M. 527, 29 M. 111 = 15 M.L.J. 484.]**



*Evidence—continued.***—10.—Secondary Evidence—continued.**

(70)—*Lost instrument requiring stamp, which was unstamped—Secondary evidence.*—Secondary evidence cannot be given of a lost instrument requiring a stamp which was not stamped. **ARUNACHELLAM CHETTY v. OLAGAPPAH CHETTY**, 4 M.H.C. 312. [Cons., 7 M.H.C. 13; R., U.B.R. 1892-1896, Vol. II, 631, 23 M. 49, P.C.]

(71)—*Reg. XVII of 1802, s. 11—Original destroyed—Alleged fragments of the original not proved to be those of the original—Secondary evidence.*—Suit on a bond. The defendant, by his answer, denied his execution of the bond. Plaintiff, in his reply, stated the accidental destruction of the bond and prayed leave to put in evidence a registered copy thereof, which the Court allowed, and, at the same time, ordered the fragments of the original to be produced. At the trial plaintiff produced the fragments, and, under s. 11, Madras Regulation, XVII of 1802, put in as evidence a registered copy of the bond. He called no witnesses to prove that the fragments produced formed part of the original bond. The Court admitted the registered copy as evidence, and found for the plaintiff. The Judicial Committee of the Privy Council, on appeal, reversed this finding, on the ground that the registered copy in the absence of satisfactory evidence of the destruction of the original bond, was improperly admitted as secondary evidence. **SYUD ABBAS ALI KHAN v. YADEEM RAMY REDDY**, 3 M.I. A. 156.

(72)—*Pottah not registered—Pottah not utilisable therefore—Ground for admitting secondary evidence.*—A Court cannot allow secondary evidence to be adduced, because the pottah on which a plaintiff's title is based has not been registered, and therefore, cannot be used by reason of the Registration Law. **L.G. CROWDIE v. KULLAR CHOWDHRY**, 21 W.R. 307.

(73)—*Copy obtained from office of registering officer—Value.*—The mere circumstance that the copy of an instrument was procured from the Records of the Registrar of Deeds would not make that registered document evidence, or give it effect as against the persons who appear to be affected by its terms. **SHAIKH FYEZ ALI v. OMEDEE SINGH**, 21 W.R. 265. [R., 9 Bom. L.R. 401.]

(74)—*Lease irrelevant as unregistered—Secondary evidence.*—Secondary evidence of the execution of a lease is also inadmissible where it is not admissible as being unregistered. **MUSSAMUT KABOOLUN v. SHUMSHEIR ALI**, 11 W. R. 16.

(75)—*Unregistered patta and kakuliyat—Set off—Evidence.*—Where a patta and a kakuliyat have been found inadmissible by reason of non-registration, no contract which they contain can be received in evidence. **DINANATH MOOKERJEE v. DEBNATH MALLICK**, 5 B.L. R., App., 1=13 W.R. 307.

*Evidence—continued.***—10.—Secondary Evidence—continued.**

(76)—*Proof of written contract—Document inadmissible for want of registration—Secondary evidence inadmissible—Admission made in a deposition.*—A written contract must be proved by the production of the writing itself; if the document is inadmissible from want of registration, no secondary evidence can be given thereof. A party's admission as to the contents of a document not made in the pleadings, but in a deposition, is secondary evidence, and cannot take the place of the document itself. **SHEKH IBRAHIM v. PARVATA VALAD HARI**, 8 B.H.C. A.C. 163. [F., 8 B. 89; R., 6 B. 168, F.B.]

(77)—*Execution of original document or loss thereof not proved—Admissibility.*—The plaintiff produced a registration copy of a *hibbana-mah*, without producing the original or accounting for its non-production or proving that the original was destroyed or lost; held that the secondary evidence tendered was not admissible in evidence. **AMEERUNNISSA KHATOON v. ABADOONNISSA KHATOON**, 15 B.L.R. 67, P.C. = 23 W.R. 208 = 2 I.A. 87 = 3 Sar. 423. [Cited, 31 C. 155.]

(78)—*Secondary evidence—Proof of title—Unregistered deed of sale—Registration Act, s. 49.*—Plaintiff alleged that A and B had sold and conveyed, by an unregistered deed, certain land to the person under whom he claimed. The deed being inadmissible in evidence, B was called to prove the sale. Held, that B's evidence should have been rejected, as secondary evidence of the unregistered deed could not be received. **RAM CHUNDR HALDAR v. GOBIND CHUNDR SEN**, 1 C.L.R. 542.

(79)—*Registration Act, 1864, s. 13—Secondary evidence not admissible, where the document is not admissible on account of non-registration.*—Where, on account of non-registration, a certain document, could not be put in evidence, under s. 13 of the Registration Act of 1864, secondary evidence of the contents of such document cannot be admitted under s. 65, (b) of the Evidence Act. **VARADA v. KRISHNASAMI**, 6 M. 117. [R., 13 M. 303, 19 B. 36.]

(80)—*Evidence Act (I of 1872) s. 91—Unregistered partition deed.*—Where an unregistered deed purported to divide some of the family immoveable properties, reciting at the same time that the division as regards the rest of the properties had already taken place, it was held that although the deed did not exclude secondary evidence of the partition of the family property previously divided, yet, it affected to dispose of certain immoveable properties, and therefore, under s. 91 of the Evidence Act, excluded secondary evidence of its contents. **KACHUBHAI BIN GULABCHAND v. KRISHNABA KOM BABAJI**, 2 B. 635.

(81)—*Copy of a copy, if evidence.*—Held that a copy of a copy of a *sunnad* is clearly inadmissible in evidence. **RAJA NEELANUND SINGH v. NUSSEB SINGH**, 6 W.R. 80.



**Evidence—continued.****—10.—Secondary Evidence—continued,**

(82)—*Evidence Act, 1872, ss. 63 (c) and 114, illus. (g)—Copy of a copy—Non-production of evidence by party in possession—absence of proof of loss or destruction.*—A copy of a certified copy of a document which has not been compared with the original, cannot be admitted in evidence, such copy being neither primary nor secondary evidence of the contents of the original. Where a party who ought to be in possession of certain documents accounts for their non-production on the ground that they have been lost or destroyed, but does not prove such loss or destruction, the presumption would be drawn that the documents would, if produced, be unfavourable to such party. **RAM PRASAD v. RAGHUNANDAN PRASAD, 7 A. 738=A.W.N. 1885, 160.**

(83)—*Secondary evidence, Kind of, admissible—Instances of admissibility.*—In a case falling under cl. (a) or (c) of s. 65 of the Evidence Act, though it might also fall under cl. (f) of the same section, any kind of secondary evidence is admissible. **IN THE MATTER OF A COLLUSION BETWEEN THE "AVA" AND THE BRENHILDA, 5 C. 568=5 C.L.R. 331. [R., 10 C.P.L.R. 59, 34 C. 293=11 C.W.N. 501, 3 O.C. 371.]**

(84)—*S. 66, cl. (6), Evidence Act—Notice to produce.*—Secondary evidence of the contents of a document is admissible, under s. 66, cl. (6), Evidence Act, when the defendant is out of jurisdiction and did not comply with the summons to produce the document and when the service of notice upon his pleader at the last moment would have been nugatory. **BISHOP MELLUE v. VICAR APOSTOLIC OF MALABAR, 2 M. 295. [R., 15 M. 241.]**

(85)—*Evidence Act, ss. 65, 66—Admission of secondary evidence.*—Where the question was whether the evidence constituted secondary evidence of the matter in dispute, which was the making of a document, and the evidence consisted of the copy of a deed which was filed in another suit, and was still on the records of the Court, and the copy was endorsed "copy in accordance with the original," and it was signed by the Judge presiding in the Court, held that the copy was duly compared and was genuine. **LUCHMAN SINGH v. PUNA, 16 C. 753=16 I.A. 126, P.C.=5 Sar. 370.**

(86)—*Ss. 65, 66, 74, 86, I.E.A., 1872—Foreign judicial records—Public documents.*—Proceedings of a Court of Justice, when certified under s. 86, are presumed to be genuine and accurate. S. 86, which says that, if a copy of a foreign judicial record purports to be certified in a given way, the Court may presume it to be genuine and accurate, does not exclude other proof. Proceedings of a Court of Justice may be proved by a Court official deposing to what took place in his presence and also to an uncertified record thereof. Such proof is secondary evidence, under ss. 65, 66, of the certified record,—the record being a public document under s. 74,—admissible without notice to the

**Evidence—continued.****—10.—Secondary Evidence—continued.**

adverse party, when the person in possession of the document is out of the reach of or not subject to the process of the Court. **HARANAND CHETLANGIA v. RAM GOPAL CHETLANGIA, 27 C. 639, P.C.=27 I.A. 1=4 C.W.N. 429=7 Sar. 648. [R. 34 C. 576=11 C.W.N. 622=6 C.L.J. 30.]**

(87)—*Deed destroyed in the mutiny, Evidence of.*—Oral evidence may be received as to the contents and genuineness of a deed, alleged to have been destroyed during the Mutiny and of which no copy is in existence. **SHEOSURUN OJHA v. MUSSAMUT GOOLBANEE KOOR, W. R. 1164, 264.**

(88)—*Civ. Pro. Code, Act VIII of 1859, s. 355—Appeal—Record lost in transit—Disposal of appeal on receipt of secondary or additional evidence.*—Where, on an appeal being preferred from a decree of the Court of first instance, the record of the case was lost in transit from the first to the second Court, it was competent to the appellate Court to receive such secondary evidence as the parties were able to produce of the papers which made up the record, and if the parties were not able in this way to show what were the contents of the whole record, each party was at liberty to produce additional evidence under s. 355, Act VIII of 1859. **BABOO GOOROO DYAL SINGH v. DURBAREE LAL TEWAREE, 7 W.R. 18.**

(89)—*Loss of anumati-patra—Secondary evidence.*—Where it had been established that an anumati-patra was lost, held, that secondary evidence of it was receivable. **KALI KISHORE DUTT GUPTA MOZUMDAR v. BHUSAN CHUNDER alias BEPIN CHUNDER DUTT GUPTA, 18 C. 201=17 I.A. 159, P.C.=5 Sar. 607.**

(90)—*Evidence—Quinquennial register—Examined copy—Admissibility.*—An examined copy of a quinquennial register is evidence without the production of the original. **SREEMUTTY OODY MONEE DEBEE v. BISHONATH DUTT, 7 W.R. 14. [R., 2 C.W.N. 229.]**

(91)—*Time for filing of documents, order of enlargement of, by first Court, appellate Court not competent to interfere with—Certified copies of documents filed in another suit, Admissibility of, in evidence.*—Where the Court of first instance has properly enlarged the time for filing certain documents, the lower appellate Court cannot interfere with such order. The objection taken in this case that the copies were not receivable was not taken either in the original case, or in the grounds of appeal to the Judge, and the special appellant had, therefore, no opportunity given him to explain the reason why the originals were not forthcoming. The originals were in existence but were filed in another suit and it was held, that, under the circumstances, the lower appellate Court was wrong in having deprived the appellant of the benefit of the above application and taken him by surprise by refusing to admit the copies, in the absence of



**Evidence—continued.****—10.—Secondary Evidence—continued.**

any objection taken to them by the opposite party. *GOUR SURUN DOSS v. KANYA SINGH*, 2 W.R. 237.

(92)—*Attested copy of petition—Original with record of different case—Application for original.*—In this case, it was ruled that an attested copy of a petition was admissible in evidence, if the original was with the record of a different case, and if an application had been made for it. *OOPENDRO MOHUN MOOSTAFEE v. POORNO CHUNDER BHUTTACHARJEE*, 19 W.R. 85.

(93)—*Admission of copy—Objection in appeal.*—Where the evidence of an *ikrar* was not of any consequence, the admission of the copy instead of the original *ikrar* is not an objection which an appellate Court ought to give effect to. *GOPAL NARAIN MOZOOMDAR v. MUDDA-MUTTY GUPTEE*, 14 B.L.R. 21.

(94)—*Abstract of pleadings in decree—Secondary evidence of admission alleged—Quære.*—Whether an abstract of the pleadings given in a decree is legally secondary evidence of an admission alleged to have been made in such pleadings? *SUNDAR DAS v. FATIMUL-UL-NISSA*, 1 C.W.N. 513. (9 C. 586, doubted.) [R., 3 C.L.J. 521.]

(95)—*Document relied on connected with several properties including suit property—Defendant, Non-production of document by—Secondary evidence.*—A plaintiff's case rested on a document that covered several properties, whereof her own was one; the defendant, though called on by the plaintiff, did not produce the document, held that secondary evidence of it could be given. *MUSSAMUT SADEEROON NISSA BIBI v. SREEMUTTY SHOURUBBY DEBEA*, 25 W.R. 459.

(96)—*Power-of-attorney to execute a deed of mortgage, effect of recognition of, in subsequent power to authorise registration of deed—The two powers of attorney, parts of same transaction.*—The question in this case was whether the power of attorney by which the son of the defendant executed the deed of mortgage was itself duly executed by the defendant or not. The original deed was not produced but the *mooktearnama* executed by defendant authorizing the registration of the deed of mortgage recognised the previous power to execute the deed of mortgage. The High Court, agreeing with the lower Courts, held that the two *mooktearnama*, formed part of one continuous transaction, and that the admission by defendant in the second instrument, of the genuineness of the first, was conclusive as against her, and, in its presence, the absence of the original power of attorney was comparatively immaterial, and that the plaintiff was entitled to a decree. The recognition of the first deed in the second proved deed, by the party executing both, was an admission conclusive against her as to the genuineness of both the deeds and was capable of being received as original evidence by itself and not as secondary evidence

**Evidence—continued.****—10.—Secondary Evidence—continued.**

with regard to the first deed in the proper sense of the term. *HOSSEINEE JAN v. MUKHDOO-MUN*, 2 W.R. 44.

(97)—*Copy of letter — Copy filed without objection in first Court—Cross-examination of author.*—Where a copy of a letter is filed without objection in the Court of first instance, and the writer of the letter is cross-examined on it, the lower appellate Court should consider the copy as evidence of the letter. *JAMES FEGREDO v. MAHOMED MODDESSUR*, 10 W.R. 267.

(98)—*Copy of mortgage-deed — Failure to produce original—Due diligence in searching for original—Secondary evidence*—A copy of a mortgage-deed produced by a party, who had failed to obtain the original was held to be admissible in evidence, as it was offered only after due diligence to obtain primary evidence. *ZUHOORUL HUQ v. BAHEER CHUNDER MULLICK SHAHA*, 25 W.R. 177.

(99)—*Written document — Oral variation—Consideration*—It is settled law that notwithstanding an admission in a sale deed that the consideration has been received it is open to the vendor to prove that no consideration has been actually paid. The Evidence Act does not say that no statement of fact in a written instrument may be contradicted by oral evidence but that the terms of contract may not be varied, etc. Hence, where the contract was to sell for Rs. 30,000 which was erroneously stated to have been paid, it was competent for the vendor without infringing any provision of the Act to prove a collateral agreement that the purchase money should remain in the vendee's hands for the purposes and subject to the conditions alleged by the vendor. *SAH LAL CHAND v. INDRAJIT*, 2 Bom. L.R. 533=22 A. 370=4 C. W.N. 485=7 Sar. 702.

(100)—*Civ. Pro. Code, s. 525—Suit upon an award—Secondary evidence.*—A suit upon an award is not barred by s. 525, Code of Civil Procedure, and secondary evidence of its contents will be admissible on proof of its loss. *GOPI REDDI v. MAHANANDI REDDI*, 15 M. 99=1 M.L.J. 591. [F., 20 M. 490; R., U.B.R. 1906, 1st Qc., Specific Relief, 30. 19 P.R. 1907=46 F.L.R. 1907=134 F.W.R. 1907.]

(101)—*Market-rate—Record by broker—Evidence.*—A record of the market-rate of any particular day made up by a broker of intelligence and experience is admissible in evidence of the particular state of the market on that day. *NARAIN CHUNDER DHUR v. COHEN*, 10 C. 565.

(102)—*Khasra, Admissibility of entries in remarks column of.*—Held, that entries made by the Patwari in the remarks column of the Khasra are admissible in evidence. *KHALIL-UR-RAMAN v. SRIPAL SINGH*, 11 O.C. 195. (3 O.C. 204, R.)

(103)—*Patwari papers—Secondary evidence.*—After the destruction of the Settlement Records



**Evidence—continued.****—10.—Secondary Evidence—continued.**

Patwari papers were held to be secondary evidence. *FATTU v. DALELA*, 1 P.R. 1875, Rev.

(104)—*Wajib-ul-arz*—Copy of, when admissible.—As the *wajib-ul-arz* on which the suit was based was destroyed in the mutiny the plaintiff tendered in evidence a book obtained from the tehseel office which purported to contain copies of the *wajib-ul-arz* authenticated by the initials of the Settlement Officer. *Held*, that under these circumstances the lower Court was right in accepting it as a genuine copy of the *wajib-ul-arz* prepared at the time of the settlement and as the copy purported to give the signatures of the persons by whom the original was executed and the name of the official in whose presence the instrument was executed, it was held that the lower Court ought to have accepted the copy in proof not of a *wajib-ul-arz* which had been contemplated but of one which had been executed and accepted. *Held* also that the *wajib-ul-arz* was not a mere contract but a record of rights made by a public servant, and consequently, without attestation or execution by the proprietors of the *mouzah*, it was entitled to weigh as evidence of village custom. *DEBIE DUT v. SHEIKH ENAIT ALI*, 2 N.W.P. 395.

(105)—*Reg. VII of 1822, s. 9 (1)—Reg. IX of 1825, s. 9—Zamindar's dues on sale of garden trees—Usage and settlement papers—Destruction of latter—Evidence.*—A zamindar's claim for dues on sale of garden trees, could not be decreed on mere usage also; it is also necessary to inquire whether the claim was recognised and recorded in the settlement papers also. If the settlement papers are destroyed the Court must ascertain, by the best evidence procurable, the contents of those papers regarding the dues, with reference to *Reg. VII of 1822, s. 1, cl. 9*. *PAUL RAI v. RAM HIT PANDAY*, 1 Agra 139.

(106)—*Evidence Act, s. 91—Sodi Razinama.*—A *Sodi Razinama* is a document whereby a person relinquishes his right of occupancy of land in his possession to his landlord, and requests the latter to register the land in the name of another person, to whom it has been sold. It is not one of the kind mentioned in *S. 91*, of the *Evidence Act* and therefore, does not exclude the Courts from basing their findings upon other evidence, if any. *VENKATESA v. SENGODA*, 2 M. 117.

(107)—*Tenant—Proof of lease not necessary for proving tenancy.*—A tenant can prove his tenancy right without proving his lease, even if he has any. *LALA SURABH NARAIN LAL v. CATHERINE SOPHIA*, 1 C.W.N. 248. [*F.*, 6 C.W.N. 916; *R l. on*, 8 C.W.N. 434.]

(108)—*Lease, Contents of, in dispute—Production of lease necessary—Oral evidence of lease.*—If the contents of a lease are under dispute in any way, they must be proved by the production of the document; if this is not the case, oral evidence of the pottah is admissible. *KEDAR NATH JOARDAR v. SHURFOONISSA BIBEE*, 24 W.R. 425.

**Evidence—continued.****—10.—Secondary Evidence—continued.**

(109)—*Evidence—Admissibility—Counterpart of lease—Absence of lease.*—In a suit for rent, the counterpart of a lease is admissible in evidence and cannot be rejected solely on the ground that the original lease, which must naturally be with the tenant, has not been produced. *MAJID HUSSAIN v. JEEAWON KHEWAT*, 3 Agra 233.

(110)—*Limitation Act, s. 19—Acknowledgment in writing—Evidence Act, ss. 65, 91—Secondary evidence.*—*S. 19* of the *Limitation Act* must be read with *ss. 65 and 91* of the *Evidence Act*, and it does not exclude secondary evidence of contents of documents in cases in which such would be admissible under *s. 65*. *CHATHU v. VIRARAYAN*, 15 M. 491.

(111)—*Debt—Subsequent promissory note—Written acknowledgment—Subsequent oral acknowledgment—Evidence Act I of 1872, s. 91.*—A loan subsequently acknowledged orally, for which a promissory note is also given subsequently, may be sued for independently of the pro-note, and the written admission of the debt contained in the pro-note does not exclude evidence of the oral acknowledgment. *HIRA LAL v. DATA DIN*, 4 A. 135 = A.W.N. 1881, 144. [*R.*, U.B.R. 1897—1901, Vol. II, 391, 24 B. 360, 26 A. 178 = A.W.N. 1903, 217; *D.*, 11 B. 443, U.B.R. 1907, 3rd Qr., *Evidence*, 5 = 14 Bur. L.R. 179.

(112)—*Suit on unstamped pro-note—Evidence aliunde.*—In a suit on a promissory note written on unstamped paper, independent evidence of consideration is admissible. *GOLAP CHUND MARWAREE v. THAKURANI MOHOKOOM KOOAREE*, 3 C. 314 = 2 C.L.R. 412, Note. [*F.*, 23 C. 851; *D.*, 2 M. 205; *R.*, 12 B. 443, 18 B. 369, 24 B. 360 = 2 Bom. L.R. 25.]

(113)—*Suit for goods sold and delivered—Parol evidence.*—Where, in a suit for the price of goods sold and delivered, a written admission, by the defendant, of the goods having been supplied, tendered in evidence by the plaintiff, was rejected as unstamped, *held*, the plaintiff ought to have been allowed an opportunity of proving it by oral testimony. *BINJA RAM v. RAJMOHUN ROY*, 8 C. 282.

(114)—*Note or memorandum acknowledging debt—Promissory note—Insufficiently stamped document, Admissibility in evidence of—General Stamp Act (XVIII of 1869), s. 3 (25), sch. II, No. 5.*—The defendant gave the plaintiff in respect of the price of goods purchased by him, the following instrument "Agra, 14th Nov., 1877. Due to K, cloth merchant, the sum of Rs. 200 only to be paid next January 1878." The instrument was stamped with a one-anna adhesive stamp. In a suit by K for Rs. 200 with interest thereon at 12 per cent. per annum from the 14th November, 1877 to the date of suit. *Held* by Stuart, C.J., and Pearson, O'd-field and Straight, J.J., that the suit was one for a debt, and that, although the instrument



• *Evidence*—continued.

—10.—*Secondary Evidence*—continued.

being insufficiently stamped, was not admissible in evidence as a promissory note, it was nevertheless admissible as proof of an acknowledgment of such debt. *Held per* Spankie, J., that the suit was one based upon a promissory note, and that such instrument, being insufficiently stamped, was not admissible in evidence. *KANHAYA LAL v. STOWELL*, 3 A. 581, F.B. [R., 23 A. 502.]

(115)—*Unstamped promissory note, collateral security for debt promised to be paid—Evidence Act (I of 1872), s. 91, oral evidence of original consideration.*—Plaintiff agreed with the defendant to discharge an employee of his from arrest in execution of a decree held by the plaintiff, on the defendant undertaking that he would pay the amount of a decree-debt. An unstamped promissory note was executed for the amount by the defendant, reciting the above circumstances. On the plaintiff's suit for the amount, the lower Courts held that the action was not maintainable without the note being put in evidence, which the plaintiff could not do on account of its want of stamp. On second appeal, the action was held to be maintainable apart from the note altogether. The note was merely a collateral security for the fulfilment, by the defendant, of his promise to pay the decree-debt, and consequently, cannot be considered as *the* contract, between the parties, out of which the defendant's liability arose. *BALBHADAR PRASAD v. THE MAHARAJAH OF BETIA*, 9 A. 351 = A.W.N. 1887, 49. [F., 4 Bom. L.R. 912; R., U.B.R. 1897-1901, Vol. II, 391, U.B.R., 1907, 3rd Qr., Evidence, 5 = 14 Bur. L.R. 179.]

(116)—*Insufficiently stamped promissory note—Oral contract, Suit on—Maintainability of.*—Where a promissory note, as being insufficiently stamped, is inadmissible in evidence, a suit may be brought "for money lent," if the cause of action was complete in itself before the giving of the note, and the request on the one part and payment on the other, which together constitute the cause of action, may be proved independently of the note. *KRISHNASAMI v. RANGASAMI*, 7 M. 112. [R., U.B.R. 1907, 3rd Qr., Evidence, 5 = 14 Bur. L.R. 179; D., 10 M. 94.]

(117)—*Insufficiently stamped bond—Proof of consideration.*—If the plaintiff has a cause of action for money lent independently of a bond or other deed evidencing the payment of consideration, which is inadmissible in evidence, for want of stamp, or other cause, he may be allowed to adduce other evidence as to the passing of consideration, since in the case of every loan there is an implied promise or contract to re-pay the loan. *PRAMATH NATH SANDAL v. DWARKA NATH DEY*, 23 C. 851. (3 C. 314, F.) [R., 24 B. 260 = 2 Bom. L.R. 25, 9 O.O. 315, 5 C.W.N. 56, U.B.R. 1897-1901, Vol. II, 391; Diss., 26 A. 178, U.B.R. 1907, 3rd Qr., Evidence, 5.]

*Evidence*—continued.

—10.—*Secondary Evidence*—continued.

(118)—*Unregistered document—Secondary evidence.*—A party desirous of adducing secondary evidence of the contents of an unregistered document must show that the non-registration was not due to him, or that it is owing to fraud in the opposite party. *KUMEEZOODDEEN HOLDAR v. RUJJUB ALI SHAHA*, 9 W.R. 528.

(119)—*Mortgage-deed—Counterpart executed by mortgagee—Registered copy of mortgage-deed—Secondary evidence—'Marupattam'.*—In a suit to redeem a mortgage, where a registration copy of the document was tendered as secondary evidence of the mortgage-deed and along with it another document was also produced which was an exact copy of the mortgage-document and the entries therein, with the addition that the document was called a "Marrupattam" and signed by the mortgagee, and it appeared that the latter document was written on a stamp paper of the same value as the mortgage but was neither registered nor signed by the mortgagor, *held* that plaintiff should be allowed to redeem the lands. *Per Subrahmanya Aiyar, J.*—The latter document was not a counterpart but only a copy of the original document. *Per Moore, J.*—The latter document was a counterpart and not a mere copy of the original document. But that is no reason why plaintiff's suit should be dismissed. Defendants came into possession of the lands only as mortgagees and it is not shown that subsequently they set up any higher title to the land prior to the institution of the suit. Therefore, they could not claim title by adverse possession. The plaintiff is entitled to recover the lands; and though the mortgage could not be proved against the defendants by the latter document, yet as the plaintiff admitted in the plaint that he was bound to pay the amount set forth in the registration copy of the document, a decree could be passed on the strength of that admission providing for redemption on payment to the defendants of that amount. *PARAMESVARAN NAMBUDRIPAD v. AMMUNNI NAIR*, 9 M.L.J. 300.

(120)—*Accounts settled—Hypothecation bond for balance due—Obligor preventing registration thereof—Suit on account stated.*—Where, on a settlement of accounts, the obligor executes a hypothecation bond for the balance found due but subsequently prevents registration of the bond by denying its execution, the creditor is entitled to sue on the original accounts. Secondary evidence is admissible in such a case. *KIAM-UD-DIN v. RAJJO*, 11 A. 13 = A.W.N. 1888, 280. (4 A. 330, D.)

(121)—*Will—Registered copy, Admissibility of.*—In the absence of proof that a will has been cancelled, a registered copy thereof is admissible in evidence. *ATMARAM PURANIK v. LAXMI BAI*, 12 C.P.L.R. 130.

(122)—*Admissibility of registration copies without proof of loss of original.*—Copies received from the Registration office can be accepted.



**Evidence—continued.****—10.—Secondary Evidence—continued.**

in proof without formal proof of the loss of the original. *SHAIKH SALAUDDIN v. GOPAL VALAD RATI*, 12 C.P.L.R. 117. (10 C.P.L.R. 59, *Not F.*; 22 W.R. 303. 7 C. 98, *D.*) [*Diss.*, 13 C.P.L.R. 94, 17 C.P.L.R. 161.]

(123)—*Registration Act (III of 1877), s. 17—Transfer of Property Act (IV of 1882), s. 105—Lease registered—Subsequent unregistered agreement—Admissible in evidence—Right of suit.*—The proprietor of a zemindari executed on 4th July, 1895, a reversionary lease of a portion of his zemindari to Ramasamy: the lease was to commence in 1911 A.D.: and the lease and its counterpart were duly registered. During the negotiations for the lease it was agreed between the proprietor and Ramasamy that in consideration of his obtaining the lease, Ramasamy should pay to the proprietor a sum of Rs. 500 a month for a period of ten years from July 1895: this arrangement was put in writing in the form of a letter addressed by Ramasamy to the proprietor. On the 12th July, 1895, the proprietor executed a trust-deed whereby he assigned to V as trustee, the zamindari with its incidents the trusts declared included the monthly allowance. The allowance not being paid, the proprietor assigned his right to receive, for value to Ramanadhan and gave a notice of this assignment to Ramasamy. On the 21st September, 1897, Ramanadhan commenced a suit against Ramasamy to recover 26 monthly instalments. The defendant contended that the original agreement for the payment of Rs. 500 a month was void in law as not being in writing registered and that the plaintiff was not entitled in law to prove the existence of such oral agreement; and that whatever right the proprietor might have had under the agreement had been transferred by him under the trust deed, and, therefore, Ramanadhan had no right to sue upon the agreement: *Held*, (1) that the agreement was not affected by s. 92 of the Evidence Act, and there was nothing in the Registration Act, or in the Transfer of Property Act, which required that it should be registered as part of the lease: (2) that the second contention was not tenable since all the instalments sued for accrued due after the date of the trust deed. *SUBRAMANIAN v. ARUNACHALAM*, 4 Bom.L.R. 839=12 M.L.J. 479=6 C.W.N. 865=25 M. 803=29 I. A. 318, P.C.=8 Sar. 316.

(124)—*Evidence, Admissibility of—English practice not applicable—Certified copies of public documents.*—In this case, the Judicial Committee observed that no strict rule can be prescribed with regard to the admissibility of evidence in the native Courts in India. The rules acknowledged and carried out in the Courts in England could not be applied with the same strictness to the reception of evidence in the Indian Courts. The practice in such Courts and the essential justice of the case must be looked to, and no evidence should be hastily rejected merely because it may not be accordant with the English practice. In this case, both on the side of the appellant and that

**Evidence—continued.****—10.—Secondary Evidence—continued.**

of the respondents, copies of documents come out of a public office had been received in evidence on the certificate that they were true copies signed by the officer in charge of the department, and the Judicial Committee held that they were rightly admitted. *UNIDE RAJAH RAJE BOMMARAUZE BAHADUR v. PENMASAMY VENKATADRY NAIDOO*, 4 W.R. 121, P.C.=7 M.I.A. 128. [*Appl.*, 8 W.R. 167; *R.*, 5 B.H.C., A.C., 48. 15 W.R. 102, 15 W.R. P.C., 1, 22 W.R. 355, 6 C. 171, F.B.=6 C.L.R. 439.]

(125)—*Secondary evidence—Copy of copy—Proof of execution.*—As secondary evidence, the authenticated copy of an authenticated copy of a deed is admissible on proof of the execution of the instrument. *TAYUBUNISSA BIBI v. KUWAR SHAM KISHORE ROY*, 7 B.L.R. 621=15 W.R. 228.

(126)—*Copy deposited in public office—Certified copy of copy—Absence of original accounted for—Secondary evidence.*—A certified copy of a document deposited in a public office, which document is itself a copy, can be received as secondary evidence if the absence of the original is satisfactorily accounted for. *BHULABHAI GULLABHAI ET AL v. MODJI DESALJI ET AL*, 5 B.H.C., A.C., 48.

(127)—*Copy of copy of document—Custody in public office—Original lost—Admissibility in evidence.*—The copy of a copy of a document is admissible provided it comes from a public office, and the original is proved to have been lost. *THE COURT OF WARDS v. BUNWAREE LALL THAKOOR*, 15 W.R. 102.

(128)—*Urpunnamah but not produced—Authenticated copy of proved, authenticated copy—Admissibility in evidence.*—If an urpunnamah is proved, but cannot be found, the Court may accept as secondary evidence the authenticated copy of an authenticated copy. *TAHBOONISSA BIBEE v. KOOMAR SHAM KISHORE ROY*, 15 W.R. 228.

(129)—*Copy of copy of original Kobalah—Registration—S. 17, Reg. XXXVI of 1793—Loss of original, Explanation of—Accuracy to be proved—Secondary evidence.*—A copy of a document purporting to be a copy of an original *Kobalah* registered by a *Cazea* is not covered by Regulation XXXVI of 1793, section 17; but it might be receivable as evidence if the accuracy of the copy, and the execution and loss of the original, were proved. *SREEMUNT KOWAR v. AKBAR MANDUL*, 8 W.R. 438.

(130)—*Secondary evidence—Copy of copy.*—When the original deed relied on by the plaintiff was at the command of the defendant, and plaintiff was only obstructed in producing it by the recusance of the defendant, the very best secondary evidence to which the plaintiff could have recourse in lieu of it was held to be an authenticated copy filed in another case, by the defendant herself, and, as such copy could



*Evidence*—continued.

## —10.—Secondary Evidence—concluded.

not, under the ordinary rules of Court, be removed from the custody of the Judge, it was held that there was no rule of law in Indian Courts of equity and good conscience to prohibit the reception of a copy of such copy under the circumstances. *MAKBUL ALI v. SRIMATI MASNAD BIBI*, 3 B.L.R., A.C. 54=11 W.R. 396.

See U.P. ACT XVIII OF 1876, CHAP. II, S. 9, 4 O.C. 365.

See APPELLATE COURT — OBJECTIONS FIRST TAKEN IN APPEAL, 12 W.R. 13.

See ENHANCEMENT OF RENT—ENHANCEMENT, EXEMPTION FROM, 10 W.R. 73.

Copy of a deposition is inadmissible in evidence where the deponent is alive and not called—EVIDENCE ACT, 1872, s. 33, 2 A.L.J. 91.

Admissibility of evidence to explain written document—See EXECUTOR, 21 B. 335.

See LEASE—CONSTRUCTION OF LEASE, 15 W.R. 493.

See MAHOMEDAN LAW—DOWER, 11 W.R. 65.

Suit for redemption—Proof of mortgage—Non-production of mortgage-deed—Secondary evidence—See MORTGAGE—REDEMPTION, A.W.N. 1882, 131.

Secondary evidence of the terms of a mortgage-deed—Admissibility—See MORTGAGE—REDEMPTION, 11 O.C. 285.

See PARTIES TO SUITS—GENERAL, 19 W.R. 248.

See REGISTRATION ACT, 1908, ss. 17, 49, 71 P.R. 1906=111 P.L.R. 1907.

See REGISTRATION ACT, 1908, ss. 49, 71, 72, 73, 74, 75, 1 B.L.R., F.B., 58=10 W.R., F.B., 51.

Secondary evidence of a document the loss of which is not proved—See SPECIFIC RELIEF ACT, 1877, ss. 39, 42, 1 O.C. 18.

See STAMP ACT, 1869, 24 W.R. 88.

Unstamped document alleged to be in the possession of defendant—Secondary evidence, whether admissible—See STAMP ACT, 1879, U.B.R. 1907, 4th Qr., Execution—Signing, 5.

Original instrument chargeable with penalty—Documents constituting secondary evidence not governed by the section—See STAMP ACT, 1879, s. 34, 23 M. 49=26 J.A. 262=4 C.W.N. 117, P.C.

See STAMP ACT, 1879, s. 34, 18 B. 369.

## —11.—Miscellaneous.

(1)—Evidence — English Law — Irrelevant matter—Contradiction.—It is one of the rules of English evidence that evidence cannot be

*Evidence*—continued.

## —11.—Miscellaneous—continued.

given to contradict irrelevant matter. *KELLY v. KELLY AND SAUNDERS*, 3 B.L.R., App., 6.

(2)—Enmity between parties—Rejection of oral and documentary evidence.—A Court must not decline to consider the oral and documentary evidence adduced by the parties to a suit on the ground that there had been enmity and a feud previously between them. *MAHOMED WAZIR v. HANUMAN DAS*, A.W.N. 1885, 286.

(3)—Evidence—Testimony of one witness unfavourable—Other witnesses produced—Dismissal of suit without examining them—Illegality.—The mere fact that the evidence of one witness was unfavourable to the plaintiff was not a good ground for the dismissal of the suit, without examining the other witnesses whom the appellant wished to produce. *V. P. GOVINDASWAMY PILLAY v. K. V. KOOLAYAPPA ROWTHER*, 6 L.B.R. 17. (8 W.R. 364, 12 W.R. 229, 2 M.I. A. 424, 9 B. 146, R.)

(4)—Specific statement unreliable, whole evidence not unreliable.—The evidence of a person cannot be held to be generally untrustworthy, merely because some specific statements made by him have not been accepted by the Court. *DEBI PERSHAD CHOWDHRY v. RANI RADHA CHOWDHRAIN*, 9 C.W.N. 161, P.C.=32 C. 84=31 I.A. 160=8 Sar. 708.

(5)—Evidence—Statement to be taken as a whole.—A party using the statement of another against him must put the whole statement in evidence, but the Judge is not bound to believe it all. For instance, if the Judge, on the evidence, really believes that the payments credited in a plaintiff's books were made, although he disbelieves the entry as to the amount of the debts, there is nothing inequitable in his giving the defendant the benefit of the payments. The Judge is bound to look at the whole of the entries, giving credit to such as he believes to be true, and discrediting those which he believes to be false. *ISAN CHANDRA SING v. HARAN SIRDAR*, 3 B.L.R., A.C. 133=11 W.R. 325.

(6)—Reference to probabilities in appreciating evidence—Error.—Case where it was ruled that no error of law is committed by weighing evidence with some indirect reference to probabilities. *KALEE DOSS ACHARJEE v. KHET-TROPAL SING ROY*, 17 W.R. 472.

(7)—Evidence of persons interested.—The fact that the witnesses are the servants of, or otherwise interested in one of the parties is not of itself sufficient reason for disbelieving their testimony. *A. CASPERSZ v. KISHORI LAL ROY CHOWDHRY*, 23 C. 922, P.C.=1 C.W.N. 12.

(8)—Fact, Question of—Credibility of witnesses—Trial Judge, Opinion of. value of—Strong case established by plaintiff's evidence—Necessity of rebuttal by personal testimony of defendants—Failure of defendants to depose—Material witness not cited by plaintiff, because



**Evidence—continued.****—11.—Miscellaneous—continued.**

*witness expected to be summoned by defendants*

**—Costs—Successful appellant ordered to pay costs of unsuccessful petition to admit further evidence—Set off against costs decreed.**—The appellant sued to recover jewellery of the value of Rs. 29,000 which she alleged she had deposited with the respondents, who were husband and wife, for safe custody, and produced receipts, purporting to be signed on their behalf by their son, which the respondents alleged were forgeries. The respondents denied the deposit and alleged that the only jewels they had received from the appellant had been deposited with them by way of security for two loans for Rs. 2,500 and Rs. 1,000, and they produced promissory notes for the amounts, purporting to be signed by the appellant, which the appellant alleged were forgeries. The story told by the appellant was corroborated by witnesses of whose respectability and credit the trial Judge has exceptional advantages of forming an opinion, and he held that the evidence established the appellant's case. *Held* by the Judicial Committee, differing from the High Court, that the evidence adduced by the appellant, if believed, established a strong case, which it was incumbent on the respondents to meet by personal denials. All they did however was to put against it the denial of the signature to the receipts by their son, and evidence, not very satisfactory, on a collateral matter, *viz*, the execution of the promissory notes by the appellant. The judgment of the High Court was reversed and that of the trial Judge restored. A material witness by whose hands, the appellant alleged, the jewellery had been sent to the respondents for deposit, and who was a relative of the respondents and had been a servant of the appellant but had previously to the suit left her service, was summoned by the respondents whose conduct showed that they were going to make her their witness: *Held*, that it was not unnatural that the appellant should, as she did, leave it to the respondents to call her. **MUSAMMAT DURGA KUNWAR v. MUSAMMAT MATHURA KUNWAR, 15 C.W.N. 717, P.C.**

**(9)—Question of fact—Effect to be given to parol evidence and credit due to witnesses—Concurrent opinion of Courts in India—Privy Council, Practice of.**—Upon a question of fact depending on the effect to be given to parol evidence, and the credit due to witnesses, where the Courts in India have all concurred in one opinion, the Judicial Committee will upset the finding, only after it is clearly shown that the Courts were in error. The finding of the Courts in India—first, that there was not sufficient evidence to establish an alleged Mahomedan marriage; and secondly, that the evidence in support of an alleged will was unsatisfactory—were upheld on appeal. **MUSSUMAT JARIUTOOL BUTOOL v. MUSSUMAT HOSEINEE BEGUM, 10 W.R. 10, P.C.,—11 M.I.A. 194.**

**(10)—Witness — Credibility — Deposition. Heading of.**—Where witnesses, who cannot be

**Evidence—continued.****—11.—Miscellaneous—continued.**

regarded as independent witnesses, are not shaken in cross-examination and are believed by the Judge before whom they are examined as witnesses, their evidence should not be rejected on mere suspicion, especially where the story told by them is not in itself improbable. The description of a witness in the heading of the deposition is no part of the deposition proper, that is, no part of the evidence given by the witness on solemn affirmation. **MUSST. MAQBOOLAN v. AHMED HUSAIN, 6 Bom. L.R. 233 = 26 A. 108 = 8 C.W.N. 241, P.C. = 31 I.A. 38 = 8 Sar 582.**

**(11)—Witness — Appreciation of.**—To disbelieve a witness because his evidence tells in favour of the party who has called and examined him and against the adverse party is to beg the question in dispute. **BAI GULABBAI v. SHRI DATGARJI, 9 Bom. L.R. 393.**

**(12)—Non-production of evidence—Effect.**—Dismissal for non-production of evidence has the same effect as dismissal founded on evidence, in barring a subsequent suit as *res judicata*. **RAMA RAO v. SURIYA RAO, 1 M. 84.**

**(13)—Plaintiffs summoned by defendant — Absence of plaintiff — Summons not legal — Adverse inference.**—Where the plaintiff, who was summoned by the other side, absented himself, the Court was perfectly justified in taking the circumstance of his neglect to attend into consideration when deciding the case upon the facts. **BONOMALEE CHURN MYTEE v. SHEIKH HAFIZUDEEN, 13 B.L.R. 247, Note = 12 W.R. 317.**

**(14)—Defendant refusing to give evidence—Decree for plaintiff.**—Where a defendant, though required by the plaintiff, persistently declines to give evidence, a Court is warranted in decreeing the plaintiff's case. **SREEMUTTY BURODA MOYEE DOSSEE v. RUGHOONATH CHUCKERBUTTY, 16 W.R. 293.**

**(15)—Counsel's address—Notes taken by the Judge.**—The notes taken by the Judge of Counsel's address are good evidence that when the counsel was addressing the Judge he did say what the Judge has noted. But if there is any real contention as to the correctness of the notes, it would be open to the other side to prove that they were not correct. **R. D. SETHNA v. MIRZA MAHOMED SHIRAZI, 9 Bom. L.R. 1042.**

**(16)—Evidence taken down from witnesses, manner in which Court should record—Procedure.**—It is incumbent on a Judge, even if he does not take down the whole of the evidence in his own hand-writing, to record every material answer made by the witness in the examination-in-chief, the cross-examination, and in reply to questions put by the Court. The substance of these answers should not be taken down in the columns of statement, but should be written down, in consecutive sentences. The Court should also distinguish between the evidence given in answer to the



**Evidence—continued.****—11.—Miscellaneous—continued.**

questions of the Vakil who conducts the examination-in-chief and that given in answer to the cross-examination. *SHAH SUHEEOODEEN v. LUCHMEEPUT DOOGUR*, 6 W.R. 112.

(17)—*Evidence—Expression* “ought not to be accepted” used in judgment, to be construed differently with regard to oral or documentary evidence.—The words “ought not to be accepted” when used by a Court with reference to written documents and to parol evidence are capable of different meanings. With regard to documentary evidence, the words may mean that it is not legally admissible and as to parol evidence that it is not worthy of credit. *KHEMAN KURRE CHOWDHURANEE v. BEER CHUNDER JOOBRAJ*, 6 W.R. 56.

(18)—“Goods,” *Evidence as to special meaning of.*—Evidence of a special meaning of the word “goods” rejected. *JADU RAI v. BHUBOTARAN NUNDY*, 17 C. 173.

(19)—*Silence—Inference.*—In resting on silence as to a particular matter as a legitimate ground of inference regard must be had to the circumstances; it must be considered whether there was any occasion for words, and any reasonable explanation of the silence. *CHABILDAS v. DAYAL MOWJI*, 6 Bom. L.R. 557.

(20)—*Document not produced or proved not evidence.*—Where a document has not been produced or proved, it cannot be treated as evidence in the suit. *NAMA v. RADHU*, 4 C.P. L.R. 113.

(21)—*Construction of document—Evidence of subsequent conduct—Evidence Act, s. 94.*—Evidence of the conduct of parties to a document subsequent to its execution, is not admissible for the purpose of explaining its meaning. *CHANDRA DAI v. SEWADAT PANDEY*, A.W. N. 1882, 54.

(22)—*Evidence—Copy of document—No endorsement of the nature required under s. 141, Civ. Pro. Code—Absence of original not accounted for—Copy not proved to have been admitted—Admissibility in evidence—Practice.*—Where a copy of a document was tendered before the Munsiff and was endorsed with the words “file with the record,” but contained no endorsement of the nature required by s. 141 of the Civ. Pro. Code, held that in the absence of any evidence to show that it was proved or admitted or that the absence of the original was accounted for, it was not admissible in evidence, and that no report could be called for as to its having been proved or admitted in the original Court. *RAMKHEILAWAN SINGH v. BUJHARAT RAI*, A.W.N. 1888, 22.

(23)—*Evidence—Proof of document—Comparison of signature.*—In every case of proof of handwriting by comparison, the genuineness of the writing with which the comparison is made must first be shown. Comparison of the signature to a bond with a document not before the Court or with one whose authenticity is disputed is illegal. *GURUMURTHI NAYUDU v. PAPPANAYUDU*, 1 M.H.C. 164.

**Evidence—continued.****—11.—Miscellaneous—continued.**

(24)—*Statement of party—Evidence—Contents of written instrument.*—The statement of a party to a suit is admissible original evidence against himself to prove the contents of a written instrument. *MUTTUKARUPPA KAUNDAN v. RAMA PILLAI*, 3 M.H.C. 158. [Expl., 6 M.H.C. 245; R., 12 B. 443, 13 M. 308; D., 2 M. 208.]

(25)—*Documentary evidence—Refusal to admit evidence—Supreme Court, Calcutta—Jury and Judge—New trial.*—At a trial, certain documents contained in the schedule to the answer of the defendants to a Bill of Discovery filed in Equity were read as evidence for the plaintiff, but the Court refused to allow the defendants to read the answer to which the schedule was annexed. Held, that as the Supreme Court at Calcutta, being jurymen as well as Judges, had refused to allow the answer to be read, on the ground that such answer contained nothing material to the issue which could influence their verdict, a new trial on the ground of such refusal would not be granted. *THE EAST INDIA COMPANY v. ODITCHURN PAUL*, 5 M.I.A. 43.

(26)—*Tender of documentary evidence after closing case, but before the opposite party begins his case—Exercise of judicial discretion.*—Where plaintiff tendered in evidence a judgment of the year 1836 in the Persian language, which was filed with the plaint, after he had closed his case, but before the defendant began his case, a Court, although it would be technically right in refusing to receive his judgment in evidence as “too late,” it would not be exercising a sound judicial discretion in so doing. *BARODA PRASAD CHATTERJEE v. MADHAB CHANDRA GHOSE*, 33 C. 1343.

(27)—*Date of decision.*—The date borne by a decision is not conclusive evidence of the date on which it was pronounced according to law. *GOPAL v. KRISHNA*, 3 Bom. L.R. 420.

(28)—*Objection to evidence when to be made.*—Objection to evidence must be made before its reception, but not afterwards. *ANDERSON v. TAYLOR*, 70 P.R. 1866.

(29)—*Unrebutted statement on oath—Evidence—Objection on appeal.*—No objection can be raised on appeal as against the unrebutted statement on oath of a plaintiff, which is some evidence of an alleged fact. *RAM SHEWUK ROY v. SHEO GOBIND SAHOO*, 8 W.R. 519.

(30)—*Admissibility of evidence—Mode of proof—Objection, Time for making.*—If a document is inadmissible in evidence, objection can be taken to its admissibility at any stage of the case, even if it has been duly proved. But an objection as to the mode of proof of a document is one which should be taken at the time when the document is attempted to be put in. *MADHABI SUNDARI DASSYA v. GAGANENDRA NATH TAGORE*, 9 C.W.N. 111. (23 C. 335. D.)



**Evidence—continued.****—11.—Miscellaneous—continued.**

(31)—*Material witness of plaintiff—Examination of, during defendant's absence—Counsel also not present—Irregularity—Objection to irregularity.*—The examination of a material witness of the plaintiff in the absence of the defendant, his Vakeel having been removed and and no other Vakeel then acting for him, is such an irregularity, that if objected to at the proper time would be fatal to the reception of such evidence. But where no objection was urged during the trial, or until an appeal was interposed, the Judicial Committee held that the objection came too late, and could not be sustained, as, notwithstanding such irregularity and miscarriage, that fact did not taint the whole proceeding so as to prevent the plaintiff recovering upon the other evidence, which was sufficient to establish his case. **RAJAH BOMMA-RAUZE BAHADUR v. RANGASAMY MUDALI**, 6 M.I.A. 232.

(32)—*Second appeal—Sufficiency of evidence to support given—Conclusion of fact—Question of law.*—It is a question of law for the High Court to determine on second appeal, whether there is evidence before it, on which a Court could properly arrive at any given conclusion of fact. **BIDHUMUKHIDABEA CHOWDHRAIN v. KEFY-UTULLAH**, 12 C. 93. [F., L.B.R. 1893-1900, 543.]

(33)—*Appeal—Additional evidence—Admissibility.*—Fresh evidence will not be allowed to be adduced in appeal, which was not tendered in the lower Court, on the ground that it was discovered after the filing of the appeal. **GUROMURTHI CHETTY v. ARCHIBOLD READ**, 9 Ind. Cas. 281=12 Cr. L.J. 40=9 M.L.T. 323. (31 M. 114, 3 M.L.T. 308, R.)

(34)—*Appeal—Production of additional evidence—S. 568, Civ. Pro. Code, 1882.*—Circumstances under which an appellate Court will not allow the production of additional evidence, at the hearing of an appeal, under S. 568 of the Code, 1882. **NADIAR CHAND SINGH v. CHUNDER SIKHUR SADHU**, 15 C. 768.

(35)—*Evidence—Trying different suits together—Duty of appellate Courts.*—A sued B for rent, making C a defendant; the suit was dismissed and A appealed. Then C sued B for rent; A intervened and was made a defendant; a decree was passed in favour of C and A again appealed. On appeal, the Subordinate Judge tried both suits on the same evidence, though there was evidence in the second case which was not before the lower Court on the hearing of the first. *Held*, that he should have recorded his reasons for doing so; but that his judgment could not be set aside on that ground, it not appearing that the party taking the objection had been prejudiced or that he had raised it before the Subordinate Judge. **PRAN NATH SANDYAL v. RAMKOOMAR SANDYAL**, 2 C.L.R. 33.

(36)—*Evidence taken in a particular way—Jurisdiction of the Court.*—Parties, if so minded, may ordinarily agree that evidence

**Evidence—continued.****—11.—Miscellaneous—continued.**

shall be taken in a particular way, and it is common experience that parties do agree that evidence in one suit shall be treated as evidence in another. That is not a matter which can be said to affect the jurisdiction of the Court. It is merely that parties allow certain materials to be used as evidence which, apart from their consent, cannot be used. **RAMAYA v. DEVAPPA**, 7 Bom. L.R. 642=30 B. 109.

(37)—*Improper admission of documents by Court below—Practice of Judicial Committee—Civ. Pro. Code (Act VIII of 1859), s. 39—Practice—Concurrent findings.*—The Judicial Committee will not determine an appeal against a decree upon the mere fact that some evidence has been improperly admitted by the Court below. It is the rule of this tribunal to do substantial justice between the parties, and to see if there is sufficient evidence on the whole record to justify the conclusion at which the Court below has arrived. According to the true construction of s. 39 of Act VIII of 1859, it is not fatal to the admission of documentary evidence that it is brought in subsequent to the filing of the plaint, if it appears to have been received with the sanction of the Court. The Judicial Committee will not, as a rule, disturb the concurrent decision of both the Courts below upon a question of fact, unless it very clearly appears that there has been some miscarriage of justice, some mistrial or that the conclusion is very plainly erroneous. **GOSAIN TOTA RAM v. RAJA RUKINIBALLAB**, 3 B.L.R. P.C., 34=12 W.R. 32, P.C.=13 M.I.A. 77. [F., 8 M. 373; R., 6 C.L.J. 621, 13 C.W.N. 797=10 C.L.J. 33=2 Ind. Cas. 946.]

(38)—*Act III of 1843—Question of admissibility of special appeal—Decision of single Judge of Sudder Court—Finality of decision so far as regards Sudder Court—Maintainability of appeal to Privy Council—Reg. IV of 1827, s. 27, cl. 1—Court when bound to ascertain existence of family usage.*—By Act III of 1843, the decision of a single Judge of the Sudder Court, as to the admissibility of a special appeal, has been declared final; the Act, however, has rendered it final only so far as the Sudder Court is concerned, and it is a wholly different question whether the Act could extend to take away the appeal to the Privy Council. It was contended in this case that it was the duty of the Courts, under the provisions of Regulation IV of 1827, s. 27, cl. 1, to ascertain a rule or usage by examining persons versed in the laws or usages governing the parties, but the Judicial Committee held that the Regulation imposed no such obligation upon the Judges, in the absence of any allegation by the parties of any rule or usage as to which reasonable doubt existed, as also where the parties had waived the right to the resort pointed out by the Regulation. **MODEE KOIKHOOSROW HORMUZJEE v. COVERBAEE**, 4 W.R. P.C., 94=6 M.I.A. 448.



**Evidence—continued.****—11.—Miscellaneous—continued.**

(39)—*Custom, Use of books of history in proof of.*—For the purpose of the proof of local customs, Courts should not rely on books of history (not forming exhibits in the case) without first calling the attention of the parties to them and hearing them as to whether the procedure prescribed therein is an incident of the usage as it obtained in their locality. *VALLABHA v. MADUSUDANAN*, 12 M. 495.

(40)—*Evidence Act, ss. 57, 87—Book of History in proof of custom*—A Court is justified in referring to books published long before the suit, in which the usage of the institution and its history are described, both being matters relevant to the suit. *AUGUSTINE v. MEDLYCOTT*, 15 M. 241.

(41)—*Practice—Privy Council—Reversal of judgment of High Court on facts—Local inquiry—Interference in appeal.*—In a case in which the position of certain *chur* lands in the Brahmopootra was in issue, the Privy Council on a consideration of the facts, reversed the judgment of the High Court and restored the decision of the Court of first instance which was founded upon a long and careful local investigation conducted by an Ameen who visited the spot, and whose integrity was unimpeached. An appellate Court in India ought not to interfere with the result of a local inquiry except upon clearly defined and sufficient grounds and such grounds must be expressed in the judgment. *RANI SERATSUNDARI DEBI v. PRASANNAKUMAR TAGORE*, 6 B.L.R. 677, P.C. = 15 W.R. 20, P.C. = 13 M.I.A. 607. [*F.*, 15 W.R. 423; *D.*, 17 W.R. 472.]

(42)—*Commission to examine witness—Return—Letter of Judge—Evidence.*—A letter from a Judge cannot be given in evidence to show that a formal return made by him on a commission to examine witnesses was wrong. *LAND MORTGAGE BANK OF INDIA v. SYUD MUNSUB ALI*, 1 C.L.R. 239.

(43)—*Facts observed by Judge during local investigation but not proved, Judgment based upon.*—The result of an enquiry made by a Munsiff on the occasion of a local inspection by him, in a suit respecting boundaries, though it may not be evidence according to the Evidence Act, may be taken into consideration by the Court. The result of such an investigation should be placed upon paper. *JOY COOMAR v. BUNDHOO LALL*, 9 C. 363 = 12 C.L.R. 490. [*F.*, 1 C.W.N. 682, 33 C. 133.]

(44)—*S. 3, Evidence Act—"Proved"—Information derived from local investigation by Judge.*—The information derived from a local investigation by a Judge, though not evidence, as defined in the Evidence Act, is a matter which he can take into his consideration, in order to determine whether a fact is "proved" within the meaning of the Act. *DWARKA NATH SARDAR v. PROSUNNO KUMAR HAJRA*, 1 C.W.N. 682. (9 C. 363, R.) [*R.*, 33 C. 133.]

**Evidence—continued.****—11.—Miscellaneous—continued.**

(45)—*Evidence on commission, Use of.*—Until evidence taken on commission is tendered and has been admitted as evidence in the suit, neither party has the right to make use of it. *KUSUM KUMARI ROY v. SATYA RANJAN DAS*, 30 C. 999 = 7 C.W.N. 784. (3 C.W.N. 239, Note, Diss.) [*Com.*, 13 C.W.N. 525 = 26 C. 566; *D.*, 35 C. 28.]

(46)—*Report of Local Commissioner—Local Commissioner appointed by incompetent Court.*—Where the decree passed by the District Judge on appeal is set aside as passed without jurisdiction, and the appeal is decided by the Divisional Judge acting on the report of a local Commissioner appointed by the District Judge, held, that the proceedings of the local Commissioner could not be treated as evidence for purposes of decision as the authority of the local Commissioner proceeded from an incompetent Court. *NUMDAR v. NAIM*, 40 P.L.R. 1902.

(47)—*Conspiracy to give false evidence.*—The giving of false evidence, no matter how malicious and *mala fide* it may be, furnishes no right to sue in a Civil Court, the only remedy being a prosecution for perjury. The mere fact that the giving of the false evidence is alleged to be the result of a conspiracy to obtain the conviction of a person of a criminal offence does not make any difference. Conspiracy to do certain acts gives a right of action only where the acts agreed to be done, and in fact done, would, had they been without preconcert, have involved a civil injury to the plaintiff. A mere conspiracy to injure a man, without an overt act resulting in the injury, does not furnish a cause of action. *TEMPLETON v. LAURIE*, 2 Bom. L.R. 623 = 25 B. 230.

(48)—*Dacoity—Damages—Suit against approver—Confession and evidence at criminal trial if admissible—Crim. Pro. Code (Act V of 1898), s. 339—Sessions Court's finding if binds Civil Court—Civil suit if barred—Merger of tort in felony, Rule of—Applicability in India—Civ. Pro. Code (Act XIV of 1882), s. 11.*—Held, that the confession and sworn evidence of an approver in a criminal trial for dacoity are admissible in evidence against him in a suit for damages brought against him by the complainant for having instigated the dacoity. Held, further that the Civil Court could act upon such statements, even though the Sessions Judge did not think it safe to convict the accused upon such statements. "The conditions for receiving and acting on evidence in Civil Courts are different to those governing the procedure of Criminal Courts. Specially is this the case with respect to the statements of accused persons and accomplices." Having regard to the provisions of s. 11 of the Civ. Pro. Code, the fact that the criminal trial had not resulted in a conviction of the accused was no bar to the institution of the civil suit against him. *KESHAB NATH BHATTACHARYA v. MANIRUDDIN SARKAR*, 13 C.W.N. 501 = 4 Ind. Cas. 523.



**Evidence—continued.****—11.—Miscellaneous—continued.**

(49)—*Defamation—Defamatory statement in affidavit—Privilege—Suit for damages—Maintainability.*—There is no difference between evidence given in the box and the evidence on affidavit, in that they are both absolutely privileged, and no suit for damages will lie in respect of evidence given therein. *ADAPALA ADIVARAMMA v. RABALA RAMACHANDRA REDDY*, 6 Ind Cas. 309=8 M.L.T. 53. (11 B. L.R. 318, 17 W.R. 283, 23 W.R. 931, F.; 11 M. 477, 1 Weir 561, R.)

(50)—*Documents—Presumption—Forgery.*—Although, in Indian proceedings, the presumption in favour of the genuineness of documentary evidence is very weak, yet there is no presumption in favour of forgery. Thus, when a long series of documents are produced, showing a reasonable origin of title nearly a century ago, a regular deduction of that title, and a possession consistent with it, the evidence of intrinsic improbability must be very strong to counterbalance the weight of such evidence. *WISE v. BHOOBUN MOYEE DEBIA CHOWDRAINEE*, 10 M.I.A. 165.

(51)—*Document, Unregistered—Suspicion of forgery.*—Instruments which are proved by all the attesting witnesses, and against which there is no evidence on the other side, ought not to be set aside and treated as worth nothing on a mere possible suspicion of perjury and forgery. *KALICHANDRA CHOWDHRY v. SHIB CHANDRA BHADURI*, 6 B.L.R. 501, P.C.=15 W.R., P.C. 12.

(52)—*Forgery—Act IV of 1840.*—Judgment of the High Court reversing a decision of the lower Court, which held a deed to be a forgery, upheld on a consideration of the evidence in the case. Where the Court of first instance doubted the authority of a deed, it being written on two pieces of stamped paper of different dates, *held*, under the circumstances, not to be a proper deduction. *KURALI PRASAD MISSER v. ANANTARAM HAJRA*, 8 B.L.R. 490, P.C.=16 W.R., P.C., 16.

(53)—*Fabricated written evidence produced by party, Court not relieved from duty of examining entire evidence by reason of.*—The use of fabricated written evidence by a party, however clearly established, does not relieve the Court from the duty of examining the whole of the evidence adduced on both sides, and of deciding according to the truth the matters in issue. The person using such evidence may have brought himself within the penalties of the Criminal law, but the Court should not, in a Civil suit, inflict a punishment under the name of a presumption. *GORIBOOLA GAZEE v. GOOROO DASS ROY*, 2 W.R., Act X, Rul. 99. [R., 3 W.R., Act X, Rul. 149.]

(54)—*Appeal to Privy Council on question of fact—Concurrent finding of two Courts in India—Practice.*—Where an appellant before the Privy Council asks for a reversal of the decision of two Courts in India upon a mere question of fact,

**Evidence—continued.****—11.—Miscellaneous—continued.**

that fact being the genuineness or forgery of an instrument which is the foundation of the action in which the appeal is brought, the case must be very strong to justify the Privy Council in reversing the decision of the Courts below, especially when the Judges in the Courts below had formed their opinions mainly on an inspection of the document which the Privy Council had no opportunity of seeing. *CHEYT RAM v. CHOWDRY NOWBUT RAM*, 5 W.R., P.C. 3=7 M.I.A. 207.

(55)—*Suit for cancellation of mortgage-deed—Denial of attestation—Presumption as to execution.*—Plaintiff sued for the cancellation of a deed of mortgage, which the defendants alleged had been executed by him. The plaintiff denied the execution of the document by him and alleged that it was a forgery. *Held*, that it was on the defendants to establish the genuineness of the mortgage; and as the two witnesses called by them, and whose names appeared up on the deed, distinctly declared that the signatures attached to it as theirs were not in their hand-writing, the defendant's case broke down. *Held*, further, that it was incompetent to the Judge to take upon himself to put all the oral evidence aside and to decide the issue upon inferences of his own drawn from personal inspection of the mortgage-deed. The defendants were bound by the statements of the witnesses they had elected to put in the box, and they should not have been discredited simply because their evidence turned out unfavourable to the side on which they had been summoned. *HARDIAL v. RAM DAS*, A.W.N. 1884, 19.

(56)—*Issues—Evidence led upon certain issues in one case—Use of evidence in another case—Practice.*—When evidence has been given in one case upon the issues raised in that case, examination-in-chief and cross-examination alike having been directed to those issues, nothing can be more dangerous than to take that evidence and apply it in another case in which other issues arise. Inferences drawn from that evidence bearing upon these latter issues cannot but be regarded with much misgiving. *In re LUBECK*, 7 Bom. L.R. 894.

(57)—*Finding by Criminal Court—Evidence in Civil Court on same point.*—The plaintiff sued the defendant for damages on the ground that the defendant had committed a personal assault upon him, and so had caused injury to his reputation. The plaintiff had previously taken proceedings in the Criminal Court against the defendant, who had been convicted and fined for the assault complained of. The first Court declined to receive the conviction in the Criminal Court as evidence of the assault having been committed and found that no assault had been proved and accordingly dismissed the suit. It was contended for the plaintiff that the first Court had no jurisdiction to try the *factum* of the assault and that that *factum* had been established by the judgment of the



*Evidence—continued.**—11.—Miscellaneous—continued.*

Criminal Court. *Held*, that the evidence of assault taken in the Criminal Court was no evidence on which the Judge of the Civil Court was in this case entitled to rely, that he had jurisdiction to determine the fact of assault and was bound therefore to take the evidence on record in his own Court on either side, and come to a determination upon that evidence. *ALI BUKSH DOCTOR v. SHEIK SAMIRUD-DIN*, 4 B.L.R., A.C., 31=12 W.R. 477.

(58)—*Evidence of Judge's opinion of credit of witness, found in previous case—Admissibility.*—Where a witness is examined in a suit, it is not permissible to admit evidence as to the particular estimate, formed by a Judge in a previous suit, of the credit to be attached to his testimony. *In the matter of PASUMARTY JUGGAPPA*, 4 C.W.N. 684.

(59)—*By consent—Evidence in one case imported into another.*—When the parties to a suit in order to save delay or expense or any other reason refrain from calling persons who are alive and agree or do not object to the admission of evidence given by them in some former proceeding, the evidence is not strictly admissible but if the Court of first instance allow this to be done the Court must accept the evidence and it is too late for it to take any objection to the procedure. *LAKSHMAN v. AMRIT*, 2 Bom. L.R. 386=24 B. 591.

(60)—*Proceeding between other parties—Act IV case—Evidence.*—A proceeding in an Act IV case between entirely different parties is no evidence in a civil suit. *JOY PROKASH SINGH v. AMEER ALI*, 9 W.R. 91.

(61)—*'Ex parte' case—Record of evidence—New trial—Admissibility of evidence.*—Case where it was held that the evidence recorded in an *ex parte* case is not admissible in a new trial. *ROSUL SINGH v. KISHOREE LALL*, 8 W.R. 499.

(62)—*Evidence—Admissibility of judgment of acquittal in suit for damages for malicious prosecution.*—In a suit for damages for malicious prosecution, the order of the Criminal Court acquitting the plaintiff is admissible in evidence. Although the reasonings in the judgment and the conclusions drawn from them are not binding or conclusive, yet, the judgment may be looked into for the purpose of seeing what the circumstances were which culminated in the acquittal. *RAI JUNG BAHADUR v. RAI GUDOR SAHOY*, 1 C.W.N. 537.

(63)—*Statement of age given by the plaintiff in his deposition in a previous suit, importance of.*—In dealing with the statement of the age given by the plaintiff, in the heading of his deposition in a previous suit, it was remarked by the Privy Council that such a statement must have considerable importance attached to it, if the party who made it, wishes to get rid of it in a subsequent litigation and claimed privileges of minority but does not explain how

*Evidence—continued.**—11.—Miscellaneous—continued.*

it was that he allowed his age to be put down as if he were a major. *MUNGNIRAM MARWARI v. GURSHAI NAND*, 17 C. 347=16 I.A. 193, P.C.=5 Sar. 463. [R., 26 B. 109=3 Bom. L. R. 565.]

(64)—*Recital in deed, Evidentiary value of.*—A recital in a deed or other instrument is in some cases conclusive, and in all cases evidence, as against the parties who make it; and it is of more or less weight, or more or less conclusive against them according to circumstances. It is a statement deliberately made by those parties, which, like any other statement, is always evidence against the persons who make it. But it is no more evidence as against third persons, than any other statement would be. *BRAJESHWARE PESHAKER v. BUDHANUDDI*, 6 C. 268=7 C.L.R. 6. (3 M.I.A. 347, *Expl.*; 7 W.R. 441, *doubted*). [*Appl.*, 17 A. 428=A.W.N. 1895, 93; R., 1 C.P.L.R. 59, 13 C.P.L.R. 1; R. and *Expl.*, 5 C.W.N. 402, 5 O.C. 18.]

(65)—*Recitals, Effect of.*—Recitals in an instrument may be conclusive and are always evidence against the parties who make them, but they are not evidence against third parties. *MANOHAR SINGH v. SUMIRTA KUAR*, 17 A. 428=A.W.N. 1895, 93. (6 C. 268, R.) [R., 5 O.C. 18, 5 C.L.J. 653, 13 C.P.L.R. 1.]

(66)—*Recital in deed, Evidentiary value of.*—A mere recital in a deed will be no evidence sufficient to establish the existence of a legal necessity for contracting a debt binding on a minor or a member of a joint family—*Per Prinsep, J. SIKHER CHUND v. DULPUTTY SINGH*, 5 C. 363=5 C.L.R. 374.

(67)—*Statement in will—Not evidence as to value of property.*—A statement in a will is not proper evidence of the value of the testator's property. *LAKSHMAN DADA NAIK v. RAMACHANDRA DADA NAIK*, 1 B. 561. [R., 5 B. 548, 18 B. 389.]

(68)—*Will—Recital of power of attorney—Evidence of contents.*—The recital of a power of attorney in a will, affecting to transmit the authority conferred by it, is not sufficient evidence of the contents of such an instrument in the absence of proof of its loss or destruction. *BAMANJEE MUNCHERJEE v. SYED HOSSEIN ABDULLAH*, 5 W.R., P.C., 61=1 M.I.A. 494.

(69)—*Document inadmissible for want of stamp—Original cause of action—Suit on unstamped document—When maintainable—Vendor's lien—Enforcibility in later suit.*—Where a document, which cannot be used in evidence, is executed to evidence a complete pre-existing right, a suit may be maintained on the original right itself, unless it be shown that it was intended to merge the right in the document; but where, at the time that an obligation comes into existence, a document is executed as the evidence and record of that obligation, a suit to enforce it can be only on the document itself. (10 M. 94, 29 M. 111, 7 C. 256. R.) Where A



*Evidence—continued.***—11.—Miscellaneous—continued.**

sold land to B, obtained an unstamped promissory note from B for the purchase money and sued on such note for the recovery of the money due to him, and where in such suit A failed to show that the promissory note was taken simply to evidence a pre-existing and completed right, *held*, that A's suit ought to be dismissed. *Quære*.—Whether A would still be entitled to sue for enforcement of his lien on the property sold? **KODALI MALLAYYA v. TANGOPPALA RAMAYYA, 21 M.L.J. 462.**

(70)—*Evidence—Sale of immoveable property—Payment of consideration—Statements contained in deed and made before Registrar—Burden of proof—Hindu Law—Sale by father—Suit to enforce sale against son.*—Although an admission contained in a deed of sale or made before the Registrar, that the consideration has been received by the vendor is *prima facie* evidence against the person making it, it raises only a rebuttable presumption, the weight of which varies with the special circumstances of each case. Where such an admission contained in a deed of sale of immoveable property executed by a member of a joint Hindu family, was repeated by the vendor before the Registrar, was used after his death in a suit for possession brought by the vendees against his son, who claimed not under him but by a title which, under the Hindu Law, came from the grandfather in ancestral property, and who, at the date of the sale, was only seven years of age; and where the plaintiff never attempted to obtain possession during the vendor's life-time, nor sued for possession until one day before the expiration of the period of limitation,—*held* that, under the circumstances, it rested upon the plaintiffs to prove payment of the consideration of the sale. (L.R. 3 I.A. 85, R.) *Held*, also, that, there being no allegation that the deed of sale was executed in satisfaction of any ancestral debt or for legal necessity, it was for the plaintiffs to prove that they had made proper inquiries to ascertain whether the alienation of ancestral property was justified by the Hindu Law. **SHEORATAN v. ABDUL KARIM, A.W.N. 1889, 142. (8 A. 279, 9 A. 493, F.; 15 C. 717, D.)**

(71)—*Acknowledgment of debt contained in unregistered document—Admissibility of document as evidence of acknowledgment.*—When an unregistered document which is compulsorily registrable contains an acknowledgment of a debt, it is admissible as evidence to prove such acknowledgment. **KHUSHOLO v. BEHARI LAL, 3 A. 523.**

(72)—*Compulsorily registered mortgage-deed—Subsequent registered receipt for further advance and admitting consideration of the mortgage-deed—Onus probandi of non-receipt of the consideration.*—On 5th April, 1896, A executed a mortgage-deed of Rs. 4,250 in favour of H. On 19th October, 1896, it was compulsorily registered by the Registrar. One of its stipulations was that H could not sue for his

*Evidence—continued.***—11.—Miscellaneous—continued.**

money for six years. A gave notice that he would waive the condition of six years and that H could sue at once. H replied that A could go to Court, if he liked, to which A retorted that he owed no money to H. In 1898, a reconciliation was effected and A took Rs. 250 more from H and executed a registered receipt, containing a full and categorical admission of the receipt of Rs. 4,250, previously, and Rs. 250 at the time of writing. *Held* that, under the above circumstances, the *onus* of proving that A did not receive any money lay very heavily upon him and as he failed to discharge the *onus*, H was entitled to succeed in his claim. **HAFIZ HAMID YAR KHAN v. HAFIZ ALLA BAKHSI KHAN, 8 P.W.R. 1907.**

(73)—*Unregistered receipt, Proof of payment receipted in—Admissibility of receipt—Extinction of mortgage-right.*—Even where an unregistered receipt passed on payment of money purports, in the result, to extinguish a mortgage right, the Court should not refuse to receive it in evidence of the payment therein recited, oral evidence as to the fact of such payment being also admissible. **APPAMMA NAYURALU v. RAMANNA, 23 M. 92=9 M.L.J. 124.**

(74)—*Pre-emption—Unregistered receipt for purchase money—Evidence, Admissibility of.*—In a suit to enforce a right of pre-emption, the defendants produced a receipt to show that the full amount of consideration money recited in the deed of sale had been paid by the vendee to the vendor, which the lower Court did not admit in evidence, as it was unregistered. *Held*, that the instrument creating the right, title, and interest of the vendee was the deed of sale, and the receipt was merely a subordinate and subsidiary document which of itself created no such interest. The lower appellate Court should have taken the receipt into consideration and determined its genuineness and validity one way or the other. **ISHRI DAS v. RAM LAL, A.W.N. 1881, 2.**

(75)—*Wajib-ul-arz, Evidentiary value of.*—A *wajib-ul-arz* prepared and attested in the form and manner prescribed by the Board of Revenue, is *prima facie* evidence of the existence of any custom of pre-emption which it records, open to be rebutted by any one disputing the custom; and when it records a right of pre-emption by contract between the share-holders, it is evidence of a contract binding all the parties to it and their representatives, and there will be a presumption that all the share-holders assented to the making of the entry, and, in consequence, were assenting parties to the contract of which it is evidence, and it will be for those repudiating the contract to rebut this presumption. **ISRI SINGH v. GANGA, 2 A. 876, F.B. [F., A.W.N. 1881, 114, A.W.N. 1885, 189; Appr., 8 A. 434, 12 A. 234, F.B.; R., 7 A. 720, A.W.N. 1901, 29, 25 A. 90, 26 A. 549=1 A.L.J. 278.]**

(76 & 77)—*Enjoyment of portion—Evidence of possession of whole—Enjoyment of produce—Ownership.*—When a tract of land with a



**Evidence—continued.****—11.—Miscellaneous—continued.**

defined boundary has been throughout claimed by a person as owner, and acts of ownership have been done upon various portions of it, such acts of enjoyment may be accepted as evidence of the possession of the whole. (3 B. 452, D.) The enjoyment of any right of ownership over the soil, whether it be the cutting of timber or of turf, or the gathering of produce, is *prima facie* proof of ownership of the soil, and when a Court finds that there had been such enjoyment of the forest as proved a title to the profits, it is logically bound to find a title established to the soil, especially when the enjoyment has throughout been accompanied with an assertion of such ownership. **SIVA-SUBRAMANYA v. SECRETARY OF STATE FOR INDIA**, 9 M. 285. [R., 20 M. 299.]

(78)—*Suit in ejectment—Onus—Possession Dispossession.*—Decrees were made in the year 1816, in suits respecting disputed boundaries of certain mouzabs in two zemindaries, and the boundary line determined. In 1845, a suit was brought by the representatives of one of the parties in the above suits to recover land alleged to be part of one of these mouzabs, which land, it was admitted by the plaintiff, the defendants had been in possession of since the year 1834. It was pleaded in defence, first, that the land claimed was within the boundary declared by the decrees of 1816 to belong to the defendants; and, secondly, that the plaintiff, or those under whom he claimed, had been out of possession for upwards of twelve years, and that the cause of action was, consequently, barred by Beng. Reg. III of 1793, s. 16. In such circumstances, it was *held* that the issue of possession was the first point to be considered, and that such issue was wholly independent of the question of boundary. *Held*, further, that as the plaintiff sought to disturb the possession of the defendants admitted by him to have existed for eleven years, but which the defendants alleged was a much longer period, the *onus probandi* was upon the plaintiff to remove the bar to the action imposed by Ben. Reg. III of 1793, s. 16, by satisfactory proof that the cause of action accrued to him on a dispossession twelve years before the commencement of the suit, and that he, or some person through whom he claimed, was in possession during that period; and that no proof of anterior title in his favour, such as would be involved in the boundary question, could relieve him from this *onus*, or shift the *onus* on the defendants by compelling them to prove the time and manner of possession. Although the evidence of witnesses for the defendants as to possession is of no better character than those produced by the plaintiff as to dispossession, yet it lies on the plaintiff to make out his case, and as the probabilities were against dispossession, it was held by the Judicial Committee, affirming the judgment of the *Sudder Dewanny Adawalt*, that the plaintiff had failed to prove the fact of the dispossession of the defendants, which was

**Evidence—continued.****—11.—Miscellaneous—continued.**

necessary to maintain the suit. **MAHARAJAH KOONWAR SINGH v. BABOO NUND LOLL**, 1 W.R., P.C. 51=8 M.I.A. 199. [F., 2 W.R. 65, 75, 7 W.R. 212, 14 W.R. 135, 15 W.R. 43, 9 C. 744, F.B.=12 C.L.R. 257; R., 14 W.R. 51, 4 C.L.R. 390, 9 M. 175, 7 C. 225=8 C.L.R. 126, 6 B. 508, 9 C.W.N. 111, 7 C.L.J. 414=12 C.W.N. 272=3 M.L.J. 212; D., 15 W.R. 35, 6 C. 725=8 C.L.R. 90.]

(79)—*Practice—Concurrent findings—Privy Council—Evidence—Undisturbed possession—Registry in Government books.*—The Privy Council followed in this case the usual course of confirming the concurrent judgments of the Courts below on questions of fact, and stated that, even if they had felt some doubts in it, they would have hesitated long when they were asked to continue the litigation, and send the matter again for trial in India. Where the name of a person or his ancestor has always been entered in the Government books, and it is found that he has always paid the Government assessment in respect of certain villages, though that may not be evidence of title, it is very strong evidence of possession. **DEVAJI GAYAJI v. GODABHAI GODBHAI**, 2 B.L.R. P.C., 85=11 W.R. 35, P.C. [F., 17 W.R. 346; R., 5 Bom. L.R. 956.]

(80)—*Suit for declaration of exclusive possession—No proof of possession—Decree on evidence*—Where a plaintiff in a suit for declaration of exclusive possession fails to prove the same, the Court can award him a decree as to title according to the evidence on record and can even allow the amendment of the plaint and decree exclusive possession if required. **BUTA v. SATAR BAKSH**, 67 P.R. 1891. (14 C. 814, R.)

(81)—*Presumption—Evidence of possession of appendage to property in possession—Limitation.*—Where the question was as to the right to the produce of certain trees, and the plaintiffs were found not to have, for 12 years previous to the filing of the suit, done any specific acts indicating directly their possession of the trees, but it was found that the trees grew out of a wall surrounding a garden in plaintiff's possession, *held* that the possession of the garden imported possession of the wall and the trees growing out of the wall, and the suit was not, therefore, barred. **IQBAL HUSEN v. NAND KISHORE**, 24 A. 294=A.W.N. 1902, 45. (19 C. 650, 20 C. 560, 16 C. 473, R.)

(82)—*Evidence of title—Grant, Strict proof of*—To establish the right to mouzas as forming part of a zemindary under a *mokhurrari* grant, purporting to have been made by the zemindars in consideration of past services, the grant must be strictly proved. So *held* by the Judicial Committee, reversing the concurrent decisions of the inferior and High Courts in India, in a suit impeaching the validity of the grant, and the suit remitted with directions for



**Evidence—continued.****—11.—Miscellaneous—continued.**

a new trial on further evidence. **RAJAH SAHIB PRAHLAD SEN v. DURGAPRASAD TEWARI**, 2 B.L.R., P.C., 111=12 M.I.A. 286=12 W.R., P.C., 6. [F., 11 C.L.R. 476; Appr., 23 W.R. 431; R., 13 W.R. 129, 21 W.R. 237, 21 B. 509; D., 16 W.R. 158, 16 W.R. 235.]

(83)—*Pottah hundred years old—Proof—Omission to inquire into custody—Finding on proof, Validity of.*—A pottah hundred years old was found proved by the evidence of witnesses; but the first Court failed to inquire whether it came from proper custody. *Held*, that it was not sufficient to vitiate the finding, or to justify the High Court's interference. **SHAH BUDDI-ODDEEN alias BUDDOO v. GOLAM FEER**, 17 W.R. 279.

(84)—*Act XI of 1859, s. 39—Registration under—Evidentiary value.*—The registration of a tenure in the common registry under s. 39, Act XI of 1859, is no *prima facie* evidence of the existence of the tenure. **LUKHYNARAIN CHUTTOPADHYA v. GORACHAND GOSSAMY**, 9 C. 116=12 C.L.R. 89.

(85)—*Title—Resumption chittas, Evidentiary value of.*—A Government resumption chitta, in the absence of the resumption proceedings, would not be conclusive evidence of title as against third parties. **DWARKA NATH MISSEER v. TARITA MOYI DABIA**, 14 C. 120. (9 C. 741, F.). [F., 1 O.W.N. 530.]

(86)—*Resumption or settlement chittas—Admissibility thereof in evidence.*—Resumption chittas are not admissible in evidence without the resumption proceedings. **GIRINDRA CHANDRA GANGULI v. RAJENDRA NATH CHATTERJEE**, 1 C.W.N. 530. (9 C. 741, 14 C. 220, R.)

(87)—*S. 26, Act II of 1869 (Bengal), Bhuin-hary Register prepared under—Not conclusive evidence of title of person recorded in it.*—Where a person's name is recorded in a Bhuin-hary Register prepared by the Revenue authorities under Bengal Act II of 1869, *held* that such a Register was not conclusive evidence of the title of the person whose name was recorded therein, as a co-sharer in the *mokurruree*. **KIRPAL NARAIN TEWARI v. SUKURMONI**, 19 C. 91. [R., 22 C. 112.]

(88)—*Bengal Act II of 1869 (Chota Nagpur Tenures Act)—Register of tenures prepared by Special Commissioner appointed under the Act—Register confirmed by Commissioner—Confirmation duly published in Calcutta Gazette—Register conclusive evidence of matter recorded—Interference by Civil Courts.*—Where a Special Commissioner appointed under the Chota Nagpur Tenures Act (Bengal Act II of 1869), prepared a register of tenures, the register being confirmed by the Commissioner and published in the Calcutta Gazette in accordance with the directions of s. 25 of the Act, *held*, that such a register is conclusive evidence of all matters recorded therein. The Civil Court is not entitled to hold in the above case that because the special

**Evidence—continued.****—11.—Miscellaneous—continued.**

Commissioner did not rightly understand the decision of the Commissioner, and because the register was not prepared in accordance with such order, it is otherwise than conclusive. **PERTAP UDAI NATH SAHI DEO v. MASI DAS**, 22 C. 112.

(89)—*Mal and lakheraj lands, Difference between—Oral evidence to prove lakheraj possession.*—The difference between *mal* cases of title and *lakheraj* cases is this; in *mal* cases the question of possession is dependent on the question of title; whereas in *lakheraj* cases the title may fail, and yet if possession as *lakheraj*, that is to say, possession without paying any rent, is proved, that possession may be proved to give a *lakheraj* title. The fact of possession as *lakherajdars* for a long series of years may be established by oral evidence irrespectively of the failure of documentary proof. **RADHA GOBIND DOSS v. PROKASH CHUNDER DOSS**, 14 W.R. 108.

(90)—*Enhancement of rent, Suit for—Genuineness of dakhilas produced by defendant, sworn to by him.*—Where, in a suit for enhancement of rent, the genuineness of certain *dakhilas*, produced by the defendant, is sworn to by him as having been received on payment of rent, that is legally sufficient to prove them. **SURJA KANTA ACHARJEE v. BANESWAR SHAHA**, 24 C. 231. (12 W.R. 34, 20 W.R. 364, *Rel. on*; 8 W.R. 488, 14 W.R. 211, R.)

(91)—*Tenant's receipts, Evidentiary value of.*—Tenant's receipts are evidence of value but they are not necessary evidence in an enquiry into mesne profits. **GRESH CHUNDER LAHIRI v. SHOSHI SHIKHARESWAR ROY**, 27 C. 951, P.C.=27 I.A. 110=4 C.W.N. 631=10 M.L.J. 356=2 Bom. L.R. 709=7 Sar. 687.

(92)—*Rate of rent—Decree by a co-sharer land lord, if.*—A decree by a co-charer landlord is not admissible as evidence as to the rate of rent in a suit brought by another co-sharer. **ABDUL ALI v. RAJ CHANDRA DAS**, 10 C.W.N. 1084.

(93)—*Jumma-wasil-baki papers—Inadmissible in evidence—Refreshing witness's memory from them.*—Jumma-wasil-baki papers are inadmissible as evidence of the amount of rent mentioned therein; but they may be used to refresh the memory at the time of giving evidence as to the amount of rent payable. **AKHIL CHANDRA CHOWDHRY v. NAYU**, 10 C. 248.

(94)—*S. 4, Act X of 1859—Jamabandi papers—Evidence.*—A ryot who relies on a *mokurruree* tenure will not be precluded from falling back on the presumption under s. 4, Act X of 1859. Jamabandi papers afford no independent evidence of a contested fact. **CHAMARANEE BIBEE v. AYENOOLLAH SIRDAR**, 9 W.R. 451.

(95)—*Supplementary Survey Records—Value to prove mortgage—Evidence Act, s. 65 (c)—Public documents, how proved.*—*Held* that Supplementary Survey Records containing an entry as to a mortgage are insufficient to prove the



*Evidence—continued.*—11.—*Miscellaneous—continued.*

mortgage, in the absence of other reliable evidence. (U.B.R. 1905, 4th Qr, Evidence, 3 ; 2 L.B.R. 56, R.) The proper way and the only way to prove an entry in the Settlement Records was to obtain and put in evidence a certified copy. *MI SE BAW v. MI MIN YA*, U.B.R. 1909, 4th Qr., Evidence, 19.

(96)—*Road Cess Act (IX of 1880, B.C.), s 95, Applicability of—Document, Admissibility of, not objected to in the lower Court—Decree, not inter partes, Admissibility of.*—The plaintiff, alleging himself to be a *kashtkar* or holder of a right of occupancy, sued the defendants for the possession of the land, on the ground that they were in occupation without any right. The defendants produced certain rent-receipts showing that the landlords recognised them as *kashtkars*. The plaintiff produced a rent-decree of 1869 (which contains a statement contrary to that which appears in the receipts) and road-cess returns: *Held* that the road-cess returns are admissible in favour of the plaintiff and their admissibility is not affected by s. 95 of the Road Cess Act. S. 95 of the Road Cess Act has no application to the case where the parties, who tendered road-cess returns in evidence, were not the persons who filed them, in pursuance of the provisions of the Act. The decree, though not *inter partes*, is evidence to show that the landlords recognised the plaintiff as *kashtkar*, and that the rent receipts granted to the defendants were fraudulent. When no objection was taken as to the admissibility of a document in the Court of first instance, it is not allowable to take the objection in appeal. *RAM PRASAD ROY v. LALA SHAM NARAIN*, 6 C.L.J. 22.

(97)—*Road Cess Act (IX of 1889, B.C.), s: 95—Admissibility of road-cess return—Evidence against defendant.*—Where the road-cess return signed by one of the plaintiff's vendors and the defendant is evidence as against the plaintiff claiming through his vendor, it is not inadmissible in evidence merely because, by admitting it as evidence against the plaintiff, it becomes evidence in favour of the defendant. *BENI MADHAB DANDAPAT v. DINA BUNDHU DUTT*, 3 C.W.N. 342.

(98)—*Reports of Collectors under Madras Regulation VII of 1817, how far evidence.*—Collectors acting under Madras Regulation VII of 1817 are incompetent to decide upon private rights of parties. Reports made by them and expressing their opinion on such private rights have no judicial weight; but they may be entitled to consideration because they emanate from public officers acting under the law and supplying information regarding official proceedings and historical facts, in so far as they are necessary to explain the conduct and acts of parties and the proceedings of the Government founded on them. *RAJA MUTTU RAMALINGA SETUPATI v. PERIANAYAGAM PILLAI*, 11 A. 209 = 3 Sar. 341.

*Evidence—continued.*—11.—*Miscellaneous—continued.*

(99)—*Registry in Collector's books.*—The entry of the name of one member of a joint family, as *Lumbardar* (the party liable for the assessment of the revenue) on the Registry, being for fiscal purposes, is not *per se* sufficient evidence to establish the exclusive proprietary right of the party whose name is so registered, and the rights of co-partners *inter se* are not affected by such registration. *MUSSUMAT CHEETHA v. BABOO MIREEN LALL*, 11 M I.A. 369.

(100)—*Petition to Collector.*—A petition to a Collector presented by a person, who does not offer himself as a witness and swear to its truth, is no evidence, but the petition itself may be evidence to this extent, *viz.*, that a complaint was made to the Collector. *PARVATHI v. THIRUMALAI*, 10 M. 334.

(101)—*Yadasts from Revenue Officials—Admissibility.*—Yadasts addressed by Tahsildars in respect of grants of land are admissible in evidence for indicating the general consciousness as to the nature of the grant. *SATHI-NAMA BHARATI v. SARAVANABAGI AMMAL*, 18 M. 266 = 4 M.L.J. 223.

(102)—*Income-tax returns—Certified copies, Admissibility.*—Certified copies of income-tax returns, held to be inadmissible. *ALI KHAN BAHADUR v. INDAR PARSHAD*, 23 C. 950, P.C. = 23 I.A. 92 = 7 Sar. 63.

(103)—*Partnership suits—Production of Income-tax returns.*—Rule 16 made by the Local Government in pursuance of the power contained in s. 38, Income Tax Act, 1886, is not directed against the production, in a Court of law, of Income-tax papers relating to a firm, in a suit between its members. *JADOBRAM DEY v. BULLORAM DEY*, 26 C. 281. (*Lea v. Birrell*, 1861, 3 Camp. 337, cited). [*R.*, 4 M.L.T. 317 = 32 M. 62 = 19 M.L.J. 263.]

(104)—*Title—Evidence of—Contest between rival purchasers—Suit for declaratory decree—Benami transaction.*—One of two rival purchasers of the same property sued the other, claiming a decree declaratory of his title under conveyances made by a Mahomedan widow and her assignees, and alleging that a *hiba-bil ewaz*, executed by her (long before the making of such conveyances), was only a *benami* transfer. The defence, however, was founded on that *hiba*, the defendant averring that he obtained a good title from the donee's sons. No actual possession was established by either party. The property had been let in parcels to different tenants, and the evidence as to who was the lessor was conflicting. The lower Courts were not agreed as to who was entitled to a decree. The Judicial Committee maintained the first Court's decision in favour of the plaintiff. *NIRMAL CHUNDER BANERJEE v. MAHOMED SIDDIK*, 26 C. 11, P.C. = 25 I.A. 225 = 7 Sar. 383.

(105)—*Evidence—Admissibility, as to pedigree, of document set aside by Court.*—A *Kararnama*,



**Evidence—continued.****—11.—Miscellaneous—continued.**

set aside on other grounds may be admissible in evidence to prove the relationship therein set forth ; and though the evidence is partly hearsay, such evidence is admissible on questions of pedigree. *TIMMA v. DARAMMA*, 10 M. 362.

(106)—*Presumption—Pedigree table prepared at Settlement—Circumstances to show that parties are descended from common ancestor.*—Where the predecessors of the parties are shown to—(a) possess holdings of nearly equal size, almost consecutive, (b) hold equal shares in the *shamilat khata* and (c) occupy a joint compound, the presumption is that they are descended from a common ancestor. *KANWAR v. NATHU*, 4 Ind. Cas. 549=60 P.W.R. 1909.

(107)—*Admissibility of statement by deceased persons as to heirs in accordance with practice of public offices.*—Statements made by a person as to who were her heirs, at times when there was no dispute about the question, and recorded by a *wasiq* (pension) officer in accordance with the practice in force in such office, are admissible in evidence to prove relationship. *BAQAR ALI KHAN v. ANJUMAN ARA BEGAM*, 25 A. 236, P.C.=30 I.A. 394=7 C.W.N. 463=5 Bom. L.R. 410=8 Sar. 397.

(108)—*Proof of date of birth after lapse of years—Reasonable conviction—Pleading—Decision of appellate Court on suggestion as to matter of fact by pleader—Propriety.*—In India it is difficult to prove such facts as the date of birth after the lapse of many years, and it would be unreasonable to demand such a class of evidence as would justly be demanded in England. But the evidence must be such as to carry reasonable conviction to the mind. Where an appellate Court reversed the decision of the lower Court on the basis of a suggestion on a matter of fact made for the first time by the appellant's pleader, but as to which no evidence had been taken. *Held*, by the Judicial Committee that it is very dangerous to adopt a conclusion in a Court of Appeal merely on the suggestion of a legal gentleman representing one of the parties. *NAWAB SHAH ARA BEGAM v. NANHI BEGAM*, 11 C.W.N. 130, P.C.=1 M. L.T. 429=29 A. 29=9 Bom. L.R. 80=17 M.L.J. 32=5 C.L.J. 4=34 I.A. 1.

(109)—*Legitimacy—Period of gestation.*—There is no period defined beyond which gestation cannot be protracted, although a period of 280 days appears to be as the *legitimum tempus pariendi*. Each case in which legitimacy is contested must be decided on its own merits. Where, therefore, a child was born about 365 days after the last period at which he could have been begotten by the husband of his mother and it was set up as legitimate, *held* that the utmost which could be said is that it is not outside the bounds of possibility that gestation may be protracted for a period of 365 day, but that so protracted a period of gestation was in the highest degree improbable. But when there was clear evidence in the case

**Evidence—continued.****—11.—Miscellaneous—continued.**

that the mother had been married to her husband for 10 years without having had any issue by him, and also that the mother had misconducted herself since her husband's death, it was reasonable to find that the child set up as legitimate was not so. *TIKAM SINGH v. DHAN KUNWAR*, 24 A. 443=A.W.N. 1902, 119.

(110)—*Death bed attentions—Funeral expenditure—Evidentiary value—Claim for inheritance.*—In dealing with claims to inheritance, unless it can be shown that the ordinary duties of affection or kindred have been intentionally and deliberately neglected, so as to raise a presumption of the rupture or interruption of the connecting bond, evidence referring to particulars of death-bed attentions or expenditure on the funeral obsequies may generally be passed over as of little or no importance. *MAUNG SEIN v. MAUNG KYWE*, 4 L.B.R. 291. (U.B.R. 1892-1896, Vol II, 184, F)

(111)—*Hindu families—Purchaser—Notice.*—Considering the state of Hindu families, a purchaser would be affected with notice by much slighter evidence than a purchaser in other countries, *KOGILOTHPUTENPURAYIL MANOKI KORAN NAYAR v. PUTHENPURAYIL MANOKI CHANDA NAYAR*, 3 M.H.C. 294.

(112)—*Bengal Act I of 1876—Registration of Mahomedan marriages—Copy of entry in Register—Evidence.*—“A special condition” (that a Mahomedan wife might divorce her husband under certain circumstances) is a matter which, under Bengal Act I of 1876, it is the duty of the Mahomedan Registrar (of marriages under the Act) to enter in the register and, therefore, a copy of the entry therein would be evidence of its contents, in a suit by the husband for restitution of conjugal rights, on a divorce by his wife on the occurrence of such circumstances. *KHADEM ALI v. TAJIMUNNISSA*, 10 C. 607.

(113)—*Contract, Terms of—Evidence to explain.*—Evidence of previous dealings between the parties is admissible only for the purpose of explaining the terms used in a contract, and not to impose on a party an obligation as to which the contract is silent. *Haji Mahomed v. E. SPINNER & CO.*, 2 Bom. L.R. 691=24 B. 510.

(114)—*Allegation of substitution of new contract for old—Necessity for strict proof.*—The mere fact of one party alleging that a new contract has been substituted for the old one does not of itself put an end to the old contract, even as against the party who so alleges, unless the allegation is proved to be true. *ROUSHAN BIBEE v. HURRAY KRISTO NATH*, 8 C. 926.

Reception of documentary evidence Cir. No. 9, dated the 26th Feb., 1867, 7 W.R. Civ. Cir. Orders, p. 4.

Draws attention to previous Circular, and issues further instructions regarding the recep-



*Evidence—continued.**—11.—Miscellaneous—continued.*

tion of documents and exhibits during the trial of a cause. *Civ. Cir. No. 12, dated 3rd December, 1869, 12 W.R. Civ. Cir. 11.*

Entry in account book—Suit on acknowledgment—*See ACKNOWLEDGMENT, A.W.N. 1906, 185=3 A.L.J. 800.*

*See ACT IV OF 1869, ss. 13, 14, 45 P.R. 1871.*

*See ACT X OF 1870, 17 C. 144.*

Oath taken in previous proceeding how far—in a subsequent proceeding—*See ACT X OF 1873, 33 C. 386=10 C.W.N. 501.*

Entries in register of inventions—Public documents—Burden of proof in suit for infringement of patents—*See ACT V OF 1888, ss. 14, 29, 4 A.L.J. 11=A.W.N. 1907, 23.*

Inquiry by a acquisition officer—Proof should not be in the strict judicial form—*See ACT I OF 1894, 11 Bom. L.R. 1176=34 B. 486.*

Notification of sale under Act XI of 1859—Irregularity in the description of the share of the estate to be sold—Inadequacy of price—Necessity for, to show connection between irregularity and inadequacy of price fetched—*See BEN. ACT XI OF 1859, ss. 5, 6, 33, 9 C. W.N. 343, F.B.=1 C.L.J. 14=32 C. 502.*

Revenue sale—Inadequacy of price as effect of non-specification of shares in sale-notification may be proved by oral and circumstantial. —*See BEN. ACT XI OF 1859, ss. 6, 33, 9 C. W.N. 487=32 C. 542.*

*See BEN. ACT VII OF 1876, 8 C. 853.*

Admissions by defendant's fellow tenants—No evidence against defendant—*See BEN. ACT IX OF 1880, s. 95, 1 Ind. Cas. 813.*

Rent receipts how far—of sub-division of tenancy under s. 88 of Bengal Tenancy Act—*See BEN. ACT VIII OF 1885, s. 88, 10 C.W.N. 216.*

*See BEN. ACT VIII OF 1885, s. 120, SUB. s. 2, 17 C. 466.*

Value of Thak and Survey maps—Evidence of possession—Effect—*See BEN. ACT XV OF 1891, s. 4, 6 Ind. Cas. 392.*

Admission of additional—in appeal—How the power ought to be exercised—*See BEN. ACT I OF 1895, ss. 10, 12, 15, 16, 21, 31, 1 C. L.J. 550.*

Declarations of Kanungos—Wajib-ul-arz—Answers given to official inquiries—Weight of such evidence—*See U.P. ACT I OF 1869, s. 23, List IV, 10 C.L.J. 216, P.C.=6 A.L.J. 767=13 C.W.N. 1073=11 Bom. L.R. 890=12 O.C. 304=31 A. 457=19 M.L.J. 605=4 Ind. Cas. 25.*

Entry of a person's name at the last revision of settlement is conclusive—of his fixed rate tenancy—*See U.P. ACT II OF 1901, s. 9, A.W. N. 1906, 68=3 A.L.J. 842.*

*Evidence—continued.**—11.—Miscellaneous—continued.*

Of maps—*See ALLUVION—FORMATION OF CHURS OR ISLANDS, 3 C.L.J. 560, P.C.=1 M. L.T. 175.*

Evidence, improper rejection of—Refusal to examine witnesses brought to Court by the plaintiff—Error or irregularity affecting the merits of the case—*See APPEAL—GROUNDS OF APPEAL, A.W.N. 1894, 51.*

Fresh evidence, admission of, by appellate Court, with assent or without objection—Regularity, if may be questioned on further appeal—*See APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE, 13 C.W.N. 830=10 C. L.J. 74=6 M.L.T. 7=11 Bom. L.R. 861=36 C. 833=3 Ind. Cas. 465, P.C.=19 M.L.J. 435.*

Genuineness of will—Burden of proof—Statement of reasons by Judicial Committee—*See APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE, 13 C.W.N. 782, P.C.=5 M.L.T. 384=3 Ind. Cas. 997.*

Deeds—Material alteration after execution and without privity of party to be affected by it—Effect—Whether it can be used in evidence—Distinction—*See AWARD, 6 N.L.R. 1=5 Ind. Cas. 425.*

Of *Keitima* adoption—Burmese law—Variation in evidence as to time of adoption, effect of—*See BUDDHIST LAW—ADOPTION, 32 C. 219, P.C.=4 L.B.R. 172.*

Defendant electing to produce—Whether defendants loses right to have onus placed on right party—Both sides adducing evidence—Question of onus immaterial—*See BURDEN OF PROOF—MISCELLANEOUS, 8 A.L.J. 736.*

Misappreciation of—Whether a ground for revision—*See CIV. PRO. CODE (1908), s. 115, 6 N.L.R. 49=6 Ind. Cas. 429.*

Dealing with case as if there was no evidence when in fact there was—Revision—*See CIV. PRO. CODE, 1908, s. 115, O. VII, rr. 14, 17, 18, s. 99, 13 C.W.N. 797=10 C.L.J. 33=12 Ind. Cas. 946.*

Failure of plaintiff to produce translation of accounts—Failure to take evidence—Dismissal of suit—Legality—*See CIV. PRO. CODE, 1908, O. XVII, r. 3, 8 Ind. Cas. 850=9 M.L.T. 163.*

Mode of recording—in Small Cause suit—Substance of each witness's evidence to be recorded—*See CIV. PRO. CODE, 1908, O. XVIII, r. 13, 9 C.W.N. 418.*

Taken on commission when evidence in the suit—*See CIV. PRO. CODE, 1908, O. XXVI, rr. 7, 8, 9 C.W.N. 794.*

Power of appellate Court to admit evidence in appeal—*See CIV. PRO. CODE, 1908, O. XLI, r. 27, 6 Ind. Cas. 196.*

Evidence fresh—Power of appellate Court to admit—*See CIV. PRO. CODE, 1908, O. XLI, r. 27, 9 M.L.T. 317.*



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Appellate Court admitting fresh document without recording reasons—Effect—See CIV. PRO. CODE, 1908, O. XLI, r. 27, 2 Ind. Cas. 995.

Private arbitration—Applicability of rules of—See CIV. PRO. CODE, 1908, sch. II, r. 20, 7 Ind. Cas. 333.

Evidence taken on commission, if to be formally tendered—Practice—Evidence how objected to—See COMMISSION, 13 C.W.N. 525=36 C. 566=1 Ind. Cas. 366=11 C.L.J. 150.

Compromise decree—Title suit—Agreement by one party to pay rent to another if outside subject-matter of suit—Consideration for agreement—Civ. Pro. Code, s. 375—Admissibility in evidence in subsequent suit—See COMPROMISE—COMPROMISE OF SUITS IN CIV. PRO. CODE, 13 C.W.N. 217=9 C.L.J. 16=5 M.L.T. 274=5 M.L.T. 359=1 Ind. Cas. 572.

Agreement to pay for giving false evidence—Suit to recover money promised—See CONTRACT ACT, 1872, s. 23, 10 Ind. Cas. 801.

Quality of goods referred to arbitration by both parties—Buyer claiming allowance in respect of them—Admission—Letter of reference, evidence of buyer's assent—See CONTRACT ACT, 1872, s. 120, 36 C. 736=3 Ind. Cas. 185.

Admissibility of Khasra papers—Whole evidence dealt with in detail by first Court—Appellate Court and High Court when may interfere—See CO-SHARERS—SUIT BY CO-SHARERS, 1 Ind. Cas. 205.

Custom—Evidence—Insufficient—Second appeal—High Court's power to interfere—See CUSTOM, 6 A.L.J. 719=6 M.L.T. 178=2 Ind. Cas. 490.

Necessity of—in proof of custom—See CUSTOM, 8 O.C. 142.

Illegal or legally insufficient to establish alleged custom—Existence or non-existence of custom a question of law—Right of High Court to interfere in second appeal to consider validity of finding—See CUSTOM, A.W.N. 1908, 112=5 A.L.J. 456=4 M.L.T. 169=30 A. 311.

Admissibility in evidence of compulsorily registrable unregistered document for collateral purpose—See CUSTOMS—PUNJAB—INHERITANCE, 143 P.L.R. 1906.

Pre-emptor not intending to retain property after securing it—Right to pre-empt—Instances in neighbouring sub-divisions when relevant—See CUSTOMS—PUNJAB—PRE-EMPTION, 38 P.W.R. 1907=67 P.R. 1907=51 P.L.R. 1907, 39 P.W.R. 1907.

See DAMAGES—MEASURE AND ASSESSMENT, 5 C. 283=4 C.L.R. 473.

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False evidence when amounts to fraud—See DECREE—MISCELLANEOUS, 5 M.L.T. 285=1 Ind. Cas. 548.

To explain meaning of ambiguous defamatory words—Admissibility—See DEFAMATION, 6 M.L.T. 290=33 M. 67=19 M.L.J. 714=3 Ind. Cas. 955.

Proof of a previous deposition exhibited without objection—Identity of witness—Admissibility in evidence—See DEPOSITION, 13 C.W.N. 409=1 Ind. Cas. 320.

Of long and uninterrupted enjoyment may supply absence of words importing hereditary character of tenure—Evidence of descent from father to son—See EJECTMENT, SUIT FOR, 8 C.L.J. 513.

See ESTOPPEL—ESTOPPEL BY CONDUCT, 5 C. 669=5 C.L.R. 533.

Agreement by plaintiff not to prosecute claim and not to execute decree against particular defendant—Agreement affecting immoveable property of more than hundred rupees—Agreement not registered—Admissibility thereof in—See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 15 M.L.J. 370.

Necessary to prove grant of independent right of fishery in a navigable river—See FISHERY, 12 C.W.N. 334.

Question dependent on evidence, raised after the evidence, not entertainable—See HINDU LAW—ADOPTION, 6 A.L.J. 567, P.C.=10 C.L.J. 58=13 C.W.N. 920=5 M.L.T. 423=11 Bom. L.R. 833=36 C. 780=3 Ind. Cas. 382=93 P.R. 1909=68 P.L.R. 1910=146 P.W.R. 1909=36 I.A. 103=19 M.L.J. 548.

Impartible Raj—Separate acquisitions of holder of impartible Raj—Presumption—See HINDU LAW—IMPARTIBLE ESTATE, 27 A. 203=A.W.N. 1904, 244=2 A.L.J. 720.

Hindu Law—Marriage—Evidence—Direct testimony and improbabilities—See HINDU LAW—MARRIAGE, 27 C. 971, P.C.=27 I.A. 142=4 C.W.N. 685.

Maintenance of near agnatic relations in lieu of their services and payment of their marriage expenses, not necessarily evidence of non-division from them—See HINDU LAW—PARTITION, 10 C.W.N. 338=1 M.L.T. 96=16 M.L.J. 109.

Of partition—Documentary evidence—Cumulative effect—See HINDU LAW—PARTITION, 6 A.L.J. 597, P.C.=5 M.L.T. 427=13 C.W.N. 983=10 C.L.J. 121=11 Bom. L.R. 878=31 A. 412=3 Ind. Cas. 195=19 M.L.J. 517.

Statements by family before enquiry by Government for resumption of property—Evidence in subsequent suit for partition—Estoppel—See HINDU LAW—RELIGIOUS ENDOWMENTS, 4 C. 56=2 C.L.R. 310.



**Evidence—continued.****—11.—Miscellaneous—continued.**

Power to allow fresh evidence to be given in second appeal—*See* HINDU LAW — REVERSIONERS, 5 Ind. Cas. 666.

Withholding of material documents by party in possession—Adverse inference—*See* HINDU LAW—WILL, 15 C.W.N. 741, P.C.

Admissibility of evidence to show whether omission was accidental or intentional—*See* INTEREST—SPECIAL CASES, A.W.N. 1885, 41.

*See* ISSUES—FRAMING ISSUES, 5 W.R., Act X, Rul. 72.

*See* JUDGMENT IN REM, 2 M.H.C. 276.

Recording in English in ejectment suit—Irrregularity — *See* LANDLORD AND TENANT — HOLDING OVER, 34 C. 396=11 C.W.N. 826.

Both parties giving evidence—Question of onus in second appeal—*See* LANDLORD AND TENANT—RELATIONSHIP OF LANDLORD AND TENANT, 3 Ind. Cas. 431.

Evidentiary value of statements in District Manuals—Proof of custom—*See* LANDLORD AND TENANT — TENANT'S LIABILITY FOR RENT, 8 Ind. Cas. 330.

To prove local usage of transferability of occupancy holding—Transferee allowed to hold and pay rent as marfatdar —Mutation of names on payment of *selami* — Effect—*See* LANDLORD AND TENANT—TRANSFER OF TENANT'S INTEREST, 12 C.W.N. 539.

Lease deed, want of registration — Admissibility in—Specific performance—*See* LEASE—GENERAL, 11 C.L.J. 548=6 Ind. Cas. 634.

Unregistered lease for term exceeding one year—Admissibility in—*See* LEASE—GENERAL, 10 Ind. Cas. 892.

Unregistered letter varying terms of lease—Inadmissibility in evidence — *See* LEASE—GENERAL, 10 C.L.J. 570=37 C. 293.

Lease — Unregistered instrument, admissibility of—Ss. 4 and 107, Transfer of Property Act—Ss. 3 and 17 (b), Act III of 1877—Oral letting accompanied by delivery of possession can be proved, though a document is in existence—*See* LEASE—GENERAL, 6 M.L.T. 175.

Lease and counterpart—Neither complete in itself, but each supplementing the other—Evidentiary value—*See* LEASE—CONSTRUCTION OF LEASE, 6 C.L.J. 572.

Inadmissibility of lease for want of registration — Admissibility of other evidence — *See* LEASE—CONSTRUCTION OF LEASE, 27 A. 190=A.W.N. 1904, 212.

*See* LEASE—CONSTRUCTION OF LEASE, 4 N.W.P. 36.

Registration—Lease or agreement for lease—Proposal and acceptance—Contract in writing—*See* LEASE—MISCELLANEOUS, 7 C. 703=10 C.L.R. 121.

**Evidence—continued.****—11.—Miscellaneous—continued.**

Statement of counsel not on oath, if objected to by opposite party, whether admissible in evidence—Procedure *re* statement of counsel —*See* LEGAL PRACTITIONERS—COUNSEL, 27 C. 428=4 C.W.N. 169.

Keeping in record a defamatory resolution—Not—of express malice—*See* LIBEL, 1 B. 477.

Ss. 392, 393, Civ. Pro. Code, 1882—Local investigation—Commissioner's report, admissibility of further evidence, after—*See* LOCAL INVESTIGATION, 27 C. 951, P.C.=27 I.A. 110=4 C.W.N. 631.

Practice — Judge — Personal inspection—Reliance on witnesses—*See* LOCAL INVESTIGATION, 13 Bom. L.R. 313.

Acknowledgment under the Mahomedan Law, doctrine of, not a rule of—*See* MAHOMEDAN LAW—ACKNOWLEDGMENT, 9 C.W.N. 352.

Agreement for payment of dower naming amount to be paid—Husband cannot adduce evidence to prove that transaction was unreal —Husband bound by agreement irrespective of his means—*See* MAHOMEDAN LAW—PARTITION, 13 C.W.N. 153=4 Ind. Cas. 462.

*See* MALABAR LAW—ADOPTION, 7 M. 3, F.B.

Uraima right—Sale by Urallars trustees—Custom—Evidence—*See* MALABAR LAW—ENDOWMENT, 1 M. 235=4 I.A. 76, P.C.

Unregistered document which is compulsorily registrable, how far admissible in—*See* MAINTENANCE, 7 M.L.T. 278=5 Ind. Cas. 615.

In cases of malicious prosecution—Want of reasonable and probable cause for the prosecution is some—of malice—*See* MALICIOUS PROSECUTION, 10 C.W.N. 253, F.B.

Suits for mesne profits—Evidence regarding area under cultivation withheld by defendants —Presumption—*See* MESNE PROFITS—SUITS FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 18 C. 540, P.C.

Of personal covenant—Registered or unregistered mortgage—*See* MORTGAGE—GENERAL, 1 Ind. Cas. 1, F.B.=32 M. 410=19 M.L.J. 584.

Intention to keep prior mortgage alive—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 6 B. 404, F.B.

Intention of retaining benefit of prior mortgage, nature of—Necessary for—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 6 B. 561.

Usufructuary mortgage below Rs. 100—Proof of debt—Admissibility in—*See* MORTGAGE—USUFRUCTUARY MORTGAGE, 7 A.L.J. 71=5 Ind. Cas. 519.

*See* MORTGAGE—MISCELLANEOUS, U.B. R. 1892-1896, Vol. II, 558.



**Evidence—continued.****—11.—Miscellaneous—continued.**

Claim against estate of the deceased—Un-corroborated evidence of plaintiff—Value—See **NEGOTIABLE INSTRUMENTS — PROMISSORY NOTES—GENERAL**, 12 C.L.J. 470=8 Ind. Cas. 796.

In a suit on a promissory note by the payee, the defendant can let in oral evidence to show that the plaintiff is not the real owner of the note and that consideration has been repaid to the real owner—See **NEGOTIABLE INSTRUMENTS ACT**, 1881, 28 M. 244.

Evidence equally balanced on both sides—Oath proposed by other party—Refusal—Its effect—See **OATH**, 2 M.L.T. 327.

Evidence of ownership—Presumption arising from possession—See **OWNERSHIP**, 14 C. 740=14 I.A. 101, P.C.

See **POSSESSION—SUITS FOR POSSESSION**, 9 C.L.R. 365.

Non-production of sufficient evidence—Adjournment—Costs—See **PRACTICE AND PROCEDURE**, 7 C. 177.

Whether plaintiff has sufficient—entitling him to decree, when to be determined—See **PRACTICE AND PROCEDURE**, 5 C. 353.

Belief or disbelief in evidence—Different effects—Second appeal—See **PRACTICE AND PROCEDURE**, 7 C. 263=8 C.L.R. 449.

Existence or non-existence of a custom of pre-emption—See **PRE-EMPTION—CONSTRUCTION OF WAJIB-UL-ARZ**, 2 A.L.J. 6=A.W.N. 1905, 16.

See **PROBATE AND ADMINISTRATION ACT**, 1881, s. 50, 21 C. 1, P.C.

Admissibility of a compulsorily registrable but unregistered lease in evidence—See **REGISTRATION**, 1 N.L.R. 147.

Compromise petition filed in criminal proceeding constituting a lease—Proceeding withdrawn—No order incorporating terms of petition—Petition not admissible in evidence without registration—See **REGISTRATION**, 12 C.W.N. 854=8 C.L.J. 90=35 C. 1010.

Admissibility of—as to reputation of identifiers of an executant of a will before Registrar—See **REGISTRATION**, 3 C.L.J. 349, P.C.=10 C.W.N. 52=33 C. 537=8 Bom. L.R. 375=1 M.L.T. 131=16 M.L.J. 161.

Deed made before Registration Act—Admissibility of unregistered deed—See **REGISTRATION ACT**, 1866, 1 Agra 283.

Admissibility in—, in suit for ejectment of an unregistered *amalnama* not forming lease or agreement to lease—See **REGISTRATION ACT**, 1908, ss. 2, 17, 33 C. 502.

Evidentiary value of unregistered deed of partition—See **REGISTRATION ACT**, 1908, s. 17, 4 M.L.T. 354=19 M.L.J. 228.

**Evidence—continued.****—11.—Miscellaneous—continued.**

Admissibility in—of unregistered compromise relating to land addressed to Court and judicially acted upon—See **REGISTRATION ACT**, 1908, s. 17, 27 P.R. 1906=11 P.L.R. 1906.

Admissibility in—of compulsorily registrable but unregistered partition-deed relating both to moveables and immoveables, so far as regards the moveables—See **REGISTRATION ACT**, 1908, s. 17, 119 P.L.R. 1906.

Non-testamentary document—Evidentiary value of—See **REGISTRATION ACT**, 1908, s. 17, 30 C. 783.

Award of arbitrators inadmissible for want of registration—Secondary evidence of award, whether admissible—See **REGISTRATION ACT**, 1908, ss. 17, 49, 71 P.R. 1906=111 P.L.R. 1907.

Unregistered bond, admissibility of—Suit to enforce personal obligation—See **REGISTRATION ACT**, 1908, s. 49, 7 M.H.C. 296.

Unregistered mortgage-deed—Evidentiary value of—See **REGISTRATION ACT**, 1908, s. 49, 4 L.B.R. 52.

Admissibility of unregistered agreement to give lease, in suit for specific performance—See **REGISTRATION ACT**, 1908, s. 49, 17 M.L.J. 218.

Unregistered document, admissibility in evidence—Plea of forgery—See **REGISTRATION ACT**, 1908, s. 49, A.W.N. 1881, 138.

Unregistered dastak allowing plaintiff to take possession of land to cultivate it—Not a lease—Admissible in evidence—See **BEN. REG. XI OF 1825**, s. 4, cl. 1, 8 C.L.J. 538=13 C.W.N. 267=4 Ind. Cas. 511.

Power to admit documentary evidence produced for the first time on revision—See **REVISION—GENERAL**, 55 P.L.R. 1909=59 P.W.R. 1909=4 Ind. Cas. 550.

Misinterpretation of—Not considering loss of important document—See **REVISION—GENERAL**, 97 P.W.R. 1910=7 Ind. Cas. 713.

Assumption by Court against evidence on record—Revision—See **REVISION—GENERAL**, 127 P.L.R. 1910=8 Ind. Cas. 552.

Decision of Revenue Court as to whether certain land is rent-free or rent-paying, evidentiary value of—See **SANAD**, 7 C.L.J. 202.

Proceedings of the Circuit Committee of 1786 is good—in matters relating to rights of Government with respect to zemindari property—See **SERVICE TENURE**, 3 C.L.J. 1, P.C.=10 C.W.N. 161=3 A.L.J. 55=8 Bom. L.R. 1=16 M.L.J. 1=1 M.L.T. 3=29 M. 52=33 I.A. 46.

Letting, in second appeal—See **SPECIAL OR SECOND APPEAL—PRACTICE AND PROCEDURE IN SPECIAL APPEAL**, 31 M. 415.



**Evidence—concluded.****—11.—Miscellaneous—concluded.**

Corroborative, of statements not challenged by other party—See SPECIFIC PERFORMANCE, 11 C.W.N. 946, P.C.=17 M.L.J. 454=4 A.L.J. 740=6 C.L.J. 682=2 M.L.T. 448.

Suit to restore terms of lost bond for money—Nature of evidence required—See SPECIFIC RELIEF ACT, 1877, ss. 12, 21, 22, 5 A. 44=A.W.N. 1882, 154.

Pro-note executed at Rampur in favour of Nawab without stamp—Stamp affixed when suit filed in British India—Admissibility in—See STAMP, 8 A.L.J. 566.

See STAMP, A.W.N. 1881, 108.

Suit on oral agreement embodied is an unstamped pro-note—Admission by defendant—See STAMP ACT, 1899, s. 35, 66 P.R. 1906=73 P.L.R. 1907.

Unstamped instrument, admissibility of—Secondary—See STAMP ACT, 1899, s. 35, 17 M.L.J. 308=30 M. 386.

Agreement—Unstamped hundi—Admissibility—See STAMP DUTY, 5 M.H.C. 391.

Construction of will—Admissibility of extrinsic evidence—See SUCCESSION ACT, 1865, ss. 62, 164, 12 Bom. L.R. 862=8 Ind. Cas. 180.

See SUPERINTENDENCE OF HIGH COURT, 6 W.R. 25.

Of experts or men in the trade, whether can be given to show whether or not a combination of marks is such as is calculated to deceive the purchaser—See TRADE-MARK, 4 C.L.J. 268=10 C.W.N. 107.

Relating to attestation of mortgage-deed—Burden of proof—Applicability of maxim *Ominia rite esse acta*—See TRANSFER OF PROPERTY ACT, 1882, s. 59, 2 N.L.R. 10.

Robkar of settlement officer—Admissibility in—See WAJIB-UL-ARZ, 2 Ind. Cas. 623.

See WAJIB-UL-ARZ, 15 A. 147=A.W.N. 1893, 85.

**Evidence Act (I of 1872).**

[REP. IN PT., 44 & 45 VICT., C. 58, s. 127; REP. IN PT., ACT X OF 1897; AM. ACT XVIII OF 1872; ACT III OF 1887; ACT III OF 1891, SS. 1 TO 8; ACT V OF 1899; s. 33 OVERRIDDEN, ACT XIV OF 1908, s. 13; DECLARED IN FORCE—IN THE SONTHAL PARGANAS, REG. III OF 1872, s. 3, AS AMENDED BY REG. III OF 1899, s. 3; IN THE ANGUL DISTRICT, REG. I OF 1894, s. 3; IN THE CHITTAGONG HILL TRACTS REG. I OF 1900, s. 4; IN THE ARAKAN HILL DISTRICT, REG. IX OF 1874, s. 3; IN KACHIN HILL TRACTS, AS REGARDS HILL-TRIBES, REG. I OF 1895, s. 3; IN CERTAIN TRACTS IN THE CHIN HILLS, REG. V OF 1896, s. 3; IN UPPER BURMA, EXCEPT THE SHAN STATES (WITH AN ADDITION), ACT XIII OF 1898, s. 4; IN BRITISH BALUCHISTAN (WITH AN ADDITION), REG. I OF 1890, SS. 3, 4.]

**Evidence Act (I of 1872)—continued.**

See ACT II OF 1855.

See ACT I OF 1872.

(1)—*The Law enacted by the Indian Evidence Act—Law before passing of the Act.*—With some few exceptions, the Indian Evidence Act was intended to, and did in fact, consolidate the English Law of Evidence.—*Per Garth, C.J.* The Law of Evidence as administered in England was not, in its integrity, the law in force in the mofussil Courts in India before the Evidence Act, they were guided by their own practice which was greatly moulded on principles of substantial justice.—*Per Mitler, J.* GUJJA LALL v. FATTEH LALL, 6 C. 171=6 C.L.R. 439.

(2)—*Interpretation of Evidence Act I of 1872—Reference to English Law.*—Although the Indian Evidence Act is in the main drawn on the lines of the English Law of Evidence, there is no reason to suppose that it was intended to be a servile copy of it. But when any important and radical change is attempted to be introduced, it may be expected that it would be provided for in a separate section enacted for that purpose. RANCHHODDAS KRISHNA DAS v. BAPU NARHAR, 10 B. 439.

(3)—*Presumption—Books of account—Practice.*—Where the instrument of a debt and a security for that debt are found in the hands of the debtor, the *prima facie* presumption is that the debt has been discharged. According to the Indian Evidence Act, books of account which have been regularly kept, may be appealed to not only for the purpose of refreshing the memory of a witness, but also as corroborative evidence of the story which he tells. Books of account containing entries referring to a particular transaction are not entitled to the same credit that is given to the books that record that transaction in common with other transactions in the ordinary course of business. BHOY HONG KONG v. RAMNATHAN CHETTY, 4 Bom. L.R. 378.

(4)—*Document thirty years old—Proper custody—Evidence.*—Documents thirty years old do not prove themselves in the absence of evidence that they have come from the proper custody. GURU DAS DAY v. SAMBHU NATH CHUCKERBUTTY, 3 B.L.R., A.C., 258.

(5)—*Documents of Burmese times—Proof required of—Possession.*—When a claimant comes into Court relying on documents he must prove them, and if he fails to do so and they are disputed by the other side, they cannot be admitted in evidence. MAUNG KYAW ZAN v. MA MIN BYU, U.B.R. 1892-1896, Vol. II, 366.

(6)—*See BURDEN OF PROOF—CLAIMS TO PROPERTY ATTACHED,* U.B.R. 1892-1896, Vol. II, 230.

(7)—*See BURDEN OF PROOF—POSSESSION AND PROOF OF TITLE,* L.B.R. 1872-1892, 102.



**Evidence Act (I of 1872)—continued.**

(8)—Proof of custom—Value of confessions of judgment and admissions—See CUSTOMS—PUNJAB—PRE-EMPTION 26 P.R. 1907=69 P.L.R. 1908=109 P.W.R. 1907.

(9)—Nature and scope of—See GUARDIAN—GENERAL, 86 P.W.R. 1910=7 Ind. Cas. 505=213 P.L.R. 1910.

(10)—See WITNESS—WEIGHT TO BE ATTACHED TO EVIDENCE, 18 W.R. 340.

(11)—Ss. 1, 11, 13, 32, 33, 43, 126—Legal adviser, communications to—When privileged—See CUSTOM, 4 S.L.R. 88.

(12)—S. 2—Mahomedan Law—Legitimacy—Period of gestation.—The rule under Mahomedan Law prescribing 2 years as the period of "gestation" is a "rule" of evidence within the meaning of s. 2 of the Act. When this is made with s. 5 of the Punjab Laws Act, the result is that the Courts are not bound by that rule under that Act. WARAS MUHAMMAD v. ALI BAKHSI, 76 P.R. 1891. (1 P.R. 1884, F.)

(13)—Ss. 2, 11 and 116—Fact in issue and relevant fact.—Where, in a suit for rent of land from defendant, plaintiff alleged that he bought the land from the defendant and thereafter leased it to him year by year and the defendant totally denied the sale and the lease, no question of title would arise on the pleadings because, if the lease were proved, the defendant would be estopped by s. 116 of the Act from denying his landlord's title. The fact in issue in the case is no doubt the lease alone but evidence may be given of the fact of the sale also, as a relevant fact, corroborative of the fact of the lease. Therefore, evidence relating to the sale was rightly admitted and was rightly considered by the lower appellate Court but that Court was in error in having regarded the fact of the sale as a fact in issue. KAUNG HLA PRU v. SAN PAW, 3 L.B.R. 90.

(14)—Ss. 2, 112—See MAHOMEDAN LAW—MISCELLANEOUS, 1 P.R. 1884.

(15)—Ss. 3, 45, 101, 125—Will, challenged as forgery—Proof—Suspicion alone when ground for refusing probate—Presumption against misconduct, Operation of—Order in which witnesses to be tendered, discretion of counsel and Court's power—Expert, medical, examination of, to test value of evidence of attending physician—Expert in Bengali language and legal terms, Examination of—Document put to witness, right of opposing counsel to inspect.—If a party writes or prepares a will under which he takes a benefit, that circumstance in itself ought generally to excite suspicion of the Court, and calls upon it to be vigilant in examining the evidence in support of the instrument in favour of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true will of the deceased, (2 Moore, P.C., 480, R.) Per Jenkins, C.J.—The suspicion, which by itself would be ground for the Court not pronouncing in favour of an alleged will, must be one inherent in the nature

**Evidence Act (I of 1872)—continued.**

of the transaction itself, and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction. Per Woodroffe, J.—The rule in (b) applies to cases where the circumstances of suspicion arises from the nature of the case as put forward by the propounder, in which case the propounder must remove the suspicion. Where, however, the alleged suspicion against a will arises from facts which form part of the impugnant's case, then the Court must see whether the facts which are said to give rise to suspicion are proved or whether the propounder's case is proved. The rule therefore does not apply where the question is simply which set of witnesses should be believed. In this case the trial Judge having decided against the genuineness of the will, on the ground that the evidence of the witnesses whom the propounder had called to support her case was not so unimpeachable, so absolutely trustworthy in itself as by its own merit to dispose of all objections and to allay all doubt and suspicion. Held (per Jenkins, C.J.)—That the standard of proof required by the Judge was higher than the law (as contained in s. 3, Evidence Act) prescribes. Per Woodroffe, J.—A probate case is not singular as regards the application of the general principles of proof as contained in ss. 3 and 101, Evidence Act. Per Jenkins, C.J.—The Evidence Act, by which in matters of proof the Courts in this country must be guided, has, in conformity with the general tendency of the day, adopted the requirements of the prudent man as an appropriate concrete standard by which to measure proof. The evidence Act is at the same time expressed in terms which allow full effect to be given to circumstances or conditions of probability or improbability, so that where, as in this case, forgery comes in question in a civil suit, the presumption against misconduct is not without its due weight as a circumstance of improbability, though the standard of proof to the exclusion of all reasonable doubt require in a criminal case may not be applicable. (10 Moore, P.C., 502, 531, R.) This probability gains in strength where the character and position of the individual impugned is, apart from the particular case above reproach. Per Curiam, J.—While counsel has discretion, the Court has also power under s. 125 of the Evidence Act to direct the order in which witnesses cited by a party shall be examined. Per Woodroffe, J.—A Court cannot assume that a document was proved from the refusal of opposing counsel to cross-examine it. The latter is entitled to wait until the Court ruled whether the document was proved or not. If a cross-examining counsel, after putting a paper in the hands of witness, merely asks him some questions as to its general nature or identity, its adversary will have no right to see the document; but if the paper is used for refreshing the memory of the witness or questions are put respecting its contents or regarding the handwriting, his opponent may claim to see the paper. The limits within which the opinion of experts is admissi-



**Evidence Act (I of 1872)—continued.**

ble considered, and the difference between mere advice on evidence and opinion, indicated by *Woodroffe, J. GOPESSUR DUTT v. BISSESUR DUTT*, 16 C.W.N. 265.

(16)—Ss. 3, 57 — *Registered powers of attorney, Admission of.*—A registered power of attorney was admitted under s. 57 of the Evidence Act without proof, as the registering officer is a Court under s. 3 of the Act. *KRISTO NATH KOONDOO v. T. F. BROWN*, 14 C. 176. [Diss., 17 C. 903; R., 9 Bom. L.R. 401.]

(17)—Ss. 3, 90—*Custody of old documents—Proof.*—A document may be treated as authentic and admissible in evidence, which is so old that the witnesses to its execution may be reasonably supposed to be dead. If the custody thereof, so far as witnesses can speak to it, has been and is the custody, in which, judging from the purport of the document itself and the other circumstances of the case, it would naturally be expected to reside, then the document ought to be treated as authentic to such extent as to become admissible in evidence between the parties; it would not, however, be necessary to go behind the possession of the present owner of it. *CHUNDER KANT MISTREE v. BROJO-NATH BYSACK*, 13 W.R. 109.

(18)—Ss. 3, 91, 92, 100 — *Dictation of document by transferor equivalent to execution—Inadmissibility of parol evidence to contradict or vary terms of document.*—The definition of "document," in s. 3 of the Evidence Act, does not require any signature, and what the plaintiff did (*viz.*, dictating the document himself and causing certain persons present to sign as witnesses) amounted to a virtual execution of the instrument. Parol evidence is inadmissible to contradict or vary the terms of the document. *MAUNG TUN NYO v. MA SHWE THE*, U.B.R. 1892-1896, Vol. II, 345. [R., U.B.R. 1892-1896, Vol. II, 377.]

(19)—Ss. 3, 161—*Entry in Land Records Register IX as to transfer of land not signed by person reporting transaction—Its admissibility in evidence to prove report—See MORTGAGE—GENERAL*, 5 L.B.R. 40=2 Ind. Cas. 535.

(20)—S. 4—*See ACT X OF 1873, s. 11*, 8 Bom. L.R. 19=1 M.L.T. 63.

(21)—S. 4—*Meaning of "shall presume"*—*See U.P. ACT II OF 1901, s. 20*, 8 A.L.J. 1025.

(22)—S. 4—*Record of plaintiff's name as a co-sharer—Presumption—See U.P. ACT II OF 1901, s. 201*, A.W.N. 1906, 316=4 A.L.J. 3=29 A. 148.

(22-a)—S. 4—*See No. 397, infra.*

(23)—Ss. 4 and 90—*Document more than thirty years old. Proof of—Presumption as to document more than thirty years old, discretion of Court as regards.*—The plaintiff produced a document more than thirty years old which purported to come from proper custody. The lower Courts called for proof of it, and as the plaintiff failed to prove the document formally

**Evidence Act (I of 1872)—continued.**

they rejected it. There were circumstances both internal and external which threw great doubts upon the genuineness of the document. *Held*, that, under s. 90 of the Indian Evidence Act read with s. 4 of the same Act, the Court has a discretion to call for proof of a document although it be more than thirty years old and purports to come from proper custody and that under the circumstances of the present case the discretion was rightly exercised. *MUSSAM-MAT SHAFIQ-UN-NISA v. KHAN BAHADUR RAJA SHABAN ALI KHAN*, 7 O.C. 290.

(24)—Ss. 4 and 90—*See CUSTOMS—PUNJAB—ALIENATION*, 110 P.L.R. 1902.

(25)—Ss. 4, 114, *illus. (g)*—*Non-production of instrument in party's possession.*—When a party does not produce a document in his possession, the Court may presume that its production will damage his case. This is an exercise of discretion conferred by s. 4, Evidence Act, which renders it a judicial discretion to decide whether the fact which, under s. 114, Evidence Act, may be presumed by the non-production of the document, has been proved by virtue of that presumption. But there may be circumstances which may induce the Court to call for confirmatory evidence. *RAGHUNATH v. HOTI LAL*, 1 A.L.J. 121.

(26)—S. 5—*Questions as to the admissibility of evidence—Practice.*—Such questions should be decided as they arise and should not be reserved until judgment in the case is given. *ABDUL RASACK v. MA U*, U.B.R. 1897-1901, Vol. II, 376. (9 W.R. 587, 17 C. 173, F.)

(27)—S. 8, *Accused—Statements—Departmental inquiry—Statements at the inquiry—Admissibility of statements.*—The answers to his superior officer given by an accused person in explanation of an official irregularity can be proved against him if subsequently ascertained to be false. The subordinate is under no legal obligation to attend an official inquiry but if he does attend and answers the questions put to him the answers that he gives fall under the category of statements which accompany and explain acts other than statements. *KING-EMPEROR v. GANESH*, 4 Bom. L.R. 284.

(28)—Ss. 8, 18, 21, 66, 91 and 157—*Mortgage-deed—Admissibility of oral evidence to prove its contents—Secondary evidence of documents and oral evidence—Difference.*—According to s. 91 of the Evidence Act, the terms of a mortgage can only be proved by the production of the mortgage-deed or of secondary evidence of its contents, in case it is shown to be lost or destroyed, or the opposite party who has the document fails to produce it after notice. In a case where the document was not shown to have been lost or destroyed, and the other party got no notice to produce it, oral evidence of its terms was held to be inadmissible. Distinction pointed out between secondary evidence of the contents of a document and oral evidence of the transaction under s. 157, or as showing the conduct of the parties



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under s. 8 or as an admission under ss. 18 (2), and 21 of the Evidence Act. *MI LE BYU v. MI SHWE MYA*, U.B.R. 1907, 4th Qr., Evidence, 13. (U.B.R. 1892-1896, Vol. II, 586, U.B.R. 1897-1901, Vol. II, 382, 556, R.).

(29)—S. 9—*Proof as to descent of party to suit—Admissibility in evidence of copy of previous proceedings.*—Where the plaintiff, in a suit in which the principal issue, relating to the family pedigree, was as to whether a party was the descendant in one line or another, tendered in evidence, under the provisions of s. 568 of the Civ. Pro. Code, a copy of a *rubkar*, i.e., a judgment delivered by a Magistrate in certain prior proceedings, in which there was a reference to the descent of the party, the High Court held that the *rubkar* was admissible in evidence under s. 9 of the Evidence Act and that the plaintiffs had shown proper and sufficient grounds for the admission of the copy thereof in evidence. *RADHAN SINGH v. KUARJI DICCHIT*, 18 A. 98 = A.W.N. 1895, 236.

(30)—Ss. 9, 11 (3)—*See CUSTOMS—PUNJAB—INHERITANCE*, 24 P.L.R. 1902.

(31)—Ss. 9, 13—*Butwara papers—Admissibility in evidence—Estates Partition Act (VII B.C. of 1876), s. 57.*—The partition paper prepared under s. 57 of the Estates Partition Act is admissible in evidence under s. 13 of the Evidence Act, as a record of a transaction in which the right to certain plots is recognised. The field book or *chitta*, which describes the various plots, is also admissible under s. 9 of the Evidence Act, as explanatory of the partition paper, which without the *chitta* might be very difficult to understand. *SHEIKH JAKI MAMOOD v. DINO BANDHU BHATTACHARJEE*, 2 Ind. Cas. 367. (10 W.R. 197, 21 W.R. 29, D.)

(32)—S. 10—*Scope—Alleged conspiracy—Statement made by alleged conspirator—Relevancy.*—Where, in an application for grant of probate of a will, statements, purporting to have been made to a witness by an alleged conspirator, suggesting a conspiracy, between the applicant and some of others, to put forward a forged will, were tendered in evidence under s. 10, I.E.A., it was held that they were neither relevant nor could be used to prove the existence of a conspiracy, as to which there was no issue, or to prove the complicity of the applicant. *KADAMBINI DASSI v. KUMUDINI DASSI*, 30 C. 983 = 7 C.W.N. 808.

(33)—Ss. 10, 13, 18, 21, 33, 41, 43, 45, 155, 157—*See GUARDIAN—GENERAL*, 86 P.W.R. 1910 = 7 Ind. Cas. 505 = 213 P.L.R. 1910.

(34)—S. 11—*Admission by one defendant—Relevancy as against other defendants—Fact making probable a fact in issue.*—An admission made by one of the defendants, in a previous suit (to which he was himself a party), as to the common character of a portion of a lane, may be used in evidence against other defendants even though they may not be parties to that

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previous suit. A statement to the same effect made by one of the defendants in a deed put in by him to prove his title to his own house is admissible in evidence to establish the common character of the entire lane as alleged by the plaintiff. Under s. 11 of the Evidence Act, facts are relevant which make the existence of a fact in issue highly probable. Therefore, the fact of common ownership in other parts of a lane should be treated as relevant to the issue as to the common character of the entire lane. *NARO VINAYAK PATVARDHAN v. NARHARI BIN RAGHUNATH*, 16 B. 125. (*Jones v. Williams*, 2 M.W.N. 331, R.) [*Rel. on*, 25 C. 210 = 2 C.W.N. 91.]

(35)—S. 11—*Collateral facts—Relevancy.*—In order that a collateral fact may be admissible as relevant under s. 11 of the Indian Evidence Act, the requirements of the law are (1) that the collateral fact must itself be established by reasonably conclusive evidence, and (2) that it must, when established, afford a reasonable presumption or inference as to the matter in dispute. *KHAVER SULTAN v. RUKHA SULTAN*, 6 Bom. L.R. 983.

(36)—S. 11—*Prior decision.*—Where the question was whether a channel was an old one or recently constructed, and what was the custom as to the flow of water, a prior decision on these questions, though it is no evidence of the custom as against one who was not a party to it, is yet *prima facie* evidence of the fact of the existence of the channel at the date of the litigation. *KARUPAM ZEMINDAR v. MERANGI ZEMINDAR*, 5 M. 253.

(37)—S. 11—*Probate proceedings—Statement made by testatrix to the nurse who attended her during her last illness—Statement making disposition of her property—Admissibility of such statement—Relevancy.*—In proceedings for probate of a will, a witness, who attended on the testatrix during her last illness, was asked to depose to a statement made to the witness by the testatrix as to a disposition of her ornaments by will. The District Judge, however, disallowed the question: *Held*, that the question was improperly disallowed, since a statement by the testatrix suggesting any inference as to the execution of a will would be an admission relevant against her representatives and would therefore be admissible as evidence under s. 11 of the Indian Evidence Act, 1872. *NANA v. SHANKAR*, 3 Bom. L.R. 465.

(38)—S. 11—*See EVIDENCE—DECREES, JUDGMENTS AND PROCEEDINGS IN SUITS*, 11 C.L.R. 528.

(39)—S. 11—*See NOS. 11, 13, 30, supra.*

(40)—S. 11, cl. (2)—*Lease—Facts held relevant, etc.*—On the question whether certain leases were perpetual, it was held that the fact, that the intention indicated by the acts and conduct of the parties was to make certain other leases granted at about the same time, under similar circumstances, perpetual, would make it highly probable, that the same was the



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intention with regard to the leases in dispute, and that the facts relating to these leases would be relevant facts under cl. (2), s. 11, I.E.A. Evidence adduced to show that rents were received from the grantees successors in several instances the names of the deceased grantees being still retained in the rent receipts wherein the successors (who were not recognised as *mokurari istemrardars*), were described as *marfatdars*, held not relevant and not indicative of such intention. **NARSINGH DAYAL SAHU v. RAM NARAIN SINGH, 30 C. 883.** (*Croft v. Lumley*, 6 H.L.C. 672, 713, D.) (9 C. 843, D.)

(41)—Ss. 11 and 13—*Recitals in documents if and when admissible, against persons not parties to the deeds.*—*Per RAMPINI, J.*—Documents, for instance, a deed of sale and a mortgage-deed, as in this case, though not *inter partes*, containing recitals that a particular land belongs to a particular *howla*, which is in question, are admissible in evidence under either s. 11 (b) or 13 of the Act, although they are not conclusive or binding evidence and may be very weak evidence or even of no weight at all, (16 M. 194, 23 W.R. 293, 25 C. 522, R.) *Per GEIDT, J.*—Documents containing recitals that a particular plot of land is included within a particular *howla*, though not *inter partes*, are admissible in evidence under s. 13 of the Act, as transactions by which the right to hold the land as part of the *howla* is recognised, and particularly when the existence of that right is a question raised in the case and is a relevant fact. **DWARKA NATH BAKSH v. MUKUNDU LAL CHOWDHURY, 5 C.L.J. 55.**

(42)—Ss. 11, 13 — *See RES-JUDICATA—ESTOPPEL BY JUDGMENT, 6 C. 171=6 C.L. R. 439.*

(43)—Ss. 11, 13, 32, cls. (2) and (3)—*Statement by third party—Admissibility.*—Where the suit was for ejection, the fact that the proprietor of neighbouring piece of land in describing the boundaries of his parcel stated that the land of the predecessor of the defendant was situated on that boundary is not relevant under s. 11, Evidence Act. S. 13, Evidence Act, is of no avail where the transactions were in respect of lands other than the disputed land, as there was not any transaction or particular instance by or in which the right in dispute was claimed, recognised, asserted or denied. A statement made in deed of conveyance or mortgage deed is not made in the course of business within the meaning of cl. (2) of s. 32, Evidence Act. (13 C.W.N. 71, R.) The statement in the deeds that the transferor was owner of the land conveyed or mortgaged and that he was either extinguishing his interest in the land by an absolute sale or placing a restriction on it by way of a mortgage, is one against the pecuniary or proprietary interest of the person making it; consequently the statement as a whole is admissible in evidence. **ABDULLAH v. KUNJ BEHARY LAL, 14 C.L.J. 467.** (23 B. 63, R.)

(44)—Ss. 11, 13 and 43—*Judgment inter alia, Admissibility of—Liability of partner, Extent of*

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—*Suit for rent against lessee's representatives and his partner.*—One J took from the plaintiffs a lease of all coal land lying under *mouzah* T. J. undertook to raise coal and pay the plaintiffs, from after one year of the date of the *kabuliyat*, at a rate not less than a fixed minimum. The present suit was for the realization of the minimum amount payable under the above agreement. Defendants 1 and 2 were the sons of J, and defendant No. 3 was impleaded by the plaintiffs on the allegation that J had entered into partnership with him and, for the purpose of carrying on coal business, acquired the *mouzah* T and others with the partnership funds. It was contended, on behalf of defendant No. 3, that he was not a partner of J and that he did not authorise J to take the lease and had no knowledge of the transaction. The Subordinate Judge decreed the suit against all the defendants. Defendant No. 3 appealed to the High Court. On behalf of the appellant, it was contended that the lower Court was not right in admitting a decree passed on an arbitration-award, made in a suit between him and J for dissolution of partnership. The arbitration-award, had declared that the lease of *mouzah* T and others were acquired for partnership purposes and from partnership funds, and the partners were equally liable for the debts and equally entitled to the outstanding partnership dues. In the present case, it was proved that the appellant had claimed and recovered some of the outstanding dues mentioned in the award. *Per Geidt, J.* Neither the award-decree, nor the claim mentioned above, is admissible in this case against the appellant for the purpose of proving that the latter is liable to the plaintiffs for the rent of the plaint *mouzah*. The award-decree did not relate to matters of a public nature, so as to render it admissible under s. 42 of the Evidence Act. (6 C. 171, F.B., R.; 2 C.W.N. 501=25 C. 522, 22 C. 583, Cons.) The "general principle is that the mere existence of a judgment, its date and legal consequences, are conclusively proved, as against all the world, by the production of the record, but that it furnishes no proof whatever of collateral facts, even though, as between the parties to such judgment themselves, such facts must have been proved." Further, judgment *in personam*, though generally binding upon the parties and privies thereto, may be used as against third persons, for the purpose of proving conclusively against them, in the absence of fraud upon them, the relationship between the parties, and of the extent of the relation, though the judgments cannot be used in favour of such third persons. *Per Ghose, J.*—The judgment passed upon the arbitration-award is relevant evidence in this case, upon the question whether the lease of the *mouzah* T was acquired by J for his own benefit or as partnership property, though the plaintiffs were no parties to the suit in which it was passed. The said judgment declaring that *mouzah* T is a part of the partnership property, is either a fact relevant to the question at issue



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in this case, within the meaning of s. 11, or it is a transaction recognising the right of the appellant in that property, within the meaning of s. 13 of the Evidence Act. (6 C. 171, 2 C.W.N. 501=25 C. 522, 22 C. 533, 1 C.W.N. 265, 19 A. 277, 13 C. 352, R.) [Expl., 9 C.L.J. 597=12 C.W.N. 739; R., 7 C.L.J. 384.] In the circumstances of the case, the Court directed a decree to be passed against all the defendants, but limiting the liability of the appellant to his interest in the *mouzah* T, and extending the liability of defendants 1 and 2 to any property, including *mouzah* T, that may have come into their hands from the estate of their father. **ABINASH CHANDRA CHATTERJEE v. PARESH NATH GHOSE, 9 C.W.N. 402.**

(45)—Ss. 11, 13, 43—Evidentiary value of the judgment of the Magistrate in the subsequent civil suit—See **MALICIOUS PROSECUTION, 9 Bom. L.R. 1134.**

(46)—Ss. 11 (2) and 21 (3)—*Admissions relevant otherwise than as admissions.*—The fact in issue in a suit (the plaintiffs and some of the defendants wherein were co-owners of certain property, being whether there was a partition between them, and whether under that partition those defendants came to be in possession of a specific property in lieu of their shares in all the properties, a petition and written statement filed by those defendants in some previous proceedings, admitting the partition and the exclusive acquisition of the specific property, were held to be relevant facts, which, by s. 11, cl. 2, and s. 21, cl. 3, I.E.A., made the existence of the partition highly probable. **GYANNESSA v. MOBARAKANNESSA, 25 C.210=2 C.W.N. 91. (16 B. 125, Rel. on.)**

(47)—Ss. 11, 32—*Relevant facts—Statements by persons who cannot be found or called as witnesses.*—As a general rule s. 11 of Evidence Act is controlled by s. 32 of the Act, where the evidence consists of statements of persons who are dead or who cannot be found; but this rule is subject to certain exceptions. S. 32 imposes restrictions upon the admissibility of statements made by persons who cannot be brought before the Court to give their own evidence. The whole scope and object of the section centres upon securing the highest degree of truth possible in the circumstances for the statement. It follows that where the person tendering such a statement is indifferent as to its truth or falsehood there is nothing to bring that section into play. The test, whether the statement of a person who is dead or who cannot be found is relevant under s. 11 and admissible under that section (presuming that it is in other respects within the intention of the section) although it would not be admissible under s. 32, is this. It is admissible under s. 11 when it is altogether immaterial whether what the dead man said was true or false, but highly material that he did say it. In these circumstances, no amount of cross-examination could alter the fact, if it be a fact, that he did say the thing, and if nothing more is needed to bring the

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thing said under s. 11 then the case is outside s. 32. **R. D. SETHNA v. MIRZA MAHOMED SHIRAZI, 9 Bom. L.R. 1047.**

(48) Ss. 11, 32, 33—*Previous statements, Admissibility of—Persons making statements dead.*—*Per Richards C.J.*—Previous statements made by persons who are dead are simply statements of relevant facts. Such statements are not relevant facts unless they come under some one or more of the sub-sections of s. 32 of the Evidence Act. A statement of a relevant fact, which is inadmissible under s. 32, will not be admissible under s. 11. *Per Banerji, J.*—The terms of s. 11 are no doubt wide, but they must be read subject to the other sections of the Act, and therefore the fact relied on must be proved in accordance with the provisions of the Act. If that fact is a statement made by a person who is not called or cannot be called, the statement cannot be admitted, unless it comes within the purview of subsequent sections of the Act, for example, ss. 32 and 33. **BELLA RANI v. MAHABIR SINGH, 9 A.L.J. 351.**

(49)—Ss. 11 and 43—Orders recorded in a suit, not *inter partes*, relevancy of—See **CIV. PRO. CODE, 1908, O. XVI, r. 7, O. XVIII, r. 4, 4 N.L.R. 129.**

(50)—S. 13—*Judgment in previous suit—Instance of right asserted.*—Where, in former cases, plaintiff asserted title but no judgment as to title is passed, such cases are admissible as evidence of instances in which the respective rights were asserted. **KAMALAMMAL v. KUMARA RAJA, 2 M.W.N. 1911, 337=10 M.L.T. 330. (32 M. 400, 29 C. 187, R.; 31 B. 143, Appr.)**

(51)—S. 13—*Judgments not inter partes.*—Where the judgments rejected by the lower appellate Court were not *inter partes* but were in suits brought by other creditors against the same defendants, in which the existence of the partnership denied in the present suit was asserted with success; *Held*, that the judgments were admissible in evidence and must be treated as relevant but not as conclusive as to the existence of the partnership. *Held*, also, that a statement made by an agent whom the Court regards, to make it, is admissible though not on oath. **GOVINDJI v. CHHOTALAL, 2 Bom. L.R. 651.**

(52)—S. 13—*Judgment not inter partes—Evidence—Judgment, in a former suit—Relevant evidence—Living witnesses—Their previous depositions recorded in a subsequent suit—Practice and procedure.*—The judgment in a previous suit, where the creditors of defendant 1 claimed to attach certain property as being that of defendant 1 and defendants 2 and 3 relied on a partition deed to prove that defendant 1 had given his share up to them, is, if not conclusive, at least relevant evidence in a subsequent suit, where the plaintiff claimed the property as the purchaser from defendant 1 and the defendants 2 and 3 set up the same partition deed in proof that the defendant 1 had no



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title, inasmuch as in both the cases, the point at issue, namely, the genuineness of the partition deed, was the same, and the parties also the same, namely, the defendant 1 by his creditors and assignees on the one side impeaching the deed, and the defendants 2 and 3 on the other contending for the deed. **LAKSHMAN v. AMRIT**, 2 Bom. L.R. 386 = 24 B. 591.

(53)—S. 13—*Documents not inter partes, Relevancy of.*—Plaintiffs instituted this suit for possession based on a lease to them from the shrotriendars of a village. The defendants contended that the shrotriendars were entitled only to the melvaram on the lands, but not to the lands themselves; of the documents relied on by the plaintiff some had been executed by tenants in the same village other than the defendants and they went to show that they were merely purakudis. These documents, though not conclusive against the defendants, were held to be admissible as relevant evidence under s. 13 of the Evidence Act, as showing the tenure on which the village was held. **VYTHILINGA v. VENKATACHALA**, 16 M. 194. [Appr., 5 C.L.J. 55; R., 24 B. 591.]

(54)—S. 13—*Construction of 'right' and transaction.*—In the absence of any qualification such as is found in s. 48, "right and custom" in s. 13 must be understood as comprehending all rights and customs recognised by law, and therefore including a right of ownership. As to the term 'transaction' it is doubtless one of large import, and might although by a somewhat strained use of it, be held to be applicable to proceedings in a suit; but such does not appear to be the intention of the framers of the Act, as the result of holding it to be so applicable in s. 13 would be to effect a most important departure from the English rule of evidence, which would make judgments, decrees and verdicts of juries only admissible in matters of public interest. **RANCHHODDAS KRISHNA DAS v. BAPU NARHAR**, 10 B. 439. [R., 31 B. 143 = 9 Bom. L.R. 65.]

(55)—S. 13—*Judgment.*—A judgment setting out the terms of a compromise in the form of a recital is relevant under s. 13. **ROOP CHAND BHUKUT v. HUR KISHEN DOSS**, 23 W.R. 162. [R., 24 B. 591.]

(56)—S. 13—"Right."—The right mentioned in the above section is not a public right only. **SCORJO NARAIN PANDA v. BISSAMBHUR SINGH**, 23 W.R. 311.

(57)—S. 13—*Previous judgment and decrees.*—In questions involving the determination of a right to an odbikaree, and the rule of succession to the office, previous judgments and decrees involving instances in which the right and custom were successfully asserted, are admissible under this section. **KOONDO NATH SURMA GOSSAMEE v. DHEER CHUNDER SURMA ODHIKAR GOSSAMEE**, 20 W.R. 345.

(58)—S. 13—*Judgments not inter partes—Res judicata—Admissibility.*—Judgments not inter partes, though not conclusive as res judicata, are admissible in evidence under s. 13,

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Act I of 1872, to show the conduct of parties, or particular instances of the exercise of a right, or admissions made by the parties or their predecessors in title, or to identify property or to show how it had been previously dealt with. **GOBIND KRISHNA NARAIN v. ABDUL QAYYAM**, 25 A. 546 = A.W.N. 1903, 137. (22 I. A. 60, 24 I.A. 10, 12 A. 1, 5 Bom. L.R. 230, R.)

(59)—S. 13—*Admissibility of previous judgment as regards the ownership of waste land*—See **MAD. ACT VIII OF 1865**, s. 11, 17 M.L.J. 518 = 2 M.L.T. 455 = 30 M. 510.

(60)—S. 13—*Instances of pre-emption in neighbouring mohallas—Uncontested instances—Value*—See **PUN. ACT II OF 1905**, s. 6, 138 P.L.R. 1911.

(61)—S. 13—*See CUSTOMS—PUNJAB—PRE-EMPTION*, 89 P.L.R. 1902 = 42 P.R. 1903.

(62)—S. 13—*Judgment in previous suit—Admissibility in evidence*—See **DEBUTTER PROPERTY**, 12 C.W.N. 739 = 9 C.L.J. 597.

(63)—S. 13—*Recitals of pleadings in judgments—Admissibility of such judgments in evidence—Evidence of instances*—See **MAINTENANCE—GRANT**, 3 C.L.J. 521.

(64)—S. 13—*See POSSESSION—SUITS FOR POSSESSION*, 7 O.C. 122.

(65)—S. 13—*Transactions inter alios—Proof of title—Successful resistance, on several previous occasions to proposals, by Revenue authorities to settle certain portions of land, on which jhum cultivation was being made, as ilam land open for settlement—Inference of land being included within permanently-settled estate—Inapplicability of Reg. III of 1891*—See **BEN. REG. III OF 1891**, 12 C.W.N. 1095 = 4 M.L.T. 234 = 10 Bom. L.R. 1102 = 8 C.L.J. 436 = 18 M. L.J. 549 = 36 C. 1 = 1 Ind. Cas. 182, P.C.

(66)—S. 13—*See SPECIAL OR SECOND APPEAL—MISCELLANEOUS*, 23 C. 179.

(67)—S. 13—*Decrees—Admissibility of proof of custom*—See **WAJIB-UL-ARZ**, 8 A.L.J. 770.

(68)—S. 13—*See Nos. 11, 31, 33, 41, 42, 43, 44, 65, supra.*

(69)—S. 13 (b)—*Particular instances—Primogeniture.*—Statements contained in petitions by members of a family recognizing the existence of a custom of primogeniture in the family, are relevant and admissible as evidence of particular instances in which the custom was recognized as affecting their own rights. **SHYAMANAND DAS MOHAPATRA v. RAMA KANTA DAS MOHAPATRA**, 32 C. 6. [Reversed, 6 A.L.J. 374 = 9 C.L.J. 497.]

(70)—S. 13 (b)—*Suit for foreclosure—Minority of defendant—Burden of proof—Admissibility of previous judgments*—See **MORTGAGE—FORECLOSURE**, 6 A.L.J. 693 = 2 Ind. Cas. 839.

(71)—Ss. 13, 21, cl. (1), 32, cl. (7)—*Evidence of family custom—Statement in writing by party to suit who is dead.*—In a suit to establish



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the existence of a family custom, a deed containing a recital of the custom as alleged in the plaint and a covenant to do nothing contrary to it, was tendered in evidence by the plaintiffs. The deed had been executed before suit by the present plaintiffs and by another plaintiff who had died after the institution of the suit. *Held*, that the deed was admissible in evidence on the plaintiffs' behalf, though they could themselves be called as witnesses, but though the deed was admissible, the custom as against the defendants must be proved *aliunde*. **HURRONATE MULLICK v. NITTANUND MULLICK**, 10 B.L.R. 263.

(72)—Ss. 13, 32, cls.(3) and (5)—*Admissibility of proceedings of another litigation—Statement made by a woman as to her marriage with another person—Admissibility of—Finding of fact, how far it can be challenged in second appeal—Practice—Whole cannot be challenged.*—The question for decision was whether the appellant was the legitimate daughter of one K and R. The respondent contended that R. was not the legally married wife of K, and in proof of it produced a compromise and a decree between R and another person by which R obtained only a small amount as maintenance. He also relied upon a statement made by R on a certain occasion admitting that she was the concubine and not the married wife of K. The question before the Court was whether the compromise and the decree passed in the other suit as well as the statement of R were admissible in evidence. In second appeal it was also urged that the statement of R had not been proved by the best available evidence: *Held*, that the compromise and the decree passed in the other case were relevant under s. 13 of the Evidence Act: *Held*, also that the statement of R was admissible in evidence under s. 32, cls. (3) and (5) of the same Act: *Held*, further, that it was not for a Court in second appeal to consider the precise degree of weight to be attached to the different parts of evidence. If a finding of fact had been arrived at after a careful consideration as a whole, no valid objection in law could be made in second appeal with respect to this finding. **PARBATI v. MAHARAJ SINGH**, 10 Ind. Cas. 188.

(73)—Ss. 13 (a) and 32 (c)—*Document, Statement in—Admissibility against person not a party to it—Statement of deceased person—Right or custom, Evidence of—Nakdi or bhaoli rent.*—To prove or disprove a right or custom, it is not enough to adduce evidence of a transaction, in which, or in the course of which, the right of custom was asserted or denied. The transaction will be relevant under s. 12, cl. (a) of the Evidence Act, if it be one by which the right or custom was asserted or denied. When the question was whether the tenant held lands under the *nakdi* or *bhaoli* system of rent, and the Court based its decision on a statement contained in a *hebanama* executed by the deceased grandfather of the tenant, *held* that the *hebanama* was not admissible in evidence under s. 32 (7), read with s. 13, cl. (a) of the Evidence Act. **BANSI SINGH v. MIR AMIR ALI**, 11 C.W.N. 703.

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(74)—Ss. 13 and 14—*See CUSTOMS—PUNJAB ALIENATION*, 154 P.L.R. 1901=6 P.R. 1902.

(75)—Ss. 13, 35—*Copies of judgment and decrees.*—Certified copies of judgments and decrees, which a party seeks to make use of, not as constituting matters in dispute *res judicata*, but as containing summaries of statements made by parties concerned in the management of the plaint properties, and as evidence of conduct, are inadmissible in evidence. **SUBRAMANYAN v. PARAMASWARAN**, 11 M. 116. [R., 24 B. 591; D., 15 M. 19, 18 M. 73.]

(76)—Ss. 13, 40—*See RES JUDICATA—ADJUDICATIONS*, 70 P.R. 1875.

(77)—Ss. 13, 40, 41, 42, 43—*Decrees and judgments, Admissibility of—Burden of proof.*—Judgments and decrees recognizing rights between parties to a suit or between persons whom they represent are not conclusive, but are admissible in evidence under s. 13 of the Evidence Act, though the parties in the present suit are different from those in the former suit. But such judgments and decrees, between the same parties as those in the present suit or between those under whom they respectively claim, are evidence so nearly conclusively as, when produced, to shift the burden of proof on to the opposite party. **NARANJI BHIKHABHAI v. DIPA UMED**, 3 B. 3. [Appl., 6 C. 171; R., 12 M. 9, 12 A. 1, 24 B. 591; D., 10 B. 439.]

(78)—Ss. 13, 43—*Judgment not inter partes—Admissibility of the judgment in subsequent proceedings—Particular instances in which the right was claimed—Res judicata—Civ. Pro. Code (Act XIV of 1882), s. 13.*—The plaintiff relying on a registered sale-deed passed to him by his father in 1885 sued to recover the possession of the property sold from his brother, brother's wife and the wife of a deceased brother. The plaintiff's father died in 1888 and the suit was brought in 1903. In 1886, certain mortgagees had filed a suit against the plaintiff, his father and mother on a mortgage-bond executed by the father. In that suit, the Court of first instance as also the District Court held the plaintiff's sale to be a sham transaction. The plaintiff at that time paid off the mortgage-deed. The defendants relied upon the judgment in suit of 1886 to show that the sale relied upon by the plaintiff was colourable: *Held*, by Russel, Ag. C.J., (1) that the proceedings in the suit of 1886 should be admitted as relevant evidence in the present suit, for the present plaintiff and the defendants, either by themselves or their predecessors, were parties to the suit of 1886. (2) That the judgment in the suit of 1886 would come within the purview of cl. 2 of s. 13 of the Evidence Act, 1872. *Held*, by Beaman, J., (1) that a party who has been allowed to put in a previous judgment not *inter partes*, for the purposes of s. 13 of the Indian Evidence Act, 1872, cannot be allowed to use its contents *qua* judgment virtually thereby converting it into a *res judicata*. (2) That, therefore, conceding that the judgment in suit of 1886 was admissible to



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prove that in 1886 there was a dispute about the genuineness of this sale-deed it could not be used for any ulterior purpose. **MAHAMAD v. HUSAN**, 9 Bom. L.R. 68=31 B. 143.

(79)—Ss. 13, 43—*Proceedings in suit.*—Proceedings in suits in which a former holder of the tenure of the person who was said to have created the *itmamee* right was a party are "transactions" with in the meaning of s. 13, and as such are admissible in a suit to establish an *itmamee* right. **NEAMUT ALI v. GOOROO DASS**, 22 W.R. 365. [Appr., 24 W.R. 470; Cons., 10 B. 439; R., 8 C. 985, 3 B. 3, 24 B. 591, 12 A. 1.]

(80)—Ss. 13, 65 and 66 (2)—*Grants, Construction of—Secondary evidence—Judgment not inter partes, Admissibility of—Board's letter—Recognition—Notice to quit.*—Where a grant of land was made as a present for the purpose of planting a garden, and another was made "subject to faithful service," and the documents of grants did not contain any words expressly limiting the grants to the life of the grantee, nor making them descendible to the heirs of the grantee; *held*, they conveyed only life grants. In a suit *khas* possession on the ground that the defendants were trespassers on the death of their ancestor, the grantee, the plaintiff, relied on office copies of grants kept in the course of business of the grantor's *sherista*; *held*, that no notice to the defendants to produce the original was necessary to render secondary evidence admissible, as the defendants, from the nature of the case, must have known, that they would be required to produce the originals. Where judgments not *inter partes* were filed to show that similar grants were resumed by the grantor or his heirs on the death of the grantee; *held*, they are admissible as evidence under the provisions of s. 13 of the Evidence Act. Board's letter, dated the 26th November, 1792, showing that *jaigirs* are resumable on the death of the grantee is inadmissible in evidence. When the agent of the grantor, in ignorance of the death of the grantee, granted rent receipts to the heirs in the name of the grantee, *held*, the receipts did not recognise the heirs as tenant and successors of the grantee, and it was not necessary to give them notice to quit before bringing a suit against them. **SYED MAHAMAD KHAN v. MAHARAJA NAM NARAIN SINGH BAHADUR**, 7 C.L.J. 90.

(81)—Ss. 13, 83—*Thak map—Prima facie case—Burden of proof—Chitta, Admissibility of, in evidence.*—There are certainly cases in which the *thak* map is quite sufficient to raise *prima facie* case on behalf of the person pleading it, and to put the other side to the task of rebutting that evidence, but it would not be right in point of law to direct the Court that it ought, in all cases, to act on the last *thak* or survey map, and to treat it as decisive in the absence of evidence to the contrary. (30 C. 291, P.C.=30 I.A. 44=7 C.W.N. 193, F.) Where the plaintiff's estate formed portion of a *parganah*, in which the Government and other landlords were interested, and the Government prepared

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a *chitta* of the whole property and set down against each plot to which of the various estates it belonged: *Held*, that, although the *chitta* does not come under s. 83 of the Evidence Act and cannot be regarded as a public document, yet it may be used in evidence under s. 13 of the Act, as being evidence of instances in which the rights now in controversy were recognised or asserted. (9 C. 741, R.) *Held*, further, that the *chittas* are evidence even if their accuracy cannot be presumed; for it is the fact that they are evidence of the recognition or assertion of a right that makes the entry admissible, and not the fact that they have been accurately prepared. **NOBENDRA KISHORE ROY v. KAZI LUTFUL HUQ**, 2 Ind. Cas 513.

(82)—Ss. 13, 83—*Map of khas mehal land prepared under direction of Government—Admissibility in boundary disputes—Witness, Non-attendance of—Process to compel attendance refused without good ground—Second appeal.*—In a dispute relating to the boundary of a holding between the plaintiff and the Municipal Corporation of Calcutta: *Held*, that a map prepared in 1872 under the direction of the Government, acting not in its sovereign capacity, but as the landlord of this and neighbouring holdings, was admissible in evidence, if not under s. 83, under s. 13 of the Evidence Act. A servant of the Municipality was summoned at the plaintiff's instance to produce certain documents which the plaintiff maintained would support his case of adverse possession of the land in dispute, but he failed or declined to attend, and the plaintiff's application for a warrant to compel his attendance was rejected without good reason. The suit was dismissed on the ground, amongst others, that plaintiff was not in possession for 12 years: *Held*, on second appeal, that there should be a re-hearing after compelling the witness to attend and produce the documents. **UPENDRA NATH GHOSH v. THE CHAIRMAN OF THE CALCUTTA CORPORATION**, 16 C.W.N. 116.

(83)—S. 14—*See ABATEMENT OF APPEAL*, 86 P.R. 1886.

(84)—S. 18—*Statement by defendant in another suit.*—A statement made by defendant in another suit may be used as an admission within the meaning of the above section. **HURISH CHUNDER MULLICK v. PROSUNNO COOMAR BANERJEE**, 22 W.R. 303.

(85)—S. 18—*See NOS. 28, 33, supra.*

(86)—Ss. 18, 21—*Admission by party's predecessor-in-title—Relevancy—Burden of proof—Effect on.*—An admission against her own interest by the predecessor-in-title of the defendant is relevant under ss. 18 and 21 of the Evidence Act and, though not conclusive, is sufficient by itself to shift the burden of proof. **SAKHARAM v. SHRIRAM**, 7 N.L.R. 23. (29 A. 184, F.)

(87)—Ss. 18, 21—*Previous statement by party in his own favour, not admissible in evidence—See INSOLVENCY—VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR*, 19 A. 76=23 I.A. 106, P.C.



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(88)—S. 19—*Deposition of witness—Admissibility of previous deposition containing description.*—The question at issue was whether a party was the legitimate issue of a person with whom her mother was living after having been previously married to another who, it was alleged, had divorced her. A deposition given by the mother was tendered in evidence, in which she was described at the heading as the wife of her previous husband, but in the body of which she stated she had been living with the alleged father for 10 or 12 years past. *Held*, that the deposition, even if admissible, was of no weight for the reason that her statement did not amount to an admission that she was living in adultery. **MAQBULAN v. AHMAD HUSAIN**, 26 A. 108, P.C.=8 C.W.N. 241=6 Bom. L.R. 233=31 I.A. 38=5 Sar. 583.

(89)—S. 21—*Purchaser at execution sale is a "representative in interest."*—A purchaser at an execution sale is a "representative in interest" of the judgment-debtor within the meaning of s. 21. **UNNAPOORNA DASSEE v. NUFUR PODDAR**, 21 W.R. 148. [R., 13 A. 28; D., 6 C.L.J. 659.]

(90)—S. 21—*Statement in sale certificate, an admission—Evidentiary value.*—A statement about the rent payable for a holding, as given in a sale certificate, obtained by a purchaser of the holding at a sale in execution of a decree against the former tenant, must be taken to be in the nature of an admission by him or his predecessor in title; and it cannot be used as evidence, as it does not come under any of the exceptions to s. 21. **RAMANI PERSHAD NARAIN SINGH v. MAHANATH ADIYA GOSSAIN**, 31 C. 380.

(91)—S. 21—*See ACT IV OF 1869*, 58 P.R. 1870.

(92)—S. 21—*See NOS. 28, 33, 46, 71, 86, 87, supra.*

(93)—Ss. 21, 31—*Relevancy, effect and value of admissions.*—The law regarding admissions, for the purpose of this case, is contained in ss. 21 and 31 of the Evidence Act. The former section rules that admissions are relevant and may be proved against the person who makes them. The latter declares that admissions are not conclusive proofs of the matters admitted, but that they may operate as estoppels. An admission is the easiest possible kind of evidence to procure; and when the witnesses are all closely related, though not necessarily interested in the case, there is a certain suspicion attaching to their testimony. The provision that admissions may operate as estoppels is sometimes attempted to be used as if, instead of saying that an admission is not conclusive proof, the section said that an admission is not sufficient proof without corroboration. But this is not the meaning. Conclusive proof is defined in s. 4 of the Evidence Act, and when one fact is declared to be conclusive proof of another, a Court cannot allow evidence to be given for the purpose of disproving the fact conclusively proved. The person against whom an admission is proved

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is at liberty to show that it was mistaken or untrue. When an admission is duly proved and the person against whom it is proved does not satisfy the Court that it was mistaken or untrue, there is nothing in the Evidence Act, and there is no general principle or rule of law, to prevent the Court from deciding the case in accordance with it. **MAUNG MYA v. MA THA YA**, U.B.R. 1897-1901, Vol. II, 377.

(94)—S. 21, cls. (1) and (3), s. 32 (5) and s. 157—*Admission by plaintiff—When admissible in his favour—Statement in previous deposition.*—When the plaintiffs sought to establish their pedigree by proving *inter alia* that A and B were brothers, *held*, that a statement to that effect, made by one of the plaintiffs, in a deposition given long before the controversy in suit arose, was admissible in evidence. **JADU NATH SARKAR v. MAHENDRA NATH ROY CHOWDHURY**, 12 C.W.N. 266.

(95)—Ss. 22, 65, 91 — *See NEGOTIABLE INSTRUMENTS—PROMISSORY NOTES*, 26 A. 178=A.W.N. 1903, 178.

(96)—S. 23—*Admissions in deed of compromise not admissible in evidence.*—By s. 23 of Act I of 1872 the Court is precluded from making use of the admissions in a deed of compromise which was entered into and subsequently set aside on the ground that the agent of one of the parties was not empowered to enter into it. **ILAHIA v. MAKHAN**, 83 P.R. 1877.

(97)—S. 23—*Document "without prejudice"—Admissibility in evidence—See LIMITATION ACT*, 1908, s. 19, 23 B. 177.

(98)—S. 24—*See ENGLISH LAW*, 2 Bom. L.R. 761.

(99)—S. 31—*See NO. 93, supra.*

(100)—Ss. 31, 115—*Fact evidencing admission neither conclusive proof nor constitutes estoppel.*—In a mortgage-deed executed by a widow, her son, for whom the loan was incurred, was described as the son of one R, who was alleged to have adopted him. The lower appellate Court had assumed from this fact that the mortgagees must be taken to have admitted the adoption and treated this as an estoppel against him. The High Court, however, *held* that even assuming that the mention of the adoption by R in the mortgage-deed was any evidence of admission, that could afford no conclusive proof by reason of s. 31, of the Indian Evidence Act. Also, under the circumstances, the fact treated by the lower Court as an estoppel had no such effect because it had not, as expressly required by s. 115 of the Evidence Act, caused or permitted the other party to believe a thing to be true and to act upon such belief. **YASHVANT PUTTU SHENVI v. RADHABAI**, 14 B. 312.

(101)—S. 32—*Horoscope—Admissibility in evidence.*—In a suit for immoveable property, a horoscope is not admissible in evidence under s. 32 of the Evidence Act, for the purpose of



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proving the parentage of the plaintiff, especially when the plaintiff is not aware of the person who wrote it or the endorsement upon it. **RAMANARAIN KALLIA v. MONEE BIBEE**, 9 C. 613. [F., 17 C. 849; D., 17 M. 134.]

(102)—S. 32—*Statements made by deceased tenants in road cess returns.*—Statements by deceased tenants in road cess returns filed by them, regarding the assets of the tenancy cannot, looking at the language and scope of s. 32, be regarded as statements made by those persons, within the meaning of s. 32, so as to be admissible against others. **HEM CHANDRA CHOWDHRY v. KALI PRASANNA BHADURI**, 26 C. 832.

(103)—S. 32—*Family pedigree—Admissibility.*—Where neither any of the bards who prepared the family pedigree nor the Raja who assembled the bards of the family and with their assistance got the pedigree drawn up was examined as a witness, and it was not shown that they were dead or could not be found or had become incapable of giving evidence or that their attendance could not be procured without an unreasonable amount of delay or expense, the pedigree was not admissible in evidence. **SURJAN SINGH v. SARDA SINGH**, 5 C W N. 49=27 I.A. 183=23 A. 72, P.C.=2 Bom. L.R. 942=7 Sar. 752.

(104)—S. 32—*Account sales furnished and not objected to, Value of.*—When no objection has ever been made to account sales furnished, such account sales are good *prima facie* evidence of the amount realised in the foreign market by the sale of the goods. **BARLOW v. CHURI LALL NEOGHI**, 28 C. 209.

(105)—S. 32—*Proof of pedigree.*—The claimant, to prove his title, relied upon his pedigree, not stated in any document produced that had existed in the family before this suit. The genealogy on which he claimed was, however, identical with one which his father had more than once asserted, alleging title to two *mauzas* of the Raj estate. The Raja called upon to answer in proceedings at settlement, had not given a direct denial to the alleged relationship. On the contention that there were steps in the pedigree, as to which the evidence adduced did not include proof of statements made by a deceased person who had means of knowledge, or proofs of other statements within s. 32 of the Indian Evidence Act and as to which the evidence was insufficient, *held* that the evidence taken altogether, oral and documentary, had been sufficient to prove that the appellant was related to the deceased Raja, as he had claimed to be, and that the appellant was, as heir to him, entitled to inherit the estates, on the widow's death; this opinion being founded on the documentary evidence. **BEJAI BAHADUR SINGH v. BHUPINDRA BAHADUR SINGH**, 17 A. 456=22 I.A. 139, P.C.=6 Sar. 593.

(106)—S. 32—*Admissibility of documents—'Res inter alias acta.'*—Documents, which would be admissible against persons through whom one claims, cannot be objected to by him on

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the ground that they are *res inter alias acta*. **RANI SRIMATI v. KHAGENDRA NARAYAN SINGH**, 31 C. 871, P.C.=31 I.A. 127=9 C.W.N. 74=8 Sar. 635.

(107)—S. 32—*Meaning of the words "in the ordinary course of business."*—The phrase "in the ordinary course of business" in s. 32 of the Evidence Act is used to indicate the current routine of business, which was usually followed by the person whose declaration it is sought to introduce (23 B. 63, F.). Where there is not only no evidence that there was any such current routine of business, but actually no evidence that the practice had ever been adopted on any other occasion, much less that it was habitually adopted on all occasions: *Held*, that a statement made by a person, since deceased, to his wife, that the defendants had asked him to lend them money and that he had lent them money on an "on demand" note, was inadmissible. **ABDULLA v. MA E KIN**, 11 Ind. Cas. 854=4 Bur. L.T. 185.

(108)—S. 32—*Partnership—Account books of the partnership—Entries in them binding on partners inter se—A partner can surcharge and falsify the accounts—Sleeping or dormant partner—Relation between him and the managing partner—Accounts—Directions to Commissioner.*—Where account books are admitted in evidence before the Commissioner under s. 32 of the Evidence Act, as having been kept in the ordinary course of business by persons deceased it is in the discretion of the Court to hold that they are sufficient evidence of the transaction to which the entries of the book relate, without further proof. The partnership books being accessible to all the partners and being kept more or less under the surveillance of them are *prima facie* evidence against each of them; and also for any of them against the others. But they are not conclusive evidence if the person complaining of them can by clear evidence show that there is an error in the books. When there is a question of surcharging and falsifying accounts, the case alleged must be clearly proved by the person impeaching them, and if there is any doubt it will be determined against him. **DAJI ABAJI KHARE v. GOVIND NARAYANA BAPAT**, 10 Bom. L.R. 811.

(109 & 110)—S. 32—*Act II of 1855, s. 47—Declarations of pedigree.*—S. 47, Act II of 1855, refers to declarations in cases of pedigree of deceased persons not related to the family; such declaration being admissible as evidence in the same way as those of deceased members. **MOHIMA CHUNDER CHUND v. MOTHORA NATH GHOSE**, 9 W.R. 151.

(111)—S. 32—*Hearsay evidence—Relationship, statement as to, made upon information from others, when admissible.*—On a question of relationship, the statements of certain witnesses who were supposed to be speaking from information derived from others were sought to be made admissible under s. 32, Evidence Act. The witnesses did not, however, state the persons from whom they derived that



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information nor at what period of time they derived it. *Held* by the Judicial Committee that the Courts in India had properly applied the provisions of s. 32, Evidence Act, in rejecting the evidence. **SHAFIQ-UN-NISSA v. SHABAN ALI KHAN**, 26 A. 581, P.C.=9 C.W.N. 105=6 Bom. L.R. 750=7 O.C. 290=81 I.A. 217=8 Sar. 674.

(112)—S. 32—*Proof of age—Statement by a person before a public officer as to his son's age—Admissibility.*—A statement made by a person before a public officer as to his son's age is admissible in evidence under s. 32, Evidence Act, to prove the son's age. **BAPU RAJU v. KONDU RAJA**, 9 Ind. Cas. 324=9 M.L.T. 220. (25 M. 183, 11 M.L.J. 379, 20 C. 758, F.)

(113)—S. 32—Report or certificate by medical expert as to the mental capacity of an alleged lunatic, admissibility in evidence of, in a contentious proceeding—See ACT XXXV OF 1858, 7 O.C. 354.

(114)—S. 32—Will by deceased Hindu—Statements in—Evidence to prove separation—Non-admissibility—See HINDU LAW—PARTITION, 4 S.L.R. 225.

(115)—S. 32—Statement of a deceased relative as to age—Admissibility—See HINDU LAW—WILL, 2 M.W.N. 1911, 382.

(116)—S. 32—Evidentiary value of pedigrees—See PEDIGREE, 10 BOM. L.R. 1088=13 O.W.N. 1=18 M.L.J. 424=4 M.L.T. 380.

(117)—S. 32—See NOS. 11, 43, 47, 48, 71, 72, 73, 94, *supra* and NO. 311, *infra*.

(118)—S. 32 (2)—*Accounts—Entries—Corroboration.*—Entries in accounts relevant only under s. 34 of the Evidence Act are not by themselves alone sufficient to charge any person with liability: corroboration is required. But, where accounts are relevant also under s. 32 (2) of the Act, they are in law sufficient evidence in themselves, and the law does not, as in the case of accounts admissible only under s. 34, require corroboration. Entries in accounts may in the same suit be relevant under both the sections; and in that case the necessity for corroboration does not apply. **RAMPYARABAI v. BALAJI**, 6 Bom. L.R. 50=28 B. 294.

(119)—S. 32, cl. 2—*Entry in Mahomedan Marriage Register of amount of dower, admissible in evidence to prove amount fixed.*—A register of marriages kept by the *Istahad*, since deceased, who celebrated the marriage in question, in which register, was entered the amount of the dower, was held to be admissible and relevant, as evidence of the sum fixed, being an entry in a book kept in the discharge of duty within s. 32, cl. 2, Act I of 1872. **ZAKERI BEGUM v. SAKINA BEGUM**, 19 C. 689=19 I.A. 187, P.C.=6 Sar. 218.

(120)—S. 32, cl. (2) (3)—*Recitals in deed describing boundary of land—Statement against proprietary or pecuniary interest—Admissibility in evidence.*—In a suit for possession (instituted in 1893), in which the title of the plaintiff was

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denied by the defendant the former tendered, as evidence of his ownership, a registered mortgage-deed relating to adjacent land, executed in 1877, in which the land in dispute was mentioned as one of the boundaries of the land comprised in the mortgage and was described as the property of the plaintiff. *Held* that the statement in the deed was admissible in evidence under cl. 3 of s. 32 of the Evidence Act (I of 1872), as a statement against the proprietary interest of the mortgagor, the same having been made *ante litem motam* and the mortgagor having been dead at the date of the suit. **NINGAVA v. BHARMAPPA**, 23 B. 63. [Not F., 8 Ind. Cas. 268=9 M.L.T. 91; Appl., 13 C. W.N. 71=1 Ind. Cas. 376.]

(121)—S. 32 (3)—*Deposition of a deceased person—Proceedings of the Land Registration Act (Bengal).*—The evidence of a deceased person in a proceeding under the Land Registration Act would be admissible in evidence under s. 32 (3) where the statement was against the pecuniary or proprietary interest of the deponent, even in a suit which related solely to a question of title. **SHYAMANAND DAS MOHAPATRA v. RAMA KANTA DAS MOHAPATRA**, 32 C. 6. [Reversed, 6 A.L.J. 374=9 C.L.J. 497, P.C.]

(122)—S. 32, cl. (3)—*Admission against interest—Admissible in evidence.*—Where the question was whether certain properties in possession of the defendants were *ancestral or self-acquired* so as to be chargeable with the maintenance of the plaintiff, a statement by a person who gave the defendants a share in the properties in her possession, on the ground that they also mixed their family properties with hers, is evidently against her interest, and as such admissible under s. 32, cl. (3) of Act I of 1872. **MANDANA MAHALASHAMMA v. MANDANA SORAPPA**, (1911) 1 M.W.N. 368=11 Ind. Cas. 380.

(123)—S. 32 (3)—*Recital as to ownership—Recital in a document relating not to suit land but to neighbouring land*—Where the question was as to who was the owner of a certain land: *held*, that a recital in a document dealing with the neighbouring land that the land in question belonged to the plaintiff was not legal evidence. Nor was it admissible under s. 32 (2) of the Evidence Act. *In re DADDAPANENI NARAYANAPPA*, 8 Ind. Cas. 268. (23 B. 63, Not Appr.)

(124)—S. 32, cl. (3)—*Statement by deceased landlord against proprietary interest—Admissibility.*—A statement by a deceased landlord, that there was a tenant on the land, is a statement against the landlord's proprietary rights, and, therefore, admissible under cl. 3, s. 32, I.E.A. **ABDUL AZIZ MOLLA v. EBRAHIM MOLLAH**, 31 C. 965. (22 W.R. 231, Rel. on.)

(125)—S. 32 (3)—*Preliminary inquiry under Merchant Shipping Act—Depositions of officers of vessel of defendant Company—Admissibility of such depositions, where statements not challenged by defendant's solicitor—See ACT V OF 1883, 35 C. 751.*



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(126)—S. 32, cls. (3) and (5)—*Admissibility of evidence—Statements of deceased persons.*—Where on the death of one H, a Mahomedan lady, the question arose whether S and W were the legitimate children of Z, a pre-deceased son of H, and so were H's heirs, certain documents bearing dates from 1860 to 1890 which were produced from the wasika office, and in which H, then living, had described S and W as her heirs and their mothers as the *mutai* wives of her son, were held admissible in evidence as containing statements by one who had the best means of knowledge, made at times when the present dispute was not in contemplation; and further, a petition presented to the wasika office by S and W conjointly with F, a son of Z, since deceased, whose legitimacy was not questioned, describing H's husband, who had recently died, as their grandfather, and praying that the *wasika* allowed to him to be allotted to them, was also held admissible as a statement made by F against his own interest, and as going to prove that their title as legitimate heirs was as good as F's. **BAKER ALI KHAN v. ANJUMAN ARA BEGAM**, 7 C.W.N. 465, P.C. = 25 A. 286 = 5 Bom. L.R. 410 = 30 I. A. 94 = 8 Sar. 397.

(127)—S. 32, cl. 4—*Hindu Law—Adoption—Proof of custom—Kadwa Kunbi caste of Ahmedabad—Instances of declarations held inadmissible—Fact to come—Relevant fact.*—S. 32, cl. (4) of the Evidence Act is not applicable to a case where the evidence is required to prove a fact in issue, and not merely a relevant fact. Where, therefore, the question was whether, according to the custom or caste usage of the Kadwa Kunbi caste of Ahmedabad, the adoption by a widow is forbidden without the express consent of her husband, a statement was admitted in evidence, under s. 32, cl. (4) of the Evidence Act, in the Court below, signed by several hundred witnesses, to the effect that such widow cannot adopt, that Court apparently considering that it would be unreasonable to oblige the plaintiff to incur the expense of procuring the attendance of the witnesses, held that the section was not applicable to a case of this kind, where the evidence was required to prove a fact in issue and not merely a relevant fact, and that the statement was, therefore, inadmissible to prove the custom as alleged; and, consequently, the case was remanded to the lower appellate Court for a fresh finding on the issue. **PATEL VANDRAVAN JEKISAN v. PATEL MANILAL CHUNILAL**, 18 B. 565. [R., 27 M. 228.]

(128)—S. 32 (5)—*Pedigree filed in Settlement Court, Admissibility of—Proof of such pedigree, elements necessary for—Special means of knowledge of the person filing the pedigree.*—Held, that pedigree produced in a Settlement Court is admissible in evidence under s. 32, cl. 5 of the Evidence Act, upon proof that the person making the statement contained in the pedigree was dead and had a special means of knowledge. **KASHI SINGH v. BALRAJ SINGH**, 10 Ind. Cas. 199.

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(129)—S. 32 (5)—*Pedigree, statement in a, relevancy of.*—The statement in a pedigree, made by a deceased member of one branch of a family, regarding the descendants of another branch thereof, before any dispute arose as to the latter, is relevant and admissible in evidence. **SHYAMANAND DAS MOHAPATRA v. RAMA KANTA DAS MOHAPATRA**, 32 C. 6. [Reversed, 6 A.L.J. 374 = 9 C.L.J. 497, P.C.]

(130)—S. 32, cl. 5—*Relevancy of statement in document executed by several persons, some only of whom are dead.*—A statement relating to the existence of any relationship contained in a document signed by several persons, some only of whom are dead, is admissible in evidence under cl. (5), s. 32. **CHANDRA NATH ROY v. NILMADHAB BHUTTACHARJEE**, 26 C. 236 = 3 C.W.N. 88.

(131)—S. 32, cl. 5—*Relationship, Evidence of—Special means of knowledge—Family priest.*—Evidence of statements made by a deceased family priest as to the relationship of the members of the family may be given under s. 32, cl. 5, which is wide enough to include the family priest. **SHAM LALL SINGH v. RADHA BIBEE**, 4 C.L.R. 173.

(132)—S. 32, cl. 5—*Effect of—Declaration regarding relationship, etc.—Admissibility.*—The effect of the section is to make a statement made by a deceased person, relating to the existence of any relationship by blood, marriage, or adoption, admissible, to prove the facts contained in the statements on any issue. [R., 8 O.C. 94.] Where a plaint in a former suit was verified by a deceased member of a family and as such, having special means of knowledge, the plaint was held to be relevant, under s. 32, cl. (5), to prove the order in which certain persons were born and their ages. **DHANMULI v. RAM CHUNDER GHOSE**, 24 C. 265 = 1 C.W.N. 270.

(133)—S. 32 (5)—*Statements in denial in the course of litigation not within the section.*—S. 32, sub-section (5) of the Indian Evidence Act does not cover statements of facts made by interested parties in denial, in the course of litigation, of pedigrees set up by the opposite parties. **NARAINI KUAR v. CHANDI DIN**, 9 A. 467 = A.W.N. 1887, 118.

(134)—S. 32 (5)—*Pedigree filed in settlement Court—Admissibility in evidence of such pedigrees without proof—Admission used as evidence of facts stated therein—Riwaj-i-am, good evidence of custom stated therein—Second appeal, finding of fact based on evidence cannot be disturbed in—Adverse possession from mere mutation of names in favour of guardian.*—A pedigree filed at the time of the regular settlement and accepted by the settlement Court is not admissible in evidence, unless it is proved how the pedigree was prepared, whether it was based upon the statement of a person since deceased and whether such person had special means of knowledge. Where a finding of fact has been arrived at by the lower appellate Court on an admission previously made by one of the



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parties, the finding is good and valid and cannot be disturbed in second appeal. Where a minor was entitled to a property of which the mutation of names was effected, not in his favour, but in favour of a person who was actually his guardian and not really entitled to the property on his own behalf, such person cannot be considered to be in adverse possession. **MOHAMMAD AZIM KHAN v. BRIJRAJ SINGH**, 8 Ind. Cas. 728.

(135)—S. 32, cl. 5—*Statement as to age of one member of the family by another member since dead, Admissibility of.*—A statement as to the age of a member of a family made by another member is no doubt admissible after the latter's death under s. 32, cl. (5) of the Evidence Act. The time of one's birth relates to the commencement of one's relationship by blood, and a statement, therefore, of one's age, made by a deceased person having special means of knowledge, relates to the existence of such relationship within the meaning of s. 32, cl. (5). *Per Bhashyam Ayyangar, J.* **ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE COMPANY, LIMITED v. NARASIMHA CHARI**, 25 M. 183-11 M.L.J. 379. (20 C. 758, F.) [R., 8 O.C. 94, 2 N.L.R. 34.]

(136)—S. 32, sub-s. 5—*Statement as to the existence of a relationship—Special means of knowledge—Second appeal—Remanding case for further evidence.*—Where the question was as to the existence of relationship, the statement of a person (since deceased) employed as *mukhtar* by certain members of the family, which appeared to have been made simply from his knowledge derived from his being instructed as such *mukhtar*, he not having been a member of the family, nor intimately connected with it, nor having had any special means of knowing its concerns, was held inadmissible under sub-s. 5 of s. 32 of the Evidence Act. Where the Court on second appeal reversed the lower appellate Court's judgment, which had in its turn reversed the original Court's judgment solely on the strength of the statement referred to above, *held*, the second appellate Court was justified in refusing to send the case back for evidence to be taken as to whether the person had or had not other means of knowledge. **SANGRAM SINGH v. RAJAN BAHU**, 12 C. 219 = 12 I.A. 183, P.C. = 4 Sar. 676.

(137)—S. 32, cl. 5—*See EVIDENCE—HEARSAY EVIDENCE*, 20 C. 758.

(138)—S. 32 (5)—*Pedigrees, not constituting ancient family record handed down from generation to generation and added to as occasion arose, but drawn up for particular purpose—Evidentiary value—Admissibility—See HINDU LAW—INHERITANCE*, 13 C.W.N. 1, P.C. = 18 M.L.J. 424 = 4 M.L.T. 380 = 10 Bom. L.R. 1088 = 8 C.L.J. 447 = 5 A.L.J. 701 = 11 O.C. 362 = 1 Ind. Cas. 175.

(139)—S. 32, cl. (5)—*See MAHOMEDAN LAW—MARRIAGE*, 2 O.C. 115.

(140)—S. 32, cls. 5 and 6—*Post litem—Declaration as to relationship.*—The widow of

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a last male owner died in 1892. The plaintiffs then claimed certain lands as his collateral heirs, alleging that the last male owner was descended in the same degree from a common ancestor, as the persons whose descendants in the direct line the plaintiff themselves were. These persons had made a similar claim through the common ancestor in 1847, when the settlement of the estate with the widow was being made, alleging themselves to be her husband's reversionary heirs (the widow being then in the possession of the land in dispute). The principal evidence consisted of statements made by the plaintiffs regarding their descent, the information as to which they had received from their ancestors. Objection was taken that such of these statements as were made since 1847 were inadmissible in evidence under cls. 5 and 6 of s. 32 of the Evidence Act as being *post litem*: *Held* that they were relevant, the heirship of the then claimants not being really in dispute at that time. **BAHADUR SINGH v. MOHAR SINGH**, 6 C.W.N. 169 = 29 I.A. 1 = 24 A. 94, P.C. = 4 Bom. L.R. 233 = 12 M.I.A. 56 = 8 Sar. 152.

(141)—S. 32, cls. 5 & 6—*See PEDIGREE*, 24 A. 94 = 6 C.W.N. 169 = 29 I.A. 1 = 4 Bom. L.R. 233, P.C.

(142)—S. 32, (6)—*Suit for possession as collateral heirs—Pedigree table when admissible as evidence.*—In this suit for possession based upon the rights of inheritance of the plaintiffs as collateral heirs of the last male owner through a common ancestor, a pedigree of the family was produced in evidence to show that the plaintiffs were such collateral heirs. The statements in the pedigree were held to be inadmissible in evidence on the ground that the persons by whom it was drawn up were not called as witnesses and no proof was given that they were within any of the descriptions in s. 32 of the Indian Evidence Act. The other evidence in the case not having established the descent of the plaintiffs from the alleged common ancestor, they were held to have failed to make out the claim based on their reversionary title. **SURJAN SINGH v. SARDAR SINGH**, 23 A. 72 = 2 Bom. L.R. 492 = 5 C.W.N. 49 = 27 I.A. 183, P.C. = 7 Sar. 752. [R., 26 P.R. 1901, 8 O.C. 94.]

(143)—S. 32, cl. 6—*Suit to set aside a decree on the ground of minority—Horoscope to prove age.*—Where a suit was brought to set aside a decree, obtained against the plaintiff on the ground of minority, the plaintiff alleged that, at the date of the execution of the bond and at the time of the decree, he was a minor, and produced a horoscope to prove his age, *held*, that the horoscope was not admissible under cl. 6, s. 32 of the Indian Evidence Act. **SATIS CHUNDER MUKHOPADHYA v. MOHENDRO LAL PATHUK**, 17 C. 849. (9 C. 613, F.) [D., 17 M. 134.]

(144)—S. 32, cl. (6)—*See REGISTRATION ACT*, 1908, s. 17, cl. (b), 20 B. 562.

(145)—Ss. 32, 34—*Collection papers, Admissibility of.*—The fact that collection papers may



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be admissible under s. 34 of the Evidence Act does not prevent their also being admissible under s. 32 of the Act, if the conditions prescribed by s. 32 are established. **BHABA SUNDARI DEVI v. TARIA NASYA**, 6 Ind. Cas. 369, (11 C. 407, 28 B. 294, *Expl.*)

(146)—Ss. 32 (2), 34—*Evidentiary value—Jamabandi paper—Ancient entries—Person, who is dead or cannot be found—Presumption—Corroboration.*—Where entries in jamabandi papers began over 70 years before the action was tried, the presumption was that the person who made them was dead and could not be called; and as they were made in the ordinary course of business by the landlord's agent, they were relevant without any corroboration, as evidence against the tenants, under sub-s. (2), s. 32 of the Evidence Act. The law under sub-s. (2), s. 32 of the Act, does not require corroboration as under s. 34. **DUKHA MANDAL v. W.N. GRANT**, 16 C.L.J. 24. (28 B. 294, *F.*)

(147)—Ss. 32 (2), 35—*Admissibility in evidence—Chowkidari register, entry of chakran land in, if made in discharge of official duty—Made "in the ordinary course of business."*—Reg. XX of 1817 does not impose on the Daroga any duty of keeping a register of chowkidari chakran lands. From the precise and uniform character of the entries as to such lands appearing in a register kept under the Regulations, held, that there could be no doubt that they were made under proper direction in the ordinary course of business though outside the statutory duty of the person who made them. That s. 35 of the Evidence Act did not cover such entries, but s. 32 (2) of the Act applied, and they are admissible in evidence (25 A. 90, *R.*). The phrase "in the course of business" does not apply to any particular transaction of an exceptional kind, such as the execution of a deed of mortgage, but to business of professional employment in which the declarant was ordinarily or habitually engaged. The "business" referred to may be of a temporary character. **SHEONANDAN SINGH v. JEONANDAN DUSADH**, 13 C.W.N. 71 = 1 Ind. Cas. 376. (23 B. 63, *R.*)

(148)—Ss. 32 (cls. 4 and 5), 35 and 57—*Presumption as to statement of a witness regarding facts which occurred in his lifetime and which occurred before he was born—Plea of custom obtaining in a family as well as the tribe to which the family belongs—See CUSTOM*, 8 O.C. 94.

(149)—Ss. 32 (5), 48, 49, 60—*Relationship—Hearsay evidence—Admissibility—Relationship, Evidence as to—Weight of opinion, evidence.*—It is admissible evidence for a witness to give his opinion on the existence of a family custom, and to state, as the grounds of that opinion, information derived from deceased persons. But, it must be the expression of independent opinion based on hearsay, and not mere repetition of hearsay. [*R.*, 27 A. 203 = 2 A.L.J. 720 = A.W.N. 1904, 244.] As regards the existence of relationship, the statements of the deceased relatives, servants and dependants of

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the family having special means of knowledge are admissible under s. 32 (5) of the Evidence Act. [*R.*, 8 O.C. 94.] The weight of opinion evidence on the existence of a family custom would depend upon the position and character of the witness and of the persons on whose statements he has formed his opinion. **GARU-RUDHWAJA PARSHAD SINGH v. SUPABANDHWAJA PERSHAD SINGH**, 10 M.L.J. 267, P.C. = 23 A. 37 = 8 C.W.N. 33 = 27 I.A. 238 = 7 Sar. 724 = 2 Bom. L.R. 831. (23 I.A. 147 = 19 A. 1, *R.*)

(150)—Ss. 32, cl. (5), 50, 112—*Presumption as to paternity—Illegitimate son.*—The legal presumption as to paternity raised by s. 112 of the Indian Evidence Act is applicable only to the offspring of a married couple. A person claiming as an illegitimate son must establish his alleged paternity like any other disputed question of relationship, and can, of course, rely upon statements of deceased persons under s. 32, cl. (5), upon opinion expressed by conduct under s. 50 of the Evidence Act, and also upon such presumption of fact as may be warranted by the evidence. **GOPALSAMI CHETTI v. ARU-NACHELLAM CHETTI**, 27 M. 32.

(151)—Ss. 32 (2), 65 and 90—*Mortgage—Secondary evidence—Copy—Admissibility of—Mortgagee denying mortgagor's title—Adverse possession.*—Where it is found that the defendant, in whose favour an instrument of mortgage ought to be, denies that he has it, secondary evidence (such as a copy made from or compared with the original) is admissible. A mortgagee in possession cannot plead adverse possession, and the period of 12 years will not be applicable to his case, as, under art. 148, a mortgagor can redeem the property within sixty years. **TEJU MAL v. ZULFAKAR SHAH**, 49 P.R. 1882. [*R.*, 65 P.R. 1908 = 90 P.L.R. 1908.]

(152)—Ss. 32 (3), 90—*Documents more than thirty years old, admissibility of, when come from proper custody.*—The varaspatra in this case was admissible not only under s. 32, cl. 3 of the Indian Evidence Act, as a declaration made by the widow against her proprietary interest, but also by reason of s. 90 of the Act. The document purported to be more than thirty years old and it came out of the custody of an old servant of the plaintiff's family who was in possession of several of the papers of the family. The degree of credit to be given to such a document, it was held, would depend on circumstances, chiefly on the proof of transactions or states of affairs necessarily, or at least properly and naturally a referrible to it. **HARI CHINTAMAN DIKSHIT v. MORO LAKSHMAN**, 11 B. 89. [*R.*, 20 B. 1, 29 C. 740.]

(153)—Ss. 32 (5), 90, 115—*Statements about the birth and death of relatives—Admissibility under s. 32 (5)—Presumption in favour of old documents if applicable to copies—See BENAMI TRANSACTION—GENERAL*, 7 Ind. Cas. 218.

(154)—Ss. 32, 92—*Account sales from agents abroad admissible under—S. 92, evidence as to contemporaneous oral agreement when admissible under.*—Plaintiffs were the agents of the



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defendants for the sale of certain produce shipped to Europe. Such produce was disposed of by plaintiffs' sub-agents, at various markets abroad, who were submitting accounts to the plaintiffs for the sums realised by the sale of the produce. These account sales were admitted in evidence under s. 32 of the Evidence Act, as written statements of relevant facts made by persons whose attendance could not be procured without unreasonable delay and expense, such statements having been made in the ordinary course of business, and consisting of documents used in commerce, written or signed by the persons making them. Further, the defendants impliedly agreed that the account-sales furnished by the correspondents abroad should be taken as *prima facie* evidence of what the goods realised. The onus was clearly on them to surcharge and falsify the account, and this they failed to do. The plaintiffs in this case set up a special contemporaneous oral agreement that the sales of the defendants' produce carried on by the plaintiffs in Europe should be absolutely at their discretion. Evidence of the oral agreement was admitted on the ground that the arrangement came to thereby, that the discretion of the plaintiffs in the matter of the disposal of the produce should be unfettered, was in no way inconsistent with the written agreement. It is provided by s. 92 of the Evidence Act that the existence of any separate oral agreement, as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. It was found on such proof that the plaintiffs were at liberty to sell according to their own discretion, and the defendants' contention, that they suffered loss in consequence of the sale of their consignments in falling markets, was therefore of no avail. **MAYEN v. ALSTON, 16 M. 238.**

(155)—Ss. 32, 157—*Dying declaration—Complainant remaining alive—Deposition—Corroboration.*—Where a person making a dying declaration chances to live, his statement cannot be admitted in evidence as dying declaration under s. 32 of the Evidence Act, but it may be relied on, under s. 157 of the Evidence Act, to corroborate the testimony of the complainant when examined in the case. **EMPEROR v. RAMA SATTU, 4 Bom. L.R. 434.**

(156)—S. 33—*Deposition in former suit—Representative in interest—Adoption—Declaratory suit to set aside—Limitation Act, 1859, s. 1 (16).*—The widow of one H adopted a son in accordance with an alleged *anumati patra* executed by her deceased husband. His uncle died subsequently, leaving a widow M in whose favour he had executed an *anumati patra*, in pursuance of which she adopted a son subsequently to the adoption by H's widow. The latter, as the adoptive mother of her adopted son, brought a suit against M, ignoring the existence of the latter's adopted son. The adopted son of M died and she adopted another boy. Nearly 16 years after the adoption by H's widow, M brought a suit, as the mother and

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guardian of the second adopted son, to have the adoption by H's widow declared invalid. *Held*, that the latter suit was not between the representatives in interest of the parties in the former suit, and a deposition made in the former suit was not, therefore, admissible in evidence, and that the suit was barred by limitation. S. 1 (16) of Act XIV of 1859 applies it a declaratory suit and where the suit is to have an adoption declared invalid, the only exception to limitation beginning to run from the date of the adoption which is the cause of action is that provided in s. 9, namely, the right of action being concealed by means of fraud. **MRINMOYEE DABEA v. BHOOBUN MOYEE DABEA, 15 B.L.R. 1=23 W.R. 42. [F., 1 B. 248; R., 23 W.R. 285, 13 C. 308=13 I. A. 84, P.C., 26 M. 291, 7 Ind. Cas. 892; D., 22 A. 33, F.B.]**

(157)—S. 33—*Deposition of a person not party to suit—Evidence in subsequent suit—Admission—Bill of sale—Statement—Evidence.* S. 33 of the Indian Evidence Act does not apply to the deposition of a witness in a former suit when the witness is himself a defendant in the subsequent suit, and the deposition is sought to be used against him, not as evidence given between the parties, one of whom called him as a witness, but as an admission against himself. The sections of the Evidence Act which do apply to such a deposition are the sections relating to admissions. A statement in a bill of sale is evidence both against the seller and the purchaser and against those who claim under both. **SOOJAN BIBEE v. ACHMUT ALI, 14 B.L.R. App., 3=21 W.R. 414.**

(158)—S. 33—*"Questions in issue"—Charges added at sessions—Depositions before Magistrate, Admissibility of—Dead and absconding witnesses.*—The question whether the proviso to s. 33 is applicable—i.e., whether the questions at issue are substantially the same—depends upon whether the same evidence is applicable, although different consequences may follow from the same act. The evidence of witnesses, one of them being dead and the other absconding, given before a Magistrate, was held admissible at the sessions trial, even though fresh charges had been added. **THE EMPRESS v. ROCHIA MOHATO, 7 C. 42=8 C.L.R. 273.**

(159)—S. 33—*Copy of a deposition inadmissible, where deponent is alive and not called.*—Copy of a deposition is inadmissible in evidence, under s. 33, unless the deponent is dead or cannot be found, or is incapable of giving evidence, or his presence cannot be obtained without an unreasonable amount of delay or expense, and, even then, only when the proceedings are between the same parties or their representatives in interest and the adverse party in the first proceeding had the right and opportunity to cross-examine and the questions in issue were substantially the same in the first as in the second proceedings. **CHAKAURI SINGH v. SURAJ KUAR, 2 A.L.J. 91.**

(160)—S. 33—*Deposition of person who might be brought into Court.*—The deposition by a



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person wherein he denied on oath that he had presented a certain petition in Court, which purported to be from him, is *held* to be inadmissible as evidence when such person might have been brought into Court, but was not. **BHOOBUN MOYEE DOSSEE v. UMBICA CHURN SETT**, 23 W.R. 343.

(161)—S. 33—*Requirements, how satisfied.*—In order to satisfy the requirements of s. 33 of the Evidence Act, the two suits must be brought by or against the same parties or their representatives in interest, at the time when the suits are proceeding and the evidence is given. **SITANATH DASS v. MOHESH CHUNDER CHUCKERBATI**, 12 C. 627.

(162)—S. 33—“*Incapable of giving evidence*”—*Discretion.*—The words “incapable of giving evidence” in s. 33 denote incapacity of a permanent character, and not of a momentary or temporary character. Where a witness is proved to be incapable of giving evidence, the Court has no discretion as to admitting his deposition. But when the absence of a witness is due to a temporary cause, then it is left to the discretion of the Court to determine whether the delay and expense consequent upon an adjournment for the purpose of procuring the presence of the witness are likely to be so great that it would be unreasonable to incur them. *In re PYARI LALL*, 4 C.L.R. 504. (Diss., 6 C. 774=8 C.L.R. 124; R., 21 C. 955.)

(163)—S. 33—*Evidence at previous criminal trial, Admissibility of*—S. 9, Act I of 1877, *Specific Relief.*—In a suit under s. 9, Act I of 1877, for possession of a certain house, evidence given at a former case for criminal trespass, in respect of the same house, by a person since dead, is admissible in evidence under s. 33. **FOOLKISSORY DASSEE v. NOBIN CHUNDER BHUNJO**, 23 C. 441.

(164)—S. 33—*Witness dying after examination-in-chief, but before cross-examination—Admissibility of evidence—Value.*—The plaintiff was examined-in-chief, but died before cross-examination. The question was as to the admissibility of his evidence. *Held*, that, without going so far as to hold that the evidence is altogether inadmissible for any purpose, because the cross-examination was not completed, it is clear that the principles underlying s. 33, Evidence Act, points to the conclusion that such evidence ought not ordinarily to be acted upon. **ROSE alias HAGI v. VADALA PIL-LAMMA**, 7 M.L.T. 41=11 Cr. L.J. 145=3 Ind. Cas. 512=20 M.L.J. 400. (5 C.W.N. corxx, F.)

(165)—S. 33—*Deposition in a suit against widow—Value of deposition in subsequent suit against reversioner—See WITHDRAWAL OF SUIT*, 7 Ind. Cas. 892=12 C.L.J. 434.

(166)—S. 33—*See NOS. 11, 33, 48, supra.*

(167)—S. 34—*Account books, Admissibility of—Accounts not written from day to day—Finding or fact arrived at after consideration of the*

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*evidence on the record—Second appeal, finding of fact cannot be challenged in.*—*Held*, that, where original accounts were kept in a rough book or on slips of paper and were after an interval of time entered in the regular books, the books cannot be rejected on the ground that the entries were not made in them regularly from day to day. *Held*, further, that, when the lower appellate Court had, after considering such of the evidence as was on the record, come to a finding, such finding could not be upset in second appeal. **MANGLI PRASHAD v. MANDIR DAS**, 11 Ind. Cas. 95.

(168)—S. 34—*Account books, entries, how to be proved—Limitation Act (XV of 1877), ss. 19, 20—Acknowledgment—Admission should be of distinct liability in dispute, not any liability—Payment of interest—Where debtor liable in respect of several transactions—Appropriation of interest to several debts.*—It is essential in every case, where reliance is placed upon books of account, to establish that they have been regularly kept in the course of business. They need not be written up from moment to moment, or from day to day. (27 C. 118, P.C., 26 I.A. 254, 4 C.W.N. 417, *Rel. on.*) But it is obvious that, if they have been written up casually once a week or a fortnight, though they may be admitted in evidence, they do not possess the same claim to confidence that attaches to books entered up from day to day or from hour to hour as transactions take place. (4 B. 576, R.) The proper procedure to follow is to call the clerk, who has kept the accounts, or some person competent to speak to their genuineness, to prove that the books have been regularly kept and that they are generally accurate. (6 M.I.A. 88, F.) Where certain account books were produced in the original Court by the plaintiff, and all that was proved was that they were in the handwriting of his father, and the books were not even examined in detail in the original Court, and the particular entries upon which the plaintiffs relied were not selected and exhibited: *Held*, that the entries ought to have been pointed out and proved, and evidence should also have been given in detail as to the character of the books themselves. An acknowledgment under s. 19 of the Limitation Act, 1877, need not be expressed and may be left to implication; but it must be a necessary implication from the words used that the person acknowledging was referring to and admitting the distinct liability in dispute and not any liability. (9 Bom. L.R. 950, *Rel. on.*) Therefore where A, who was indebted to B in respect of eleven different transactions, wrote a letter to the effect that the money of the addressee would be paid: *Held*, that, the terms of the letter not being specific enough to indicate whether the acknowledgment related to one or more of these transactions, it was not sufficient to save the claim in respect of any of them from the bar of limitation. S. 20 of the Limitation Act, 1877, did not expressly refer to the case of payment of a sum as interest, when more than one debt was due from debtor to the creditor. When there are two debts



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and payment of interest has been made by the debtor without specification, it may save either a debt from limitation. The amount due as interest from a debtor to a creditor in respect of eight different transactions was Rs. 207 when a payment of Rs. 200 was made towards interest. The sum paid was sufficient to discharge the whole of the interest due on the last seven debts amounting to Rs. 175 and there was a balance of Rs. 25 left which might be deemed as part payment of interest on the first sum due: *Held*, that the inference was perfectly legitimate that the payment might reasonably be attributed to all the debts which were thus saved from limitation. If the plaintiff shows the ground of exemption from limitation, the requirement of s. 50 of the C.P.C. of 1882 is satisfied; but this does not preclude the plaintiff from taking another and an inconsistent ground to get over the bar of limitation, if he believes that the latter is the true ground, and he is entitled to urge that the suit is not barred by limitation for a reason different from the one assigned in the plaint. **HINGU MIYA v. HIRAMBA CHANDRA**, 8 Ind. Cas. 81.

(169)—S. 34—*Jumma-wasil-baki papers*.—*Jumma-wasil baki* papers have no weight except as corroborative evidence. **SURNOMOYI v. JOHUR MAHOMED NASYO**, 13 C.L.R. 345.

(170)—S. 34—*Mashkabari and rokar books prepared on examination of khata books, admissibility of, in the absence of khata books*.—There was evidence to show that the *khata* books containing the memoranda of the receipts and expenses of a *debutter* estate as well as that on the *nij* estate of the *shebait* were destroyed by him soon after the *furd*, embodying the expenses, and *mashkabar*, monthly accounts, were prepared. It was found that these latter accounts were kept regularly in the ordinary course of business. The *mashkabari* and *roka* books, regularly prepared upon examination of the said memoranda, and the *furds* should be regarded as the original accounts and are admissible in evidence under s. 34, even though the *khata* books may not be forthcoming. **RAJA PEARY MOHAN MUKERJEE v. NARENDRA NATH MOOKERJEE**, 9 C.W.N. 421=32 C. 582. (27 C. 118=4 C.W.N. 147, R.)

(171)—S. 34—*Proof of debt—Entries in account books*.—S. 34 of the Evidence Act declares that entries in account books regularly kept in the course of business should not alone be sufficient evidence to charge any person with liability. **GHASITA v. RANCHORE**, A.W.N. 1881, 65. [R., 23 A. 502=A.W.N. 1901, 150.]

(172)—S. 34—*Indian Evidence Act—Account book, entries in, not made from day to day or from hour to hour*.—In a suit for money due under a mortgage-bond, the defendant pleaded payment. In support of his plea he produced oral evidence and an account-book. This book was kept at his office at *Hauthanda*, and in it the money received and disbursed on his behalf was entered. Receipts or disbursements

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of money at any other place but *Hauthanda* were entered when they were brought to the knowledge of the office under the date of entry. The entries were not made from day to day or from hour to hour as transaction took place. *Held*, that the account-book was, within the meaning of s. 34, Evidence Act, an account-book regularly kept in the course of business and was admissible to corroborate the oral evidence of the defendant. The time of making the entries may affect the value of an account-book, but should not, if not made from day to day or from hour to hour, make it entirely irrelevant. **DEPUTY COMMISSIONER OF BARABANKI v. MUNSHI RAM PARSHAD**, 2 O. C. 311. (4 B. 576, *Disappr.*)

(173)—S. 34—*Suit on account—Best evidence not produced—Suit must fail*.—Where a Small Cause Court gave a decree for the plaintiff on the evidence of his account books and of his book-keeper, who deposed that the entries in the account books were made from memoranda supplied to him by the plaintiff on the days on which such memoranda were supplied, *held* that the plaintiff not having produced the best evidence by himself going into the witness-box or by accounting for his forbearance from going into the witness-box was not entitled to succeed. **HIRA BHAGAT v. GOBIND RAM**, 63 P.R. 1897. [R., 110 P.R. 1908.]

(174)—S. 34—*Account books—Proof of—Evidence, joint family—Pre-emption—Limitation Act, s. 21—"Only," meaning of*.—It is not necessary in a suit on accounts to show how the accounts came to be written and that they were kept in regular course of business. If a *gomastah* and a member of a firm are examined and depose that the accounts were regularly kept the accounts may be held to have been proved in the absence of evidence to the contrary. The general presumption with regard to a Hindu family is that it is joint. In a joint family business the act of one member, though not a managing member will bind the other members if done in the usual course of business. The meaning of "only" in s. 21 of Limitation Act is that the signing partner must be shown to have had express or implied authority to acknowledge and this will be presumed in a going mercantile concern. **BICHHA LAL v. JAI PARSHAD**, 45 P.R. 1899. [R., 110 P.R. 1908.]

(175)—S. 34—*Entries in books of account—Corroborative evidence*.—Under I.E.A., entries in books of account, regularly kept in the course of business, are admissible in evidence, not only for refreshing the memory of the witness, but also as corroborative evidence of the story which he tells. Books of account which profess to record facts relating only to the particular transaction in question, are less reliable than a book wherein the same is recorded in common with other transactions in the ordinary course of business. **BHOY HONG KONG v. RAMANATHEN CHETTY**, 29 C. 384, P.C.=29 I A. 43=6 C.W.N. 401=4 Bom. L.R. 378=8 Sar. 258.



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(176)—S. 34—Proof and corroboration of bahi account—See ACCOUNTS — MISCELLANEOUS, 80 P.R. 1910=147 P.L.R. 1910=117 P.W.R. 1910.

(177)—S. 34—See HINDU LAW — JOINT FAMILY, 5 P.L.R. 1900.

(178)—S. 34—See NOS. 74, 145, 146, *supra*.

(179)—S. 34 (4)—Application of section.—S. 34, cl. 4 would manifestly be inapplicable to a document purporting to deal with the rights of a private individual as against the public, in which the interests of the individual formed the subject-matter of the statement. HEINIGER v. DROZ, 3 Bom. L.R. 1=25 B. 433.

(180)—S. 35—Measurement papers prepared by Ameen—Admissibility.—The measurement papers, prepared by a Batwara Ameen deputed by the Collector at the time of the partition of the Mehal, cannot come within the description given in s. 35, and so cannot be admitted in evidence. MOHI CHOWDHRY v. DHIRO MISSRAIN, 6 C.L.R. 139. [F., 25 C 90.]

(181)—S. 35—Entries in Collector's register kept under Bengal Act VII of 1876, whether admissible in evidence.—Where a Collector, according to the provisions of Bengal Act, VII of 1876, makes entries in a register kept by him, held, that such entries are entries made in an official register kept by a public servant, and that certified copies of such entries are admissible in evidence under s. 35 of the Evidence Act. SHOSHI BHOOSHUN BOSE v. GIRISH CHUNDER MITTER, 20 C. 940. (5 C. 744, R.; 19 O. 431, Diss.)

(182)—S. 35—Judgment, Admissibility of.—A judgment is admissible in evidence under s. 35 of the Evidence Act, when it is tendered in evidence as proof that in a particular instance the plaintiff's predecessor acted in the capacity of karnavan of a *Marumakkattayam* tarwad, wholly irrespective of the particular decision arrived at in the suit. The original rough draft of a plaint kept for record in the vakil's office, and bearing the number of the suit and the decision of the suit endorsed on it, is not a copy, and is therefore admissible in evidence. BYATHAMMA v. AVULLA, 13 M. 19. [R., 15 M. 378, 18 M. 73.]

(183)—S. 35—Act XL of 1858, certificate of guardianship under —A certificate of guardianship is a document, which is issued to a person appointing him the guardian of a certain person on the ground that that person is a minor. This certificate is no evidence of the age of that person under s. 35 of the Evidence Act, for it is neither a book nor a register, nor a record kept by any officer in accordance with any law. SATIS CHUNDER MUKHOPADHYA v. MOHENDRO LAL PATHUK, 17 C. 849. [F., 18 A. 478=A.W.N. 1896, 158.]

(184)—S. 35—Teiskhana papers prepared by patwari—S. 16, Reg. XII of 1817.—Teiskhana papers prepared by patwaris, under s. 16, Reg. XII of 1817, are not papers of the description contemplated by s. 35 of the Evidence Act.

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They are inadmissible in evidence under that section. SAMAR DASADH v. JUGGUL KISHORE SINGH, 23 C. 366. (18 O. 534, R.) [R., 30 B. 523, P.C.=8 Bom. L.R. 705=4 C.L.J. 181=1 M.L.T. 301.]

(185)—S. 35—Estates Partition Act, 1876, Bengal, s. 44, Butwara khasra prepared under —Entry.—A *butwara khasra* (measurement paper) prepared under s. 54 of the Bengal Act, VIII of 1876, cannot come within the provisions of s. 35, I.E.A., inasmuch as it is not an official book, register, or record, such as is referred to in that section. (6 C.L.R. 139, 4 C. 79, R.) Where the name of a tenant in possession is entered in such a register, such an entry is not admissible in evidence under s. 35, I.E.A. PERMA ROY v. KISHEN ROY, 25 C. 90.

(186)—S. 35—Suit for redemption of particular mortgage — Evidence of other mortgages not admissible—Survey Officer's statement as to entry of a person as occupant of land, admissibility and evidentiary value of.—This was a suit for redemption of a mortgage alleged by the plaintiff to have been made to the defendants on a particular occasion. The lower appellate Court, although it found that the mortgage-deed relied on was not proved yet, gave the plaintiff a decree, holding that some other old mortgage was proved by the evidence in the case. The High Court reversed the decree observing that when a particular instrument is sued on as the basis of a right, it is incumbent on the plaintiff to establish his case on that particular cause of action, and not on a cause of action merely bearing the same common name or of the same description, and so included in the same class. [F., 18 M. 462=5 M.L.J. 187; R., 18 A. 403; D., 17 B. 365.] Under s. 35 of the Evidence Act, a statement made by the Survey Officer that the name of this or that person was entered as the occupant of certain lands would be admissible if relevant but it would not be admissible to prove the reasons for such an entry as facts in another case. GOVINDRAV DESHMUKH v. RAGHO DESHMUKH, 8 B 543.

(187)—S. 35—Report by a public servant to his official superior—Admissibility.—A single document may, in certain cases be a public record within the meaning of s. 35, Evidence Act. But it does not follow that every report regarding a particular fact, from a public servant to a superior officer and made in pursuance of orders given by the latter, is admissible evidence to prove such fact. So, where, in reply to a certain reference from the Collector, the Tahsildar sent the following report "I beg to state that the Village Munsif of Inavaram reports that the charities referred to have not yet been commenced," held that this report was not admissible in evidence of the fact that the charities had not been commenced on the day when the report was made. It is not necessary that the statement, to be evidence under s. 35, must be a statement within the personal knowledge of the party making



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it. **MALLIKARJUNA DUGGET v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL** 35 M. 21. (1 I.A. 209, 11 M.L.J. 315, 7 M.L.J. 117, 21 B. 695, 34 A. 457, R.)

(188)—S. 35—*Scope of.*—S. 35 relates to that class of cases where a public officer has to enter in a register or other book some actual fact, which is known to him; as, for instance, the fact of a death or a marriage. **SARASWATI DAS v. DHANPAT SINGH**, 9 C. 431=12 C.L.R. 12.

(189)—S. 35—*Statement in decree—Admission.*—Where the decree in a former suit (of 1818) against the defendant's predecessor in title contained an abstract of the pleadings in the case, and hence an admission by him therein made in the written statement, *held*, such statement in the decree was admissible as evidence of the admission under s. 37 of the Evidence Act. **PARBUTTY DASSI v. PURNO CHUNDER SINGH**, 9 C. 385. (5 C. 744, R.) [F., 15 M. 378, 3 C.L.J. 521; *Appl.*, 15 M. 19; *Appr.*, 18 M. 73; *Doubted*, 1 C.W.N. 513; R., 11 M. 116.]

(190)—S. 35—*Assistant Collector's report to the Collector—Admissibility in evidence.*—Where a report accompanied by statements was made by an Assistant Collector, and where the report was tendered in evidence to prove to certain survey numbers in dispute, *held*, that the report, which was prepared by a public servant in the discharge of his duty as such, was admissible in evidence under s. 35, Evidence Act. **METHARAM v. JAMAL**, 2 S.L.R. 82. (5 C. 744, P.C., *Rel. on*; 9 C. 741, D.; 9 C. 431, *Not F.*; 20 C. 940, R.; 18 C. 504, 20 C. 335, *Not Appl.*)

(191)—S. 35—*Relevancy under, of entries in settlement records.*—Settlement records are made by Settlement Officers in accordance with the directions to them, which are executive instructions. So, entries of mortgages made in them, in the course of official duty, are merely a piece of evidence relevant under s. 35 of the Act, the weight and probative value to be given to them being a matter to be decided by the Court. *Held*, also, that, where one person allowed another to hold himself out as the owner and to register himself as such in the settlement records, such conduct could not estop the former from subsequently setting up his rights against the latter. **MI SA U v. NGA PYAN**, U.B.R. 1903, Evidence, 3. (2 L.B.R. 56, U.B.R. 1892-1896, Vol. II, 379, R.)

(192)—S. 35—*Recital in judgment—Relevant fact.*—In a suit by a *melkanomdar* to redeem the *kanom*, when the *kanom* deed has been proved to have been lost, a recital of the admission of the *jenmi's* title in the judgment in a previous suit for redemption of the same *kanom* is a relevant fact. **THAMA v. KONDAN**, 15 M. 378. [R., 18 M. 73.]

(193)—S. 35—*Record of rights of later date—Public document—Effect of omission of entry—Authority of settlement officer to make entry as*

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*to pre-emption—Probative value of entry.*—Where the rebutting evidence as to pre-emption as against the *prima facie* case proved by the *wajib-ul-arz*, consisted in an entry of *nadarad* in the column provided for the right of pre-emption, *held* that, if the meaning of the word "*nadarad*" was merely "*nil*" as meaning no entry, such an entry, though in a public document, was not relevant under s. 35 of the Evidence Act to prove that no custom existed or that the custom has ceased to exist because no entry as to the custom has been made in it. (A.W.N. 1901, 29, 16 A. 40, 15 A. 20, 7, I.A. 63, 10 C. 1024, 7 C.L.R. 356, R.) *Held* also with reference to the entry of "*nadarad*" in the record of rights, that, even if the expression meant that the custom had ceased to exist, the entry was not relevant to disprove the custom since, under the Rules framed by the Board of Revenue for the purpose of the settlement in which such record was prepared, the Settlement Officer was authorised to make an entry as to pre-emption only if the proprietors expressly demanded it and proved conclusively the existence of the custom, and since the entry within the meaning above given was one which the officer was not competent to make. **ALI NASAR KHAN v. MANIK CHAND**, 25 A. 90=A.W.N. 1902, 207. [R., 13 C.W.N. 71=1 Ind. Cas. 376, 2 Ind. Cas. 623.]

(194)—S. 35—*Chaukidar's register of births and deaths, Admissibility of—Public record.*—An entry in a *Chaukidar's* register of births and deaths was relied upon as proof of the date of the birth of a person. The entry was admittedly not made by the *Chaukidar* and there was no evidence that it was made by any other public servant or that it was the duty of any public servant to make it. *Held*, that the register was not admissible under s. 35 of the Evidence Act. **SAMPAT v. GAURI SHANKAR**, 14 O.C. 68.

(195)—S. 35—*Ward's age—Entry in the Administration Report of the Court of Wards—Proper evidence.*—An entry of the ward's age in the Administration Report of the Court of Wards is evidence of his age under s. 35 of the Evidence Act. **ARI CHETTIAR v. RAMA REDDIAR**, 9 M.L.T. 214=9 Ind. Cas. 567.

(196)—S. 35—*Admissibility of Butwara Chita—See BEN. ACT VIII OF 1885, ART. 3, 1 Ind. Cas. 807.*

(197)—S. 35—*Survey officer's decision as to tenure, binding effect, of until reversed by Courts decree—Settlement officer's statements of facts in dharepatrak, are admissible in evidence as entries coming under s. 35—See BOM. ACT I OF 1880, ss. 20, 21, 21 B. 695.*

(198)—S. 35—*See CUSTOMS—PUNJAB—MISCELLANEOUS, 121 P.L.R. 1902=97 P.R. 1902.*

(199)—S. 35—*Examination of thugyi or revenue surveyor—Proof by him of entries made in ordinary course of duty—Entries admissible in evidence under s. 35, Evidence Act—See GIFT, 14 Bur.L.R. 30.*



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(200)—S. 35—Judgments—Recitals of pleadings—Admissibility in evidence of judgments containing recitals of pleadings—See MAINTENANCE GRANT, 3 C.L.J. 521.

(201)—S. 35—Batwara Khasra — Measurement papers—Proof—See PARTIES TO SUITS—ADDING PARTIES TO SUITS, 8 Ind. Cas. 890.

(202)—S. 35—See PRE-EMPTION — CONSTRUCTION OF WAJIB-UL-ARZ, 26 A. 549=1 A.L.J. 278.

(202-a)—S. 35—Entries in *khewats* and *khataunis*—Admissibility of, to prove existence of disputed mortgage—See BEN. REG. VII OF 1822, s. 9, 6 A.L.J. 197=31 A. 247=2 Ind. Cas. 215.

(203)—S. 35—See WAJIB-UL-ARZ, 8 Bom. L.R. 402=3 A.L.J. 415=10 C.W.N. 730=3 C.L.J. 594=28 A. 488.

(204)—S. 35—See NOS. 75, 147, 148, *supra*.

(205)—Ss. 35, 43, 48—Entries in *Wajib-ul-arz* of a village, admissibility in evidence of, as proof of family custom of inheritance—See HINDU LAW—ADOPTION, 3 A.L.J. 415, P.C. 10 C.W.N. 730=8 Bom. L.R. 402=3 C.L.J. 594=1 M.L.T. 171=28 A. 488.

(206)—Ss. 35, 48—Proof of special custom—Village administration-papers, Admissibility of.—On the question of the existence of a special custom in the Bahrulia clan in Oudh excluding daughters from inheritance, the *wajib-ul-arz* or village administration-papers, directed to be made by Reg. VII of 1822 and ascertaining and recording usages of the kind of the custom in question, were properly received in evidence under s. 35 of the Evidence Act, though they had been prepared by the settlement officer's subordinates and not by himself as required by the Regulation. [*F.*, 9 C. 586, 15 M. 378, 3 C.L.J. 594=3 A.L.J. 415=8 Bom. L.R. 402=1 M.L.T. 171=10 C.W.N. 730=28 A. 488, P.C.; *D.*, 11 M. 116, 4 O.C. 71; *R.*, 15 C. 20=14 I.A. 127, P.C., 12 A. 328. *F.B.*, 12 A. 234, *F.B.*, 20 C. 940, 1 O.C. 301, 25 A. 90, 8 O.C. 94, 31 A. 247=6 A.L.J. 197=13 C.W.N. 1073=10 C.L.J. 216.] *Semble*. Even if such papers were to be treated only as the recorded opinions of those likely to know the custom, they would be admissible in evidence under s. 48 of the Act. LEKRAJ KUAR v. MAHPAL SINGH, 5 C. 744=6 C.L.R. 893=7 I.A. 63, P.C.=4 Sar. 93. (2 N.W.P. 395, *Appr.*)

(207)—Ss. 35, 61, 62, 63—Statement in a judgment—Secondary evidence—Certified copy of translation of judgment—See LIMITATION ACT, 1908, s. 19, 4 Ind. Cas. 579.

(208)—Ss. 35, 65, 90—Ordinary correspondence conducted by officials whether comes within the meaning of s. 35—Secondary evidence—When admissible in evidence.—S. 35 does not apply to ordinary correspondence, though that correspondence might be conducted by officials, for the entries must be in something which is either "a book, register, or record," and they

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must be made "by public servants in the discharge of their official duties." S. 90 cannot apply unless it is shown that the original has been lost or destroyed. JIJOYAMBA BAI SAHIBA v. VENKGALAKSHMI AMMAL, 7 M.L.T. 117=3 Ind. Cas. 827. (5 C. 886, 22 A 294, *R.*)

(209)—Ss. 35, 74—*Teiskhana register prepared by patwari, not a public document*—S. 16, Reg. XII of 1817.—A "Tesikhna Register" (so called from the number of columns in the statement or register) prepared by a person who is called a *patwari* and submitted to the Collector, in accordance with the rules framed by the Board of Revenue under s. 16 of Reg. XII of 1817, is not an official or a public document. Though the object of the Register is to afford information to the Collector, yet that does not make it binding as an official record of the facts contained in it. The *patwari*, who prepares the same, is not public servant. He is a person, who is a servant of the zemindar. His duties are performed in the *Serishta* of the zemindar on information supplied by the zemindar and nobody else. BAIJ NATH SINGH v. SUKHU MAHTON, 18 C. 534. [*Diss.*, 3 O.C. 205; *R.*, 23 C. 366.]

(210)—Ss. 35, 74, 80, 90—Public Record—Ancient documents—Presumption as to their genuineness—Production from proper custody—Mortgage—Acknowledgement of liability—Limitation Act, 1877, s. 19.—In a case where the question of age of a person at a certain time was disputed, the descriptive roll of that person prepared by a public officer, in accordance with his legal duties and a Patwari's statement about an entry in the Revenue papers (both of which documents being more than 50 years old) and the Municipal Register of Deaths are relevant under s. 35 and being public documents within the meaning of clause (iii) (i) of s. 74 of that Act and produced from proper custody they would be presumed to be genuine. ANIS-UL-REHMAN KHAN v. BENI RAM, 59 P.R. 1901.

(211)—S. 36—Topographical Survey map—Admissibility in evidence—Value as evidence—Presumption that entries are correct—Boundary dispute—Jungle land—Duty of Court to settle boundary, when evidence insufficient—Second appeal—Civ. Pro. Code. (Act XIV of 1882), s. 584—Error of law.—When the question was in which of two adjoining villages—the boundary line between which admittedly corresponded with the boundary line between two pergunahs—the land in dispute was included, *held*, that a Topographical Survey map of 1869, in which the boundary line between two pergunahs was given was admissible in evidence under s. 36 of the Evidence Act. When pergunah boundaries are found entered in such map, the presumption is that they were so entered in pursuance of instructions received. S. 36 of the Evidence Act does not require that the authority, under which map is prepared, must be authority given by statute. Assuming that Topographical Survey maps were not prepared for revenue purposes, they are



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official documents prepared by competent persons, and with such publicity and notice to persons interested, as to be admissible and valuable evidence of the state of things at the time they were made. They are not conclusive and may be shown to be wrong, but in the absence of evidence to the contrary, they may be properly judicially received in evidence as correct when made. (7 C.W.N. 193=30 C. 291, R.) In cases of boundary disputes, the fact that no satisfactory evidence as to possession is obtainable, does not relieve the Court of the duty of settling the boundary line on the evidence before it. (21 C. 504, F.) Held, on second appeal, that, in the absence of better evidence, the lower appellate Court erred in law in not accepting a Topographical Survey map as evidence of possession at the time the map was made. **GAJHOO DAMOR SINGH v. KOTWOR JAGATPAL SINGH**, 11 C.W.N. 230=9 C.L.J. 415.

(212)—S. 36—*Entry in thakbust map, if relevant evidence under.*—As the object of a thakbust survey and map is to ascertain and delineate the boundaries of the estates borne on the Revenue roll of the district, the entry in a thak map that certain lands formed part of an estate becomes a relevant fact under s. 36 of the Evidence Act; and such entries are evidence on which a Court may act. **ABDUL HAMID MIAN v. KIRAN CHANDRA ROY**, 7 C.W.N. 849. (7 C.W.N. 193, 9 C.L.R. 305, Rel. on; 3 C.W.N. 99, 18 C. 225, R.) [F., 10 C.L.J. 527; R., 35 C. 621.]

(213)—S. 38—*Unauthorised translation of the Code Napoleon.*—An unauthorised translation of the Code Napoleon is not a work to which reference can be made under s. 38. **E. CHRISTIAN v. DELANNEY**, 26 C. 931=3 C.W.N. 614.

(214)—S. 39—*Account books, value of.*—See **MORTGAGE—REDEMPTION**, 3 Ind. Cas. 291.

(215)—S. 40—*Scope and application of.*—S. 40 was intended to include all judgments which by law operate to prevent a Court, whether Civil or Criminal, from taking cognizance of a suit, or trying any particular issue, and admits as evidence all judgments *inter partes* which would operate as *res judicata* in a second suit. **GUJJA LALL v. FATTEH LALL**, 6 C. 171=6 C.L.R. 439.

(216)—S. 40—*Bombay Land Revenue Code (V of 1879), s. 108—Bombay Khoti Act (I of 1880), s. 17—Conclusiveness of entry in survey record.*—*Res judicata*—*Dhara land*—*Khoti land.*—An entry in a record prepared under s. 108 of the Bombay Land Revenue Code, by the Survey Officer, describing certain lands as *Khoti*, is by force of s. 17 of the Bombay Khoti Act, conclusive and final evidence of the liability thereby established, and the Civil Court cannot look behind the entry. [R., 21 B. 235; D., 21 B. 480.] And, under the circumstances mentioned above, the evidence of a decision otherwise relevant under s. 40 of the Evidence Act as proof of *res judicata* earlier than the date of

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the survey entry, where a Civil Court adjudged the land to be *dhara*, and the evidence that the *khots* have never received that, are inadmissible for the purpose of depriving the conclusive effect of the entry by the survey authority. All these matters must have been shown to the survey officer before he arrived at the decision of which the record is the entry. **RAMCHANDRA v. RAGHUNATH**, 20 B. 473=P.J. 1893, 142.

(216-a)—S. 40—See NOS. 76, 77, *supra*.

(217)—Ss. 40, 41, 42—*Res judicata—Absence of jurisdiction—Collusion or fraud—Separate suit unnecessary.*—When a subsisting judgment, order or decree, relevant under ss. 40, 41 or 42 of the Evidence Act, is set up by one party as a bar to the claim of the other; the latter can show that the judgment order, etc., was delivered by a Court without jurisdiction or was obtained by fraud or collusion, and it is not necessary for him to have it previously set aside by a separate suit. **BANSI LAL v. DHAPO**, 24 A. 242=A.W.N. 1902, 38. (26 C. 891=3 C.W.N. 670, 27 C. 11=3 C.W.N. 660, 20 A. 370, R.)

(218)—Ss. 40, 44—*Decree under s. 32, Agra Tenancy Act—Right to plead that it was passed without jurisdiction.*—See **RES JUDICATA—MISCELLANEOUS**, 6 Ind. Cas. 98.

(219)—S. 41—*Probate granted before Hindu Wills Act.*—S. 41, Evidence Act, applies to probates granted before the Hindu Wills Act. **GRISH CHUNDER ROY v. BROUGHTON**, 14 C. 861.

(220)—S. 41—*Final judgment in probate proceedings—Operation of.*—S. 50, Act V of 1881.—A final judgment or order of a competent Court, in the exercise of probate jurisdiction, as conferring the status of executor to the grantee of a probate, is conclusive proof of the existence of such status and the fact that the will is genuine. It operates as a judgment *in rem*, and its effect cannot be nullified except by a proceeding for revocation of probate under s. 50, Act V of 1881. **MONMOHINI GUHA v. BANGA CHANDRA DAS**, 31 C. 357=8 C.W.N. 197. [R., 6 C.L.J. 453.]

(221)—S. 41—*Judgment of Court of Probate, a judgment in rem.*—Proceedings under Probate and Administration Act, V of 1881, previous decision under Guardians and Wards Act (VIII of 1890) if *res judicata*—Civil Procedure Code, s. 13—See **RES JUDICATA—ADJUDICATIONS**, 16 M. 380=3 M.L.J. 121.

(222)—S. 41—See NOS. 33, 77, 217, *supra*.

(223)—Ss. 41, 42, 43—*Judgments in rem.*—See **CUSTOMS—PUNJAB—WILL**, 14 P.R. 1912.

(224)—Ss. 41, 44—See **ACT IV OF 1869**, ss. 17, 20, 22 A. 270, F.B.=A.W.N. 1900, 59.

(225)—Ss. 41, 110—*Question of status—Res judicata—Probate proceedings.*—S. 242, *Indian Succession Act.*—The expression "legal character" in s. 41, Evidence Act, when it has reference to a judgment of a Court of Probate,



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means the status of an Administrator or Executor and that only, though, when it has reference to a Matrimonial Court, it includes wife-hood and widow-hood, and a judgment of a Court of Probate is conclusive proof that the person to whom letters or probate have been granted has been clothed with the powers and the responsibilities of the deceased and of nothing else; and a question of status decided by a Court of Probate can be raised again. This is in accordance with s. 242 of the Indian Succession Act. *MINGWEE ZAN v. MI SHWE TAIK*, U.B.R. 1210, 4th Qr., 61. (7 W.R. 339, U.B.R. 1902-1903. Vol. II, Probate and Administration, p. 1, R.)

(226)—S. 42—*See* NOS. 77, 217, 223, *supra*.

(227)—Ss. 42, 48—*Proof of usage—Evidence*.—Where any question of right or custom is to be decided, opinion of persons, who would be likely to know of its existence are, under s. 48, I.E.A., admissible in evidence. A judgment of the High Court, regarding the transferability of tenures held under similar conditions in an adjoining village of the same pergunnah, is evidence of the usage of transferability, under s. 42, I.E.A. *E. DALGLISH v. GUZUFFER HASSAIN*, 23 C. 427. [F., 26 C. 184.]

(228)—S. 43—*Relevancy of judgments in other suits*.—Decrees in former suits are relevant under s. 43, but not sufficient to bind those who are not parties to the suits. *AZMUT ALI KHAN v. HARNAM*, 61 P.R. 1875.

(229)—S. 43—*See* NOS. 11, 33, 44, 45, 49, 77, 78, 79, 205, 223, *supra*.

(230)—S. 44—"Not competent," meaning of—The words "not competent" in s. 44 refer to a Court acting without jurisdiction; and a decree of a Court in a suit which should have been dismissed as barred by s. 244 of the Code of Civil Procedure, though wrong, could not be treated as passed by a Court not competent to pass it. *KETLILAMMA v. KELAPPAN*, 12 M. 228. [F., 21 B. 205.]

(231)—S. 44—*Scope*.—S. 44 lays down not only a rule of law relating to evidence, but also a rule of procedure. *RAJIB PANDA v. LAKHAN SENDH MAHAPATRA*, 27 C. 11=3 C.W.N. 660.

(232)—S. 44—*Suit for rent by administrator—Tenant's plea that letters of administration were obtained by misrepresentation, if entertainable—Fraud*.—Plaintiff having obtained letters of administration to the estate of a deceased landlord sued a tenant for rent. The latter in his written statement objected that the letters of administration had been obtained upon a misrepresentation by the plaintiff as to his relationship with the intestate: *Held*, that assuming that the letters of administration could be regarded as an order within the meaning of s. 44 of the Evidence Act, the allegations of the defendant were not such as would entitle him to go into evidence for the purpose of proving that the letters of administration were invalid

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in law. That such a defence could not be successfully raised so long as the letters of administration were not revoked by a competent Court. Payment of rent to the plaintiff by the defendant would afford the latter full indemnity against the claim of any other party. *AMBICA CHARAN DAS v. KALA CHANDRA DAS*, 10 C. W.N. 422. (27 C. 11, 6 C.W.N. 787, D.)

(233)—S. 44—*Compromise decree—Suit to set aside, on the ground that agreement obtained by exercise of undue influence—Suit maintainable—Motion or application for review of judgment*.—S. 44 of the Evidence Act does not purport to enumerate the grounds on which a decree can be attacked by a separate suit. Whether or not a party may proceed by way of motion or application for review of judgment, he may proceed by suit in the matter of attacking a decree on any ground other than that of fraud. *Held* therefore, that a suit was maintainable for the purpose of setting aside a decree based on an agreement alleged to have been entered into by the exercise of undue influence. *SHAMI NATH CHAUDHRI v. RAMJAS CHAUDHRI*, 9 A.L.J. 1.

(234)—S. 44—*Consent-decree, Binding character of*.—A consent-decree will, except in cases of fraud or collusion, be binding on all parties thereto, so long as it subsists. A party to such a decree cannot escape from its effects, merely by the plea that his consent thereto was given by his pleader in excess of his authority. The exceptional case of fraud or collusion will have to be specifically alleged and substantiated by the party setting it up. *BAIKANTHA NATH ROY CHOWDHURY v. MOHENDRA NATH ROY*, 1 C.L.J. 65.

(235)—S. 44—*Decree fraudulently suffered by ancestor—Whether heir claiming property can set up fraudulent character of decree*.—Where a Muhammadan suffered a fraudulent and collusive decree to be passed against him on the basis of a *wagf* in respect of his properties, with the intention of restricting the inheritance to the property to his descendants and tying up the same for their benefit and so as to debar his collateral heirs from succession, *held*, in, a suit by the latter class of heirs after the ancestor's death for possession of their share of inheritance, that they were not precluded from setting up the fraudulent character of the decree in order to avoid its effect as against them. *BARKAT-UN-NISSA v. FAZIL HAQ*, 26 A. 272. (27 C. 11, 6 B. 703, 26 C. 891, R.)

(236)—S. 44—*FRAUD—PLEADINGS AS TO FRAUD*, 27 C. 11=3 C.W.N. 660, 12 C. 156.

(237)—S. 44—*See* INSOLVENCY—MISCELLANEOUS, 21 B. 205.

(238)—S. 44—*Avoiding of judgment—Incompetency alleged must be, not latent, but patent—See LANDLORD AND TENANT—MISCELLANEOUS*, 3 N.L.R. 185.

(239)—S. 44—*Party to collusive proceedings—Right to plead collusion to avoid decree—See PLEADINGS*, 6 N.L.R. 177=8 Ind. Cas. 1179.



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(240)—S. 44—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 5 C.W.N. 559.

(241)—S. 44—*See* NOS. 218, 224, *supra*.

(242)—S. 45—Opinion of witness as to market value of property—Evidence—*See* PRE-EMPTION—GENERAL, 4 O.C. 247.

(243)—S. 45—*See* NOS. 15, 33, *supra*.

(244)—Ss. 45 and 65—*Certified copy of registered document, Admissibility of.*—Under cl. (e) or cl. (f) to s. 45 a certified copy of a registered document is not admissible in evidence. *SANSARO V. GHASI GAONTIA*, 13 C.P.L.R. 24. (12 C.P.L.R. 117, *Diss.*)

(245)—S. 47—*Handwriting—Proof—Witness proving handwriting.*—A witness need not state in the first instance how he knows the handwriting, since it is the duty of the opposite party to explore on cross-examination the sources of his knowledge, if he be dissatisfied with the testimony as it stands. It is permissible and may often be expedient that the matters referred to in the explanation to s. 47 of the Evidence Act, 1872, should be elicited on the examination-in-chief. Yet, it is within the power of the presiding Judge and often may be expedient to permit the opposing advocate to intervene and cross-examine so that the Court may be in a position to come to a definite conclusion on adequate materials as to the proof of the handwriting. *SHANKAR V. RAMJI*, 5 Bom. L.R. 663=28 B. 58.

(246)—S. 48—*Statement of persons as to existence of custom or usage—Admissibility.*—The statements made by persons who are in a position to know of the existence of a custom or usage in their locality, are admissible under s. 48. *SARIATULLAH SARKAR V. PRAN NATH NANDI*, 26 C. 184. (23 C. 427, *F.*) [*R.*, 8 C.W.N. 235.]

(247)—S. 48—*Custom—Opinion of witnesses who give evidence.*—A general custom or general right may be proved by evidence, under s. 48 by the opinions of persons who would be likely to know of its existence, if it existed, such opinions are relevant, but such opinions must be given by witnesses who give evidence. *MAUNG ON V. MAUNG SHWE BWIN*, 1 L.B.R. 80.

(248)—S. 48—*See* HINDU LAW—WIDOW 12 C.W.N. 74, P.C.=9 Bom. L.R. 1348=6 C.L.J. 766=3 M.L.T. 1=5 A.L.J. 1=30 A. 1=35 I.A. 1.

(249)—S. 48—*See* NOS. 149, 205, 206, 227, *supra*.

(250)—S. 49—*Special means of knowledge.*—Where witnesses, as members of a family, have special means of knowledge, as to the usages of the family, their evidence will be relevant under this section, so far as the existence of such usage is concerned. *SHYAMANAND DAS MOHAPATRA V. RAMA KANTA DAS MAHAPATRA*, 32 C. 6. [*Reversed*, 6 A.L.J. 374=9 C.L.J. 497, P.O.]

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(251)—S. 49—*See* NO. 149, *supra*.

(252)—S. 50—*See* ADULTERY, 5 C. 566=5 C.L.R. 597, F.B.

(253)—S. 50—*See* NO. 150, *supra*.

(254)—Ss. 55, 57, 58 (2)—Judicial notice of facts of public history—*See* LIBEL, 14 C.W.N. 713=6 Ind. Cas. 81=37 C. 760.

(255)—Ss. 56, 57—Under section 4 of Act II of 1855, the Court is entitled to refer to entry made by its own Nazir. *NILKUNT CHACKERBUTTY V. SHEO NARAIN KOONWAR*, 8 W.R. 276.

(256)—S. 57—*Printed letters—Admission of secondary evidence—Right to reject in appeal—Canon—Law usage—Trustee—Rights of—S. 30 of the Civ. Pro. Code—Limitation.*—In a suit for declaration that a church and its properties were trust and that plaintiffs were its trustees and for possession of the same from defendants, certain documents consisting of printed letters of the Priests of the Jesuit Mission in the Madura District, dated about 75 years ago, were admitted in evidence under s. 57, Evidence Act, as books of reference to prove the history of Christianity and especially of the Roman Catholic Mission. *Held* that, though the books were admissible to prove facts of public history, they could not be relied on to prove where certain particular Missionaries were living or when they died. The Court can dispense with evidence only of what may be regarded as notorious facts of public history. Where the lower Court has received secondary evidence of certain documents, the Court in Appeal would be slow in rejecting the same on the ground that there was no satisfactory explanation for the non-production of the originals. For the determination of questions regarding temporal rights in Roman Catholic Churches, the authority of Canon Law may be invoked. A single trustee is not entitled to recover possession of the properties appertaining to the trust from another trustee by evicting him, though he may be entitled to maintain a suit in ejectment against a stranger on behalf of the trust. A complete repudiation by a trustee of the trusts in which he is bound to hold the properties committed to his charge for the benefit of others works a forfeiture of his office, so as to entitle the Court to decree his eviction from the properties in his possession, even though there is no prayer in the plaint to remove the defendant from the office of trustee. Under s. 30 of the Code of 1882, the Court has the power to allow a plaintiff to sue some persons as representing themselves and others having the same interest in the subject-matter of the suit, and the consent of the defendants on record is not necessary to enable the Court to do so, as otherwise it would be in the power of parties to prevent a plaintiff from availing himself of the benefit of s. 30, Civ. Pro. Code (A.W.N. 1888, 102, *R.*) Where the defendants claimed to hold certain moveables as belonging to the church and did not set up their own



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right, the plaintiffs' trustees are not barred by limitation from recovering the same, as the right to the properties of the trust go with the right to the office of trustee. **AMBALAM PAKKIYA UDAYAN v. RIGHT REVEREND J.M. BARTHE**, (1912) 1 M.W.N. 152. (23 M. 271, 17 C. 3, F.)

(257)—S. 57—*Palayam, History of—Nelson's Manual, Admissibility in evidence of.*—A document may be referred to in connection with ancient facts of a public nature, provided it is an approved, public and general history. It is provided by s. 57 of the Indian Evidence Act that on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books of reference. Mr. Nelson's Manual of the Madura District was compiled and published under the orders of the Madras Government and contains frequent references to official documents, and it was referred to by the Privy Council in L.R. 1 I.A. 314. Therefore, it is an appropriate book of reference in connection with the question whether a palayam was one of the group of Dindigul palayams whose history forms part of the political history of the District of Madura prior to British rule. **VIRA CHINNAMMAL v. AKULU AMMAL**, 1 M.L.J. 326.

(258)—S. 57—See NOS. 16, 148, 254, 255, *supra*.

(259)—S. 57, cls. 6. 7—*Document 30 years old—Fact of appointment not proved—Seal not legible.*—Where a document of 1820 purported to be a copy of a decision passed by one A, a Kazi, or Sudder Ameen of Chittagong, but there was no evidence that the person held such appointment and the seal upon the copy produced was not legible, *held* that, as there was no Official Gazette in which the appointment was made, existing then, and as there was no certificate that the copy was a true copy, the document was not admissible notwithstanding that it was more than thirty years old. **JAKER ALI CHOWDHRY v. RAJ CHUNDER SEN**, 10 C.L.R. 469=8 C. 831, Note.

(260)—S. 57 (7)—*Interpretation of—See CIV. PRO. CODE, 1908, s. 139, O. IX, r. 5, 5 Ind. Cas. 537.*

(261)—S. 57 (8)—See **ABATEMENT OF APPEAL**, 51 P.R. 1896.

(262)—S. 57, cls. (8) and (13)—See **U.P. ACT XXII OF 1886, 4 O.O. 182.**

(263)—Ss. 57, 60—*Science, Evidence of books of.*—Under the provisions of the penultimate paragraph of s. 57 and of the first proviso of s. 60 of the Evidence Act. Taylor's *Medicinal Jurisprudence* may be referred to. **HATIM v. EMPRESS**, 12 C.L.R. 88.

(264)—Ss. 57, 87—See **EVIDENCE—MISCELLANEOUS**, 15 M. 241.

(265)—S. 58—*Document admitted by the opposite party need not be proved.*—Under s. 58 of the Evidence Act no fact need be proved which the parties agree to admit at the hearing

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or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings. Where a plaintiff admitted, in a written statement in a former suit and in his oral examination in the suit in question, an agreement set up by the defendant by which the plaintiffs undertook for consideration not to redeem a mortgaged land till after the death of the defendant, but declined to be bound by it, *held* that the defendant was not, in the face of the plaintiff's admission bound to adduce evidence of the agreement. **MAUNG KAT v. MAUNG SO**, U.B.R. 1897-1901, Vol. II, 379. (3 M.H.C. 342, 5 E. 143, 24 C. 20, R.) [R., U.R.R. 1897-1901, Vol. II, 556; F., U.B.R. 1904, 3rd Qr., Buddhist Law—Inheritance. 1, U.B.R. 1907, 1st Qr., Evidence, 1.]

(266)—S. 58—*Document admitted by the other side need not be proved—Insufficient stamp—Dismissal of suit—Practice.*—When an agreement sued upon is admitted by the defendant, proof of it is dispensed with. A Court cannot dismiss a suit based on an admitted document, on the ground that the document was not sufficiently stamped. **RAHIMTOLLA v. H. MURRAY**, 11 Ind. Cas. 810.

(267)—S. 58—*Document—Non-registration.*—Where a document is by reference included in the plaint or written statement, and its terms and execution admitted on the record by the pleadings it is not necessary to prove it or put it in evidence and its non-registration is immaterial. **MAUNG KYAW YAN v. MAUNG PO WIN**, U.B.R. 1904, 3rd Qr., Evidence, 1.

(268)—S. 58—*Defendants deemed to have admitted notice—Proof of notice dispensed with under—See CONTRACT ACT, 1872, s. 73, 9 Ind. Cas. 470.*

(269)—S. 58—See **JURISDICTION — QUESTION OF JURISDICTION**, 12 Bom. L.R. 712.

(270)—S. 58—*Mortgage admitted—No proof required—See MORTGAGE—GENERAL, 11 Ind. Cas. 850.*

(271)—S. 58—See NO. 254, *supra*.

(272)—Ss. 58 and 91—*Distinction between evidentiary admissions and admissions by pleadings—Admission by pleading not excluded by s. 91—See SALE—GENERAL, U.B.R. 1907, Evidence, 1.*

(273)—Ss. 58, 110—*Conditional sale—Redemption—Re-purchase—Sale-deed unregistered—Admission—Suit for possession—Burden of proof—See SALE—GENERAL, 9 Ind. Cas. 770.*

(274)—S. 60—See NOS. 149, 263, *supra*.

(275)—Ss. 60, 67—*Proof of execution of deed.*—To prove the execution of a bill of sale executed in their favour by the plaintiff's father, the defendants called a Kazi, who deposed that the vendor came before him, accompanied by witnesses, and acknowledged the execution of the deed, which was then registered. The lower appellate Court found it was sufficiently proved.



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On special appeal to the High Court, it was contended that the execution was not sufficiently proved under s. 67, Act I of 1872. *Held*, the proof of execution was sufficient; direct evidence of the handwriting of the executant was not necessary under s. 67. It was not intended by s. 60 to exclude circumstantial evidence of things which can be seen, heard or felt. **NEEL KANTO PANDIT v. JUGGOBUND-HOO GHOSE**, 12 B.L.R. App. 18. [Rel. on, 37 C. 470 = 14 C.W.N. 148.]

(276)—Ss. 60, 67, 68 and 69—*Proof of document—Procedure to be followed in proving mortgage-deeds—Attesting witnesses, absence of, not accounted for.*—The plaintiffs sued the heirs of a mortgagor on a mortgage-deed, execution of which was denied. In order to prove the deed, witnesses were examined who were acquainted with the hand-writing of two of the attesting witnesses, who were admittedly dead. There was no evidence on record to show that the other attesting witnesses were not alive or were not subject to the process of the Court. There was only a statement by the plaintiffs' Pleader to the effect that he had been unable to ascertain their whereabouts: *Held*, that, under the provisions of the Evidence Act, evidence could not be admitted to prove the signature of the attesting witnesses until the absence of all the attesting witnesses had been duly accounted for. **SWAMIDIN SINGH v. KANIZ FATIMA**, 11 Ind. Cas. 225.

(277)—S. 61—See NO. 207, *supra*.

(278)—Ss. 61, 65, 66—*Copy of document admitted in evidence in Court below without objection—No objection to be allowed in appellate Court.*—Where a copy of a document is admitted in evidence in the Court below without any objection, objection to the admissibility of the same should not be allowed in the appellate Court. **KISHORI LAL GOSWAMI v. RAKHAL DAS BANERJI**, 31 C. 155. (26 C. 53, Diss.)

(279)—S. 62—See NO. 207, *supra*.

(280)—Ss. 62, 63 (4)—See LEASE—CONSTRUCTION OF LEASE, 6 C.L.J. 572.

(281)—Ss. 62, 64, 65, 91, 99—Inadmissible documents, secondary evidence of, inadmissible. See REGISTRATION ACT, 1908, ss. 17, 49, 5 N. L.R. 70 = 2 Ind. Cas. 244.

(282)—Ss. 62, 91, 110—*Burden of proof—Civil Justice Reg. 18—"Res judicata."*—The parties here had been in dispute as to the original ownership of the whole property of which the land now claimed forms a portion, and in previous litigation it had been decided that the award upon which the deceased defendant Maung Shwe Waing sued as representative of the former mortgagor was not genuine. In the present proceedings the position of the parties was reversed as regards the portion of land in dispute, Ma Hnin Nwe, the former defendant under whom the plaintiffs claim as heirs, being represented by mortgagor, and the former

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plaintiff Maung Shwe Waing being represented as mortgagee. Under these circumstances, it seemed at least open to question whether the parties were previously "in the same rights" as required by s. 18 of the Civil Justice Regulation to raise the bar of *res judicata*. The original mortgage-deed would in accordance with usage be with the mortgagee, and as the mortgage was denied no such document was, of course, forthcoming. On such occasions it was also the usage to make the document in duplicate or counterpart, the mortgagee taking one and the mortgagor the other, and in this instance the evidence showed that this practice was in effect followed. In strictness, therefore, each part would be primary evidence of the document under s. 62 of the Evidence Act, and secondary evidence would not be admissible until the non-production of both parts had been duly accounted for. The plaintiffs failed to prove the execution of the counter part produced, and even if that should not be treated as a counterpart they could not succeed because they had not produced the best evidence. Defendant being in possession of the land the burden of proving that the plaintiffs were entitled to deprive him of such possession lay on the plaintiffs, and the plaintiffs had not satisfactorily proved such claim. **MAUNG YA BAING v. MA KYIN YA**, U.B.R. 1892-1896, Vol. II, 234. [R., 2 U.B.R. 1892-1896, Vol. II, 377.]

(283)—S. 62—Secondary evidence—Copy of copy—See FOREST LANDS, 15 M.L.J. 147 = 28 M. 257.

(284)—S. 63—See MORTGAGE—REDEMPTION, 11 O.C. 285 (B).

(285)—S. 63—See REMAND, 24 W.R. 232.

(286)—S. 63—See Nos. 207, 280, *supra*.

(287)—S. 64—*Copy of document admitted without objection in Court of first instance—Whether objection could be taken in appeal as to its admissibility.*—The only question in the suit was whether the Court of first instance was right in having admitted a copy of a sale-certificate in place of the original, which was not proved to have been lost. *Held*, that, when the copy was filed by the defendant, plaintiff did not take any objection to its admission. Consequently, no objection could be entertained in appeal as to its admissibility. **THET SHE v. MAUNG BA**, 3 L.B.R. 49.

(288)—S. 64—See NO. 289, *supra*.

(289)—S. 65—Secondary evidence—Document proved to have been returned to debtor—No notice given—Admissibility of secondary evidence—Promissory note, Suit on—Execution and payment of interest—Proof of earlier note not necessary.—The lower appellate Court admitted oral evidence as to a previous promissory note in lieu of which the promissory note in suit was executed, and gave it as his ground for such admission of oral evidence that the original note was destroyed. The facts on the record showed that the old note was returned



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to the debtor when the new one was executed. *Held*, that secondary evidence of the contents of the previous note would be admissible only if notice to produce were first served on the defendants. As in this case no such notice was served, the secondary evidence of the previous note was not admissible. In a suit on a promissory note, the evidence as to the earlier note is not essential for the success of the suit, when the execution of the note in suit and the payment of interest on it are satisfactorily proved. **MAUNG SAN HLA v. SUBRAMANIAM CHETTY**, 12 Ind. Cas. 861.

(290)—S. 65—*Secondary evidence—Question of admissibility of, ordinarily for Court of first instance—Party tendering such evidence must show that it is admissible.*—Secondary evidence of the contents of a document may be given when the original is lost. It is, of course incumbent on the person who tenders secondary evidence to show that it is admissible. Where the question was whether the lower Court's judgment that secondary evidence of the contents of a document, on which the plaintiff relied, was inadmissible was right, *held* that the party, who tendered secondary evidence, must show that it was admissible: and the question of admissibility is ordinarily for the Court of first instance to decide. If the legislature had intended to place registered documents on a specially favourable footing as regards their proof by secondary evidence, it would doubtless have done so explicitly. **ABDUL RASACK v. MAU**, U.B.R. 1897-1901, Vol. II, 382. (19 C. 438, Cited) [R., U.B.R. 1907, 4th Qr., Evidence, 13.]

(291)—S. 65—*Public document—Secondary evidence other than certified copy, admissibility of when document is lost.*—When a public document has been proved to be lost and it is also proved that no certified copy of the original is available, secondary evidence other than a certified copy is admissible. So long as the original is in existence no secondary evidence other than a certified copy is admissible. **SYAD PIR SHAH v. GULAB SHAH**, 63 P.R. 1878.

(292)—S. 65—*Registration copy—Copy of public document—Admissibility of.*—A certified copy obtained from the registration office is not a copy of the original document and is not therefore admissible under cl. (e) or cl. (f) of s. 65, but it is a copy of a public document and it is therefore admissible as secondary evidence of such public document. **RADHAKISAN MARWARI v. MT. SONA BAI**, 17 C.P.L.R. 161. (12 C.P.L.R. 117, D.)

(293 & 294)—S. 65—*Admissibility of evidence as to opinion—See TRADE MARK*, 15 M.L.J. 45 F.B.

(295)—S. 65—*See NOS. 80, 95, 151, 208, 244, 278, 281 supra, and No. 330, infra.*

(296)—S. 65, cl. (e)—*Sale certificate—Public document—Secondary evidence.*—A sale certificate granted under s. 259 of the Civ. Pro. Code,

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1859, is a document of title. Such a sale certificate, in the hands of the purchaser at an auction sale, is his title-deed and he can, if he be so minded, refuse to produce it in the Court; but in that case secondary evidence of the same will be admissible under s. 65 (c) of the Evidence Act, 1872. *Per Candy, J.*—A certificate of sale granted under the Civ. Pro. Code is a document of title, but is not a public document under the Evidence Act, so as to allow secondary evidence of it to be given under s. 65 (c) of the Act. **VASANJI v. HARIBHAI**, 2 Bom. L.R. 533.

(297)—S. 65, cls. (e) and (f)—*Certified copy of registered instrument, Admissibility of.*—A certified copy of a registered instrument is not admissible under cl. (e) or (f) of s. 65 of the Evidence Act. **HAZARI LALL v. MANNOO LALL**, 10 C.P.L.R. 59. (5 C. 568, 7 C. 98, R.) [R., 13 C.P.L.R. 94, 12 C.P.L.R. 117, 17 C.P. L.R. 161.]

(298)—S. 65, cls. (e), (g)—*Evidence of record-keeper and clerks as to general result of their examination of records—Admissibility—See CIV. PRO. CODE, 1908, O. XX. r. 2, 11 C.W. N. 501=34 C. 293.*

(299)—S. 65 (f)—*Registration office copy of sale-deed, when admissible—Registration Act (III of 1877), s. 57 (5).*—A Registration office copy of a sale-deed is inadmissible in evidence under s. 65 (f) of the Evidence Act to prove the contents of the original sale-deed, unless a case for the reception of secondary evidence is made out. **MUNNAN v. NAJMUN**, 11 Ind. Cas. 50.

(300)—Ss. 65, 66, 86—*Foreign proceedings Proof of.*—Section 86, Evidence Act, 1872, lays down that if a copy of a foreign judicial record purports to be certified in a given way, the Court may presume it to be genuine and accurate. The section, however, does not exclude other proof; for under ss. 65 and 66 of the Evidence Act, secondary evidence may be given of public documents, without notice to the adverse party, when the person in possession of the document is out of reach of, or not subject to, the process of the Court. **HARANUND ROY v. RAM GOPAL**, 2 Bom. L.R. 562.

(301)—Ss. 65 (c), 66 (2)—*Redemption, suit for—Mortgage-deed—Notice to produce—Secondary evidence—See MORTGAGE—REDEMPTION, A.W.N. 1888, 147.*

(302)—Ss. 65 (e), 74 (i) (iii)—*Probate—Copy—Proof—Admissibility—Probate granted in Australia—See WILL—GENERAL, 11 Ind. Cas. 261.*

(303)—S. 65, cl. (e) and s. 74, cl. (2)—*Certified copy of a registered deed, admissibility of, to prove existence condition, and contents of the original—Public document—Registration Act, s. 57.*—*Held*, that a mortgage-deed registered according to law is under s. 74, clause (2) of the Indian Evidence Act a public document



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and its existence and condition or contents may under section 65 (e) of the said Act read with section 57 of the Registration Act be proved by a certified copy. **BENI PERSHAD v. SAHAI LAL, 7 O.C. 327. [Overruled, 7 O.C. 365.]**

(304)—Ss. 65 (e) and (f) and 74 (2)—See **REGISTRATION ACT, 1908, s. 57, 7 O.C. 365.**

(305)—Ss. 65, 79—*Evidence—Certified copy—Proof of execution of original document*—In a suit for declaration of title to immoveable property, the plaintiff tendered in evidence what purported to be a certified copy of a petition signed by the defendant in certain revenue proceedings. The defendant denied the genuineness of the document and execution of the original was not proved. *Held* that s. 79 of the Evidence Act (I of 1872) would not authorize the presumption that the original document was executed by the defendant; that s. 65 carried the case no further, as it was still necessary to prove execution of the original and that it was in fact what, judging from the copy, it purported to be; and that the document was not admissible in evidence. **REHLO v. JAI DEVI, A.W.N. 1889, 190.**

(306)—Ss. 65, 91 — *Document—Secondary evidence.*—The question in the case was, who was the owner of three parcels of land claimed by plaintiff. These parcels of land came into the possession of Maung Pan and Maung Po Ni or of the former, by virtue of certain documents which were in Maung Pan's custody. The plaintiff removed them from his custody surreptitiously. She said she put them back in the old place. The burthen of proving this was on her, and her own word on the subject was quite insufficient. The plaintiff was a wrong doer in this matter and every presumption was against her. S. 91 of the Evidence Act forbids any evidence to be given of the terms of a contract, or of a grant or of any other disposition of property, when they have been reduced to the form of a document, except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible. Section 65 provides for the giving of secondary evidence. The plaintiff had not established the preliminary facts necessary for the admission of secondary evidence, and all the evidence on the record touching the contents of the documents was irrelevant and useless for purpose. Suit dismissed accordingly for want of admissible evidence. **MAUNG PAN v. MA BWIN, U.B.R. 1892, 1896, Vol. II, 347.**

(307)—Ss. 65 and 91—See **CAUSE OF ACTION, 42 P.R. 1895.**

(308)—Ss. 65 (b), 167—*Civ. Pro. Code, 1877, s. 578—Secondary evidence, Improper admission of.*—The appellant sued under s. 93 (1) of Act XVIII of 1873, to cancel a lease, for the breach of its conditions, producing a copy of the lease as evidence of its existence and of its conditions. The original of the lease was in the possession of the respondent who did not deny the existence

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of the lease nor raise any objection to the admission of the copy as evidence of its existence or of the conditions of the lease. *Held*, that the non-production of the original lease would not, under the circumstances of the case, be detrimental to the maintainability of the suit, and that the suit should be decided on its merits. **ATA HUSAIN v. JAMNA DAS, A.W.N. 1881, 9.**

(309)—S. 66—See **NOS. 28, 80, 278, 300, 301, supra.**

(310)—S. 67—*Writer of document, if necessarily to be examined in proof of document.*—S. 67 does not require the subscribing witnesses to a document necessarily to be produced. Nor does the Act require the writer of a document to be examined as a witness. **ABDOOL ALI v. ABDOOR RUHMAN, 21 W.R. 429.**

(310-a)—S. 67—See **NOS. 275, 276, supra.**

(311)—Ss. 67, 32—See **DEED—EXECUTION OF DEEDS, 11 B. 690.**

(312)—S. 68—*Attesting witness to mortgage document not called—Admissibility of document in evidence to enforce personal covenant.*—Where an attesting witness is necessary to the validity of an instrument, a person who was such witness must be called, if available, whatever be the purpose for which the instrument is produced. So, where a person omitted to take proper steps to cause the attendance of the only available attesting witness to the mortgage-deed on which he sued, and the lower Courts admitted the document in evidence, for the purpose of enforcing the personal covenant in the bond, *held* that the section prohibits the proof of execution of the document otherwise than by the evidence of an attesting witness, and that it is impossible to view the question of the execution with reference to the covenant to pay, as severable from the execution of the document, in so far as it creates the security. Where the requisite attestation is wanting, that involves a question exclusively as to the validity of the transaction; whereas, where an attesting witness, who ought to have been called, has not been called, that raises a question exclusively as to proof and admissibility. **VEERAPPA KAVENDAN v. CHINNAMUTHU RAMASAWMY KAVENDAN, 2 M.L.T. 175=17 M.L.J. 213=30 M. 251. (18 M. 29, D.) [R., 32 M. 410=19 M.L.J. 584=1 Ind. Cas. 1.]**

(313)—S. 68—*Writer of document signing his name at the foot of it but above executant's signature, if attesting witness.*—In this case, the scribe of a document, which was required by law to be attested, signed his name at the end of the body of the document, but above the executant's signature. *Held*, that such signing did not constitute the scribe an attesting witness within the meaning of s. 68, Evidence Act. **BAHADUR v. BALCHAND, 8 N.L.R. 3=1 Ind. Cas. 179. (20 A. 532, Diss.; 2 N.L.R. 10, 14 C.P.L.R. 42, 27 B. 91, 26 A. 69, 31 M. 215, 20 A. 532, R.) [F., 6 N.L.R. 152.]**

(314)—S. 68—*Mortgage—Attestation—Proof.*—Where only one attestator proved a mortgage



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bond attested by more than two witnesses and where its due execution was not denied, held, that having regard to s. 68, the document may be taken as properly proved. **NUND KISHORE LAL v. KANEE RAM TEWARY**, 29 C. 355 = 6 C. W.N. 395.

(315)—S. 68 — *Mortgage-deed — Attesting witness not examined—No objection taken to admissibility of mortgage-deed in first Court—Waiver of objection.*—Where no objection was taken to the admissibility of a mortgage-deed in the Court of first instance on the ground that the deed had not been proved by the examination of one attesting witness at least, as provided in s. 68 of the Indian Evidence Act, the objection must be considered to have been waived and could not be taken in appeal. **PONNAMMAL v. KALITHITHA MOODELLY**, 18 M.L.J. 143.

(316)—S. 68—*Transfer of Property Act*, 1882, s. 59—*Admissibility of an unattested mortgage-bond to prove debt.*—An unattested mortgage document cannot be proved even as containing a personal covenant to pay. S. 68 of the Indian Evidence Act excludes it. **MADRAS DEPOSIT AND BENEFIT SOCIETY, LTD. v. OONNAMALAI AMMAL**, 18 M. 29. [Not Appr., 30 M. 284 = 17 M.L.J. 167 = 1 M.L.T. 416; R., 30 M. 251 = 17 M.L.J. 213 = 2 M.L.T. 175, 53 P.W. R. 1907, 17 M.L.J. 39, 32 M. 410 = 19 M.L.J. 584; D., 26 C. 222.]

(317)—S. 68—*Surety bond—Attestation.*—A surety-bond, so far as it creates a mere money or personal liability, does not require to be attested, and s. 68, I.E.A., does not therefore apply. **SONATUN SHAHA v. DINO NATH SHAHA**, 26 C. 222 = 3 C.W.N. 228. 18 M. 29, Diss.).

(318)—S. 68—*Hindu Law—Joint family property, Presumption as to—Property purchased from joint funds—Joint family property, existence of, necessary to raise presumption as to jointness.*—In order to prove a sale-deed, it is not necessary, under s. 68 of the Evidence Act, to examine a marginal witness, as the sale-deed is not a document which is required by law to be attested. In order to establish that property purchased by a member of a joint family is joint family property, it must be shown either that it was acquired from the common funds or that the family of which the purchaser is a member possessed joint property. Without such proof the presumption that the property is joint family property cannot arise. **GOPAL v. BISHUNATH**, 10 Ind. Cas. 64.

(319)—S. 68—*Essentials of attestation—Position of scribe*—See **ATTESTATION**, 6 N.L.R. 152.

(320)—S. 68—See **DEED—ATTESTATION OF DEEDS**, 2 C.W.N. 603.

(321)—S. 68—See **MORTGAGE—GENERAL**, 1 Ind. Cas. 1, F.B. = 32 M. 410 = 19 M.L.J. 584, 5 C.W.N. 454.

(322)—S. 68—See **MORTGAGE—FORM OF MORTGAGES**, 29 C. 355 = 6 C.W.N. 395.

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(323)—S. 68—See **SCRIBE**, 5 C.W.N. 454.

(324)—S. 68—See **TRANSFER OF PROPERTY ACT**, 1882, s. 59, A.W.N. 1897, 146.

(325)—S. 68—See No. 276, *supra*, and NOS. 330, 716, *infra*.

(326)—Ss. 68, 69, 70—*Co-executant if may attest execution by others*—See **TRANSFER OF PROPERTY ACT**, 1882, s. 58, 14 C.W.N. 1046 = 7 Ind. Cas. 735.

(327)—S. 69—See NOS. 276, 326, *supra*, and No. 716, *infra*.

(328)—S. 70—“*Admission*,” applicability of the term.—The term “admission,” in s. 70, relates only to the admission of party in the course of the trial of a suit, and not to the attestation of a document by the admission of the party executing it. **ABDUL KARIM v. SALIMAN**, 27 C. 190.

(329)—S. 70—See No. 326, *supra*.

(330)—Ss. 70, 65 (b), 68—*Meaning of “admission” in s. 70—Effect of admission of execution made before the Registering officer.*—S. 70, Evidence Act, relates only to the admission of a party in the course of the trial of the suit in which the document to be proved is produced. An admission of execution before the Registering officer when the deed was registered does not suffice to bring s. 70 into operation. **BUDHA v. SARWAN**, 7 N.L.R. 88. (27 C. 190, F.; 1 C.W.N. cxxxii, 2 N.L.R. 10, R.).

(331)—Ss. 70, 114—*Proof of execution of mortgage-deed — Attesting witnesses* — See **TRANSFER OF PROPERTY ACT**, 1882, s. 59, 7 C.W.N. 384.

(331-a)—S. 72—See No. 573, *infra*.

(332)—S. 73—*Lessors’ signatures on pottahs.*—In this case the ryots swore to have got their pottahs from the hands of the persons who professed to sign them. Held under s. 73, it “proved to the satisfaction of the Court” that the signatures were those of the lessors. **TARA PERSHAD TANGEE v. LUKHEE NARAIN PAURAI**, 21 W R. 6.

(333)—S. 73 — *Signature — Comparison — Finding based on—Legality—No interference in second appeal.*—Comparison of signatures is one of the modes of proving handwriting. Although where there is no other evidence, such proof would be regarded hazardous and inconclusive, it cannot be regarded as an error in law to base the conclusion on such proof alone, and a Court of Second Appeal would have no power to set aside a finding based on such comparison. **PASUPULETI VENKAMMA**, 11 M. L.T. 424. (10 C. 1047, D.; 37 C. 467, R.).

(334)—S. 74 — *Public documents.*—Documents purporting to be abstracts from, or copies of, Government measurement chittas, produced from the Collectorate, there being nothing to show that they were the record of measurements by any Government Officer, are not public documents. **NITTYANUND ROY v. ABDAR RAHEEM**, 7 C. 76.



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(335)—S. 74—*Letters between district authorities.*—Letters between district authorities are public documents as they form records of the acts of public authorities. Hence they are admissible evidence under s. 74. *PRITHEE SINGH v. THE COURT OF WARDS*, 23 W.R. 272.

(336)—S. 74—*Papers filed in suit—Compromise.*—All the papers filed in a suit, in which a compromise is confirmed by a decision, form part of the record. Such record is a public document. They may be proved by an office copy. *BHAGAIN MEGH RANEE KOOR v. GOOROO PERSHAD SINGH*, 25 W.R. 68. [F., 5 C.W.N. 353.]

(337)—S. 74 — *Public document — Census register.*—Census registers are not public documents within the meaning of s. 74 of the Indian Evidence Act. *EMPEROR v. BHAVANRAO*, 6 Bom. L.R. 535.

(338)—S. 74—Public document—Deposition of witness—Certified copy—See *MAHOMEDAN LAW—LEGITIMACY*, 2 C.L.J. 218.

(339)—S. 74—See PUBLIC DOCUMENTS, 5 C. 568 = 5 C.L.R. 331.

(340)—S. 74—See NOS. 209, 210, 302, 303, 304, *supra*.

(341)—S. 74 (1) (III)—*Certified copy of will taken from the records in the Ceylon Registration Office, inadmissibility of, as secondary evidence of will.*—Where a copy of a will certified by the Registrar-General of Ceylon to be a true copy made from the record filed in his office, was sought to be put in evidence, the will not being a public document within the meaning of s. 74 of the Evidence Act, in the absence of evidence that the copy in question was compared with the original, it was held inadmissible as secondary evidence of the contents of the document. *Quære* :—Whether the provisions of s. 35 can be taken to apply to an entry in a public register or record kept outside British India. *PONNAMMAL v. SUNDARAM PIL-LAI*, 23 M. 499 = 10 M.L.J. 310.

(342)—S. 74, cl. (2)—See U.P. ACT I OF 1869, ss. 2, 3, 7, 8, 10, 14, 22, 1 O.C. Sup. Vol. 36.

(343)—Ss. 74, 76—*Loan Register of the Public Debt Office in the Bank of Bengal—Bankers' Books Evidence Act (XVIII of 1891 and I of 1895).*—The Loan Register of the Public Debt Office in the Bank of Bengal is a public document, within the meaning of s. 74, I.E.A. Any person is entitled to inspect the same and to obtain certified copies thereof under s. 76, I.E.A., who can show a *prima facie* case that he has an interest for the protection of which liberty to inspect must be given. (20 M. 189, F.) *Mutter v. The Eastern and Midlands Ry. Co.*, L.R. 38 Ch. D. 92 (106), R.; *Rex v. Justice of Stafford Shire*, 6 Ad. and E. 84 (99, 101) cited and followed). *Quære* :—Whether the Loan Register is a Banker's book within the meaning of the Bankers' Books Evidence Act. *CHANDI CHARAN DHAR v. BOISTAB CHARAN DHAR*, 31 C. 284 = 8 C.W.N. 125.

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(344)—Ss. 74, 77—*Proceeding between same parties in another suit—Public documents—Plaint—Written statement—Judgment.*—This was a suit arising out of an alleged trespass. The question to be decided was whether the property trespassed upon belonged to the plaintiff or not. The present defendant had, previous to this suit, instituted a suit against the present plaintiff on account of the alleged trespass to the same property, which property the then plaintiff stated to be his property. That suit was dismissed on the ground that the plaintiff therein had not proved his title to the property in question. *Held* (1) that the judgment in the previous suit was admissible in evidence, (2) the plaint in the previous suit was also admitted in evidence, (3) but the written statement in the previous suit was rejected. *SHAZADA MAHOMED SHAHABOODEEN v. DANIAL WEDGEBARRY*, 10 B.L.R. App., 31.

(345)—Ss. 74 and 77—*Public document—Khasras, Certified copies of—Admissibility in evidence — Patwari—'Public officer'—U. P. Act XVII of 1876, ss. 206 and 212—U. P. Act XIII of 1882, s. 8.*—In a suit for possession of land, certified copies of *khasras* prepared by the patwari of the village for the years 1286, 1288, 1291 and 1292 F. were not admitted in evidence on the ground that they were not public documents within the meaning of s. 74 of the Indian Evidence Act, 1872. *Held*, that under s. 8, Act XIII of 1882 the *khasras* for 1291 and 1292 Fasli were public documents, and that under s. 77 of the Evidence Act they could be proved by the production of certified copies. The patwaris for talukas in respect of whom the provisions of ss. 206 and 212 both inclusive on the Oudh Land Revenue Act were not applicable, may, as regards the compilation of the *khasra* the *jamabandi*, and *naksha jinswar*, which it was their duty under the law to compile and file in the Tahsil annually for public purposes, be deemed to have been 'public officer' within the meaning of s. 74, Indian Evidence Act, notwithstanding that they were not appointed or paid by Government, and could not be suspended, dismissed, or punished by it for neglect of such duty, and that the *kharsa*, *jamabandi* and *naksha jinswar* compiled by them were 'public documents,' and could be proved by the production of certified copies as provided in s. 77 of that Act. *Held*, therefore, that the *khasras* for 1286 and 1288 Fasli were 'public documents' and certified copies of them were admissible in evidence. *DALJIT SINGH v. THE HON'BLE MAHARAJA PARTAB NARAIN SINGH*, 3 O.C. 205.

(346)—Ss. 74, 83, 90 — *Evidentiary value of maps*—See MAPS, 14 C.L.J. 578.

(347)—S. 76 — *Receipt of money due to plaintiff by defendant—Liability of the latter*—See BOM. ACT XX OF 1881, s. 10, 2 S.L.R. 20.

(348)—S. 76—See No. 343, *supra*.

(349)—Ss. 76 and 77—*Scope of—Kobalas.*—Ss. 76 and 77, refer to public documents, and



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are not applicable to *kobalas*. HUREEHUR MOJOOMDAR v. CHURN MAJHEE, 22 W.R. 355.

(350)—S. 77—*Certified copy of order of Court passed on compromise*.—A certified copy of the order of a Court passed upon a compromise should be received in evidence, if offered in proof of the compromise, under s. 77, Evidence Act, as it is a copy of a document forming the record of an Act of a public judicial officer. MANGAL SEN v. HIRA SINGH, 1 A.L.J. 369.

(351)—S. 77—See NOS. 344, 345, 349, *supra*.

(351-a)—S. 78—See NO. 583, *infra*.

(352)—Ss. 78, 86—Copies not certified—Admissibility—See PARTNERSHIP—SUITS RELATING TO PARTNERSHIP, 87 P.L.R. 1909 = 4 Ind. Cas. 929.

(353)—S. 79—See NO. 305, *supra*.

(354)—S. 80—See NO. 210, *supra*.

(355)—S. 83—“*Accuracy*” of Ameen’s map—*Meaning*.—“*Accuracy*” of Ameen’s map means accuracy of drawing and measurement. It has no reference to correctness of boundaries, etc., in relation to rights of parties. OMIRTA LALL CHOWDHRY v. KALEE PERSHAD SHAHA, 25 W.R. 179.

(356)—S. 83—*Maps and plans prepared under authority of Government—Admissibility in evidence—Weight of evidence*.—Where, in a dispute relating to the ownership of lands forming part of the wild unsurveyed tract of the forest at the foot of the Western Ghats, an entry in a Government survey plan relating to the lands in dispute was objected to as being inadmissible in evidence on the ground that the plaintiff was not a party to the plan: *Held* that the plan was admissible in evidence under s. 83, Evidence Act, though no doubt the weight to be attached to the entries therein depends largely on the circumstances under which it was prepared. VADAKKINYEDATH KIRANGAT SANKARAN NAMUDRIPAD STYLED MURTI v. NILAMBUR THACHARAKAVIL MANAVIKRAMAN STYLED VALIA THIRUMALPAD, 9 M.L.T. 415. (30 C. 291, P.C., R.)

(357)—S. 83—*Measurement chittas*.—Government chittas made for its private use are not admissible in evidence against private parties for proving the character or tenure of the lands described therein. RAM CHUNDER SAO v. BUNSEEDHUR NAIK, 9 C. 741. [F., 14 C. 120, 23 C. 335, 1 C.W.N. 530; R., 16 C. 586.]

(358)—S. 83—See SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL, 22 W.R. 519.

(359)—S. 83—See NOS. 81, 82, 346, *supra*.

(360)—Ss. 83, 90—Map—Evidentiary value—See MAPS, 10 Ind. Cas. 376.

(361)—S. 85—*Power-of-attorney by executors, proof of, by means of declaration of attesting witnesses before notary public*.—A power-of-attorney given by the executors under a will to a certain person authorising him to apply for

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letters of administration, did not purport to have been executed in the presence of a notary public or any other of the persons designated in s. 85 of the Evidence Act; but with regard to the execution of the power by each of the executors, one of the attesting witnesses had made a declaration before the notary public as to his having witnessed the execution of the power, and a certificate signed and sealed by the notary public was appended to the declaration. *Held*, that the power of attorney was sufficiently proved by the fact of its execution having been proved by means of an affidavit made before a person competent to administer an oath. The provision contained in s. 85 of the Evidence Act is not of an exhaustive character so as to preclude other modes of proving the execution of a power of attorney. *In re SLADEN*, 21 M. 492.

(362)—S. 85—*Executor—Dative qua father—Power-of-attorney—Application for letters of administration*.—In order to comply with the provisions of s. 85 of the Evidence Act, the power-of-attorney must be executed before or be authenticated by one of the persons mentioned in the section. An application for letters of administration made by a person under a power-of-attorney executed in Scotland by a person appointed executor *Dative qua father* was refused, as the power was not executed and authenticated as required by s. 85 of the Act. *In the goods of A. J. PRIMROSE*, 16 C. 776. [Commented on, 21 M. 492.]

(363)—Ss. 85 and 114—*Power-of-attorney executed before, and authenticated by, a notary—Evidence of identification of executant, if necessary—Rules and Orders of the Calcutta High Court Rule, 748*.—S. 85 of the Evidence Act is mandatory. When a document purporting to be a power-of-attorney and to have been executed before, and authenticated by, a notary public is produced before the Court, an affidavit of identification as to the person purporting to make the power-of-attorney being the person named therein is unnecessary. If the Court, however, is not satisfied as to its execution and authentication, it may, under Rule 748 of the Calcutta High Court’s Rules and Orders, call for further evidence. *In the goods of W. H. MYLNE*, 9 C.W.N. 986 = 33 C. 625.

(364)—S. 86—*Notification by Deputy Commissioner of Cooch Behar regarding certified copies of judicial record, compliance with the Act—Civ. Pro. Code, s. 434—Quære*.—Whether the notification in the Calcutta Gazette of the 8th April, 1879, by the then Deputy Commissioner of Cooch Behar, regarding the mode of certifying copies of judicial records as correct copies, after the Governor-General in Council had, under s. 434 of the Civ. Pro. Code, notified that decrees of Cooch Behar Courts might be executed as if they were decrees of British Indian Courts, was a compliance with the provisions of s. 86 of the Evidence Act, when there was a representative of the Government of India resident in Cooch Behar? The notification referred to above is of



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no use when there is no representative of the Government of India in Cooch Behar, so that certified copies of judicial records of Cooch Behar cannot then be received in evidence in British Indian Courts under s. 86 of the Evidence Act—*Per Norris, J.* GANEE MOHOMED SARKAR v. TARINI CHARAN CHUCKERBATI, 14 C. 546.

(365)—S. 86—See NOS. 300, 352, *supra*.

(366)—S. 87—See NO. 264, *supra*.

(367)—S. 88—*Admissibility of evidence regarding the contents of telegrams.*—S. 88 allows the Courts to treat telegraph messages received, as if they were the original sent, with the exception, that a presumption is not to be made as to the persons by whom they were delivered for transmission and, unless the non-production of the originals is accounted for, secondary evidence of their contents is inadmissible. SHUNARAM v. EMAMI, U.B.R. 1897-1901, Vol. II, 384.

(368)—S. 90—*Document thirty years old—Presumption as to genuineness*—Where a document more than 30 years old purporting to come from proper custody, is required by the Court before which it is produced to be proved and is left unproved; and there are circumstances, both external and internal, which throw great doubts upon the genuineness of the document, the Court can, in the exercise of the discretion vested in it under s. 90 of the Evidence Act, decline to admit it to evidence without formal proof and their Lordships of the Privy Council will be always slow to overrule the discretion exercised by a Judge under s. 90. MUSSAMMAT SHAFIQ-UN NISSA v. RAJA SHABAN ALI KHAN, 6 Bom. L.R. 750.

(369)—S. 90—*Document—Proper custody—Presumption.*—*Per Batty, J.*—S. 90 of the Evidence Act, 1872, admits a presumption of the genuineness of documents purporting to be thirty years old, if produced from proper custody proved to have had a legitimate origin, or an origin, the legitimacy of which the circumstances of the case render probable. It is not necessary that the documents should be found in the best and most proper place of deposit. The section insists only on a satisfactory account of the origin of the custody, and not on the history of its continuance. *Per Aston, J.*—Section 90 of the Evidence Act requires as a condition precedent that the document must be produced from the proper custody. TAJUDIN v. GOVIND, 5 Bom. L.R. 144=27 B. 452.

(370)—S. 90—*What is proper custody.*—Although a person appointed manager by the Court, of the property of an insane person, ought to restore a document in his possession as such manager to the proprietor, when he is removed from the management, his failure to do so does not, having regard to the explanation to s. 90, make the custody of the document improper within the meaning of the Evidence Act. SHYAMA CHARAN NUNDY v. ABHIRAM GOSWAMI, 3 C.L.J. 806=10 C.W.N. 738=33 C. 511. [R., 12 C.W.N. 68.]

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(371)—S. 90—*Ancient document—Applicability to originals and copies.*—S. 90, Evidence Act, is not limited to cases in which the document is actually produced in Court, and consequently, secondary evidence of an ancient document is admissible, without proof of execution of the original, when the document is shown to have been lost and to have been last heard of in proper custody. SAWAN SINGH v. KARIM BAKSH, 93 P.R. 1910=128 P.W.R. 1910=186 P.L.R. 1910=8 Ind. Cas. 353. (5 C. 886, F.; 22 A. 294, R.)

(372)—S. 90—*Evidence—Presumption as to document more than thirty years old.*—The presumption allowed by s. 90 of the Indian Evidence Act, 1872, is not a presumption which the Court is bound to make; but the Court has an absolute judicial discretion to say whether, in any particular case, it is so satisfied as to the execution of a document that it will allow the presumption to take the place of specific evidence as to the signatures which the document purports to bear. HANUMAN SHUKUL v. RAM CHARITTAR LAL, A.W.N. 1901, 28.

(373)—S. 90—*Mortgage—Amount of mortgage-debt in dispute—Burden of proof on mortgages.*—As to the presumption which a Court may make under s. 90 of the Evidence Act, the power thereby given must be exercised with great discretion in a country where documents are written on such materials as *parabai* and palm-leaf, and where in Burmese time neither parties nor witnesses were ever in the habit of attaching their signatures, so that the term "execution" is rather a convenient expression than a correct description of the actual proceeding. The present case is an illustration of the comparative futility of attempting to act under s. 90. The custody from which the documents in question were produced was as proper on the one side as the other; and if the presumption as to ancient documents were to be applied one set was *prima facie* as much entitled to the benefit of the rule as the other; yet it was quite certain that one or other of the sets was forged, and perhaps both. It was clearly preposterous to apply any mechanical rule of presumption to circumstances like these. MA LON v. MAUNG MYO, U.B.R. 1892-1896, Vol. II, 350. [R., U.B.R. 1897-1901, Vol. II, 373.]

(374)—S. 90—*Ancient document—Copy and not original produced—Presumption as to its genuineness—When can be drawn—Genuineness of lost document—Presumption.*—S. 90, Evidence Act, does not make it incompetent for the Courts to draw any presumption as to the genuineness of an ancient document, merely because a copy of the same and not the original was produced in evidence. (5 C. 886, 22 A. 294, F.; 25 M. 674, R.) Whether the Court should presume the genuineness of the lost document is a matter that depends upon the special circumstances of each case. PONNAMBALATH PARAPRAVAN BAVOTTI HAJI v. KAROTH SANKARAN NAIR, 21 M.L.J. 981.

(375)—S. 90—*Evidence—Rule as to old documents.*—Where a document is so old that



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the *factum* of its execution cannot be proved, the party who relies upon it should prove that it comes from proper custody. **SRIEKKANT BHUTTACHARJEE v. RAJ NARAIN BHUTTACHARJEE**, 10 W.R. 1.

(376)—S. 90—*Proper custody to be proved.*—A document more than thirty years old, must be shown to have come from proper custody, i.e., the custody of the person who would have been the proper person to keep it. **THAKOOR PERSHAD v. MUSSAMUT BASHMUTTY KOOER**, 24 W.R. 428.

(377)—S. 90—*Proof of proper custody and of transactions done in accordance with the document.*—The party tendering as evidence a sunnud bearing a seal and purporting to be at least 30 years old, ought to adduce such evidence as he is able of custody and of payment of rent or other acts done according to its terms. In the absence of such evidence no reliance can be placed on such document. Where the lower Court relies on such document without proper proof, the High Court would reverse the decision of the lower Court and remand the case for re-trial. **G. H. GRANT v. BYJNATH TEWAREE**, 21 W.R. 279. [R., 9 C.L.R. 425.]

(378)—S. 90—*Presumption as to documents thirty years old—Ancient documents, Proof of.*—The rule regarding the proof of documents more than thirty years old is that they need not be proved, provided they have been so acted upon, or brought from such a place as to offer a reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty. **HARI DHANGAR ET AL v. BIRU DASRU ET AL**, 5 B. H.C., A.C., 135. [Cons., 6 B.H.C., A.C., 90; R., 2 Bom. L.R. 76.]

(379)—S. 90—*Ancient document—Absence of attestation—Effect.*—Mere absence of attestation is not fatal to the admission of an ancient document coming from the proper custody. **MOHESH ROY v. BOODHUN MAHTOON**, 18 W.R. 315.

(380)—S. 90—*English law regarding documents 30 years old—Applicability to India—Admissions—Practice.*—The English law that a document more than 30 years old, if free from suspicion of dishonesty, may be admitted as evidence without proof of execution or writing, is not allowed to prevail here in a case inconsistent with the title which such documents profess to create. Where a defendant seeks to use statements put in as evidence and to treat them as admissions by the plaintiff who put them in, the plaintiff may show the real nature of the transaction and get rid of the effect of the apparent admissions. **MUSSAMUT LUTEEFOONISSA v. GOOR SURUN DOSS**, 18 W.R. 485. [F., 20 W.R. 112, 9 C.L.R., 64; R., 23 C. 460, 27 C. 231, 23 B. 406, 29 C. 740, 27 B. 452, 33 C. 967=10 C.W.N. 650=4 C.L.J. 22.]

(380 a)—S. 90—*Proof of old document—Possession under it to be proved.*—In this case

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the document was not proved because of its great age, and of there being no witnesses to prove it. *Held*, that it was necessary in order to establish its authenticity to show that it was accompanied by possession. **BISHESHUR BHUTTACHARJEE v. GEORGE HENRY LAMB**, 21 W.R. 22. [R., 9 C.L.R. 425.]

(380 b)—S. 90—*What is proper custody—Evidence as to.*—In this case the document purported to be 45 years old, and the mohurrir swore that it had been in his custody as keeper of plaintiff's records for the time of his service. *Held*, that the custody was proper. **EKCOWREE SINGH ROY v. KYLASH CHUNDER MOOKERJEE**, 21 W.R. 45.

(381)—S. 90—*Document more than 30 years old—Discretion of Court to refuse to admit without formal proof.*—The Courts in India had refused to admit without formal proof a document which was more than 30 years old and which purported to come from proper custody. *Held*, on a review of the circumstances, that the lower Courts had properly exercised the discretion vested in them under s. 90 of the Evidence Act. The Judicial Committee would always be extremely slow to overrule the discretion exercised by a Judge under s. 90, Evidence Act. **SHAFIQ-UN-NISSA v. SHABAN ALI KHAN**, 26 A. 581, P.C.=9 C.W.N. 105=6 Bom. L.R. 750=7 O.C. 290=31 I.A. 277=8 Sar. 674.

(382)—S. 90—*Presumption—Document 30 years old.*—In applying the presumption allowed by s. 90 of the Indian Evidence Act, the period of thirty years is to be reckoned, not from the date upon which the document is filed in Court, but from the date on which, it having been tendered in evidence, its genuineness or otherwise becomes the subject of proof. **MINU SIRCAR v. RHEDDY NATH ROY**, 5 C.L.R. 135.

(383)—S. 90—*Ancient documents, Proof of—Custody.*—Ancient documents are admitted in evidence upon proof that they have been produced from proper custody, but their value as evidence when admitted must depend in each case upon the corroboration derivable from external circumstances. In order to form an estimate of their value, the following considerations have usually been regarded as important:—Have they been produced on those previous occasions on which they would have been naturally produced, if in existence at the time? Have any acts been done under them? Has there been ancient or modern corresponding enjoyment? **BOIKUNT NATH KUNDU v. LUKHUN MAJHI**, 9 C.L.R. 425. (1 W.R. 131, 21 W.R. 279, 21 W.R. 22, 21 W.R. 130, R.) [R., 29 C. 740, 110 P.L.R. 1902=82 P.R. 1902.]

(384)—S. 90—*Document more than thirty years old—Authority of executant to sign it on behalf of others.*—Where the executant of a document purports to sign it on behalf of others, the fact that it is more than thirty years old, though it would, under the provisions of s. 90 of the Evidence Act, raise a presumption in



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favour of the genuineness of the document, would not dispense with proof of the authority of the executant to sign it on behalf of others so as to bind them or those claiming under them. **UBILACK RAI v. DALLIAL RAI**, 3 C. 557.

(385)—S. 90—*Presumption regarding ancient documents—Presumption if applicable to certified copy when original is lost.*—The use of the words "is produced" in s. 90 of the Evidence Act, does not limit the operation of the section to cases in which the document is actually "produced in Court." The presumption of s. 90 is, therefore, applicable to a copy of a document which had been lost and was more than 30 years old. **ISHRI PRASAD SINGH v. LALLI JAS KUNWAR**, 22 A. 294 = A.W.N. 1900, 82. (5 C. 866, R.) [R., 7 M.L.T., 117.]

(386)—S. 90—*Ancient documents coming from proper custody. Admissibility and evidentiary value of—English Law.*—The plaintiff in this case who was the uncle of the first and brother of the second defendant sued them for a partition of the family estate. The defendants pleaded that, according to the custom of the family, the estate was impartible; and, for the purpose of disproving the custom so set up, plaintiff adduced in evidence a number of documents more than thirty years old. *Held*, that such documents would be admissible as coming from the proper custody. The English cases sanction a liberal construction of what may be deemed proper custody. The practice of conveyancing in England, the complication of transactions and titles affording multiplied means of exposing falsehood, and the careful preservation of muniments by the owners of estates, have made a rule convenient and beneficial in England which cannot be applied so indulgently in India without encouraging forgery and fraud. Consequently, in the Indian Courts, ancient documents brought in, without possession to support them, and without proof of any acts done in connection with them, would generally have almost no weight as a ground of inference. **TIMANGANGAVDA v. RANGANGAVDA**, 11 B. 94, note = P.J. 1878, 240. [R., 11 B. 89.]

(387)—S. 90—*Document, thirty years old—Natural and proper custody—Application of rule.*—The custody of a *pattah*, more than thirty years old, in favour of the female holder's father, such holder having been in possession of the land ever since the father's death for forty years without interruption, was held to be a natural and proper custody within the meaning of s. 90 of the Evidence Act. The rule laid down in s. 90 of the Evidence Act as to proof of execution of documents thirty years old ought to be applied with special care and caution. **TRAILOKIA NATH NUNDI v. SHURNO CHUNGONI**, 11 C. 539, [Cited, 110 P.L.R. 1902 = 82 P.R. 1902; R., 26 C. 740.]

(388)—S. 90—*Document more than thirty years old—Presumption of genuineness—When such document would be proof of title.*—A Court is not bound to presume the genuineness of the

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signature of a document upwards of thirty years old, even though produced from proper custody. [R., 20 B. 1, 27 B. 452.] And, unless it is shown that the executant of such document was at the time entitled to grant such a document, it would be no proof of title. **UGGRAKANT CHOWDHRY v. HURRO CHUNDER SHICKDAR**, 6 C. 209.

(389)—S. 90—*Document more than thirty years old -- Previous production in Court—Legal presumption of genuineness.*—Mere proof of the production of a document, more than thirty years old, from the records of a Collector's Office (even assuming the proceedings of such office to be as good for this purpose as those of a Court) where it had been previously filed would not raise a legal presumption in favour of its genuineness; but it must be shown that it had been so filed in order to the adjudication of some question of which the Collector had cognizance, and that it had come under the cognizance of the Collector. **GUDDAHUR PAUL CHOWDHRY v. BHYRUB CHUNDER BHUTTA-CHARJI**, 5 C. 918.

(390)—S. 90—*Ancient document—Presumption to be met and rebutted.*—It is in the discretion of a Court whether it will raise the presumption in favour of a document for which s. 90 provides. But this discretion is not to be exercised arbitrarily, but must be governed by principles which are consonant with law and justice. And while, on the one hand, great care is requisite in applying the presumption, on the other hand, it is clear that very grave injustice may be perpetrated, if an ancient document coming from proper custody is rejected by a Court capriciously or for inadequate reasons. (11 C. 539, R.) When the genuineness of a document purporting to be an ancient document is put in issue, it appears to have been sometimes thought that any presumption in its favour is thereby excluded. But this would be to deprive the party producing it of the benefit of the presumption precisely in the circumstances in which he most stands in need of its aid. The presumption merely takes the place of the evidence which would, where a modern document is concerned, be necessary for the purpose of proving due execution. Such presumption must be met and rebutted in the same way as direct evidence of execution in the case of a modern document. **GOVINDA HOZRA v. PROTAP NARAIN MUKHOPADHYA**, 29 C. 740. (18 W.R. 485, 9 C.L. R. 425, 11 B. 89, R.)

(391)—S. 90—*Presumption as to documents over 30 years old—Procedure*—When a document, which is over thirty years old, has been tendered, under s. 90 of the Act, it is for the Court to determine, which is a matter for judicial discretion, whether it will make the presumption mentioned in the section, or will call upon the party to offer proof of the document, stating its reasons in the latter event, and, in the former, whether the presumption has been rebutted or not. **SRINATH PATRA v. KULODA PROSAD BANERJEE**, 2 C.L.J. 592.



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(392)—S. 90—*Presumption, how weakened—Lessor and lessee—Adverse possession—Non-payment of rent, if creates adverse possession—Lessee holding over—Limitation Act (XV of 1877), sch. II, art. 139.*—The Court may presume the genuineness of a document more than 30 years old, if it be produced from proper custody, but the effect of the presumption may be weakened by circumstances which tend to raise doubts as to its authenticity. Where a lessee enters into possession under a lease, he cannot acquire any title by adverse possession against his lessor pending the term of the lease unless he distinctly asserts such a title to his knowledge and gives him notice that he asserted such a title. A failure to pay rent to the lessor during the period of the lease does not alone operate to create in favour of the lessee a title by adverse possession. (4 C 314, 7 B. 40, R.) If a lessee holds over after the expiry of the lease and if no subsequent arrangement is arrived at between him and his lessor by which a new tenancy is created, time begins to run under art. 139, sch. II of the Limitation Act, against the lessor from the date of the expiry of the lease. MADAN MOHAN GOSAIN v. KUMAR RAMESWAR MALIA, 7 C.L.J. 615. (22 B. 893, 24 B. 504=2 Bom. L.R. 491, F.; 8 M. 424. Diss.) [F., 31 A. 514=6 A.L.J. 584=3 Ind. Cas. 566; R., 19 M.L.J. 732=7 M.L.T. 289.]

(393)—S. 90—*Proof of ancient documents.*—With regard to the proof of ancient documents the proper rule is, that if they are more than thirty years old, they need not be proved, provided they have been so acted upon or brought from such a place as to offer a reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty. Application of this rule considered. VITHAL MAHADEV ET AL v. DAUD VALAD MUHAMMAD HUSEN ET AL, 6 B.H.C., A.C. 90.

(394)—S. 90—*Old document—Authority to execute—Binding character—Presumption—See LANDLORD AND TENANT—GENERAL*, 15 C.L.J. 220.

(395)—S. 90—*Presumption must be applied with caution—See LIMITATION ACT, 1908, ARTS. 91, 92, 93, 120, 82 P.L.R. 1909=88 P.W.R. 1909=4 Ind. Cas. 923.*

(396)—S. 90—*See NOS. 17, 23, 24, 151, 152, 153, 208, 210, 346, 360, supra, and NO. 751, infra.*

(397)—Ss. 90, 4—*Document—Proof of custody—Genuineness presumed by original Court—Right of appellate Court to reject document—Practice as to proof of document—Preliminary decree—Final decree—Appeal against former—Whether affected by latter.*—Where the Court of first instance presumed a document to be genuine under s. 90, Evidence Act, it was competent for the first appellate Court to hold that it should not be presumed to be genuine and to reject it without calling for further proof of the same. According to the practice prevailing in

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this Presidency in the trial of suits, when *prima facie* evidence of custody and of the date of a document purporting to be 30 years old is given, the Court generally marks the document on the footing that there is sufficient evidence to justify its being marked as an exhibit at that stage. It is only subsequently that the opponent exercises his right of adducing evidence of circumstances which entitle him to say that the presumption under s. 90 of the Evidence Act should not be drawn with respect to that document. And the Court generally arrives at its conclusion on the matter, after the evidence on both sides has been given. (26 A. 581, 2 C.L.J. 592, D.) The right of a party to appeal against a preliminary decree is not affected by the subsequent passing of a final decree. RAMIEN v. VEERAPPUDAIYAN, 11 M.L.T. 69=(1912) 1 M.W.N. 117. (21 M.L.J. 1063, F.; 15 C.W.N. 830, Not F.)

(398)—Ss. 90 and 102—*Limitation—Declaration, Suit for—Court of Wards, notice of adverse title set up by third party given to, how far binding upon proprietor—Indian Limitation Act, arts. 91 and 120, sch. II—Burden of proof—Document 70 years old, Presumption as to genuineness of.*—The estate of the plaintiff was in 1893 in charge of the Court of Wards, he having been declared a disqualified proprietor. A special manager was appointed, who was deputed by the Deputy Commissioner to make an enquiry as to the titles of the persons in possession of villages of the estate. This inquiry included a village called *Dharwa* which at that time was in the possession of the defendant. He produced before the Special Manager a document under which he claimed to hold the village. On the 20th June, 1893, the manager submitted to the Board of Revenue a report in which he stated that *Dharwa* "was granted by a written lease to the grandfather of the present lessee," that is, the defendant, "68 years ago by the plaintiff's ancestors at the annual rent of Rs. 376 authorising the lessee to hold the village as zemindari perpetually, etc." In September, 1893, the Board of Revenue decided that no action should be taken to disturb the defendant. In 1889 when the plaintiff's property was not in the charge of the Court of Wards he caused a notice of ejectment to be issued to the defendant in respect of *Dharwa*. The defendant sued him to contest the notice, and produced the lease dated the 1st March, 1826, which purported to confer under-proprietary rights upon the defendant's ancestors. The notice of ejectment was cancelled on the 11th February, 1899 on the ground that it was bad in form. The plaintiff sued the defendant for a declaration that the latter had no right as proprietor or under-proprietor in the lands. In his plaint he stated that the lease was a fictitious document and even if it were genuine it had not been acted on and that the cause of action arose on the 11th February, 1899, the day on which the notice of ejectment was cancelled. The questions for determination were whether the suit was



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barred by art. 91 or art. 120, sch. II, Indian Limitation Act, whether the burden of proof lay on the defendant, and what were his rights in Dharwa. *Held*, that the notice of the document obtained in 1893 by the Court of Wards was not notice of it to the plaintiff, who could not consequently be deemed to have obtained notice of it in 1893, and that the suit was therefore not barred by art. 91 or by art. 120, sch. II of the Indian Limitation Act but was within time. *Held* further, that the suit being substantially one to have the document set aside and for a declaration that the defendant had not under proprietary rights in the village, the burden of proof in view of s. 102 of the Indian Evidence Act, lay on the plaintiff. *Held*, further that the document might be presumed under s. 90, Indian Evidence Act, to be genuine and to be the document under which the defendant was in under-proprietary possession of the village. **DEPUTY COMMISSIONER, RAI BARELI v. MAHESH BAKESH, 6 O.C. 142.**

(399)—Ss. 90, 114—*Original document not produced and not shown to have been lost—Secondary evidence—Presumption.*—When a copy of a document is exhibited in a suit and the original document is not produced, though the original purports to be more than thirty years old, the presumption which, under s. 90 of the Evidence Act, may be made where a document over thirty years old is produced from proper custody, ought not to be made. (5 C. 886, R.). The law as to the presumption which may be made in the case of documentary evidence is laid down in the sections which deal with documentary evidence, and s. 114 has no application to a case of this sort. **APPATHURA PATTAR v. GOPALA PANIKKAR, 25 M. 694.**

(400)—S. 91—"Grant," meaning of.—*Quære*: Whether the word "grant" in s. 91 of the Indian Evidence Act means a grant of property only or refers to other grants also. **SOMASUNDARA MUDALY v. DURAISAMY MUDALIAR, 27 M. 30.**

(401)—S. 91—*Kabuliyat, non production of—Collection papers admissible—Presumption that rent is same as in the preceding year.*—Where the plaint in a suit for rent showed that the suit was not based exclusively on a *kabuliyat* executed by the defendant, but also on the collection of rent, and the plaintiff did not produce the *kabuliyat*, but filed collection papers to prove that the defendant was holding at the rate claimed by the plaintiff in the year, collection papers were admissible in evidence, as they were not put in proof of the terms of the *kabuliyat*, and s. 91 of the Evidence Act, did not apply. A raiyat is presumed to hold in any year at the same rent as in the preceding year. **GOURI SANKAR DATTA MOJUMDAR v. MINNATH ALI CHOWDHURI, 2 Ind. Cas. 636.**

(402)—S. 91—*Registration Act, s. 48—Irrelevant evidence—Inadmissible evidence—Possession—Title.*—In a suit not to recover the

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money but to recover the land said to have been transferred to plaintiff in satisfaction of the debt, evidence of the debt, apart from its connection with the land is irrelevant. The object of the plaintiff is to prove title to the land, and for this purpose the document not having been registered is inadmissible in a case where registration is necessary. Moreover, the agreement between the parties having been reduced to the form of a document, the provisions of s. 91 of the Evidence Act would bar the admission of evidence other than the document. S. 48 of the Registration Act is not applicable, as there is no conflict with a registered document, and the agreement was not merely oral. **MAUNG PAUK TUN v. MA MYAT GALE, L.B.R. 1872-1892, 650.**

(403)—S. 91—*Promissory note inadmissible—Evidence outside the note—Whether admissible.*—Where a plaintiff is able to prove the loan independently of and without the assistance of a promissory note, which cannot be admitted in evidence for some reason, he can fall back upon a claim for money lent. **RAM SARUP v. JASODHA KUNWAR, 9 A.L.J. 72.** (26 A. 178, overruled; 23 C. 851, 24 B. 360, 28 B. 432, 28 A. 298, 7 A.L.J. 459, R.)

(404)—S. 91—*Pro-note—Insufficient stamp—Effect—Admissibility of other evidence.*—A pro-note payable otherwise than on demand, bearing a one anna stamp is an insufficiently stamped document and is, under s. 34, Stamp Act, inadmissible in evidence for any purpose even on payment of penalty. In such a case a person is not entitled to fall back upon the original consideration of the contract as no other evidence of the terms of the document which is the best evidence in the case is admissible under s. 91. **MR. O'GORAM v. MAHTAB SINGH, 92 P.R. 1898.**

(405)—S. 91—*Relinquishment of occupancy-holding—Unstamped and unregistered memorandum of relinquishment—Relinquishment probable by oral evidence—Act XII of 1881 (N.W.P. Rent Act), s. 95 (p).*—An occupancy tenant relinquished his holding, and signed a memorandum of the relinquishment in a book kept by the landholder showing transactions between him and the tenant. The memorandum was not stamped or registered. *Held*, that the relinquishment was not required by s. 91 of the Evidence Act to be in writing, but might be made verbally, or in writing, or by action, and so might be proved *aliunde* even if the memorandum were inadmissible in evidence, as to which the Court expressed no opinion. S. 95 (p) of the N.W.P. Rent Act does not apply where the person claiming the lease is not a tenant in possession. **RAI SINGH v. VANSITTART, A.W.N. 1889, 3.**

(406)—S. 91—*Money lent on promissory note—Right to resort to original consideration—Oral evidence of the loan, Admissibility of.*—A document was drawn to the following effect:—"On the 8th Wazolaxan, 1265, Ko Waik and his wife Mi, Ni.....said to..... Chit and son



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Ko Po Tan,.....We are in need of money, please lend us Rs. 400, on interest at annas 4 per Rs. 10 per month ; accordingly.....U Chit and son .....lent the money on interest at 4 annas per Rs. 10 per month. The principal and interest must be paid in full on the forthcoming month of *Tagu*, Ko Waik and wife.....agreeing that in case of failure to pay the money, the land described below should be taken up and enjoyed:—This is the first time the land has been mortgaged. It must not be mortgaged to any one else." In this document, the latter part was ineffective for want of registration, and the former part which contained a distinct promise to pay came within the definition of a promissory note given in s. 4 of the Negotiable Instruments Act (1881). *Held* that the promissory note, being the record of the loan transaction. s. 91, Evidence Act, debarred the plaintiff from resorting to the original consideration, and made oral evidence of the loan inadmissible. *NGA WAIK v. NGA CHET*, U.B.R. 1907, 3rd Qr., Evidence, 5. (U.B.R. 1897-1901, Vol. II, 390, 391, *Superseded*; 3 A. 717; 4 A. 135, 9 A. 351, 26 A. 178, *F.*; 12 B. 443, 24 B. 360, 3 C. 314, 7 C. 256, 8 C. 721, 23 C. 851, *Diss.*; 5 M. 166, 7 M. 112, 10 M. 94, 23 M. 527, 21 W.R. 1, 24 W.R. 83, *R.*)

(407)—S. 91—*Promissory note—Admissibility of.*—Where the respondent obtained a decree against the applicant for the recovery of a debt alleged to be due on a promissory note and the note was not proved, but independent evidence of the obligation was admitted, *held* that independent evidence of the obligation was admissible. *MAUNG HLAW v. NAGASSAT*, U.B.R. 1897-1901, Vol. II, 390. (3 C. 314, 23 C. 581, *F.*) [*R.*, U.B.R. 1897-1901, Vol. II, 391. *R.*, *Disc.* and *Not F.*, 14 Bur. L.R. 179=U.B.R. 1907, 3rd Qr., Evidence, 5.]

(408)—S. 91—*Promissory note, Loss of—Proof of contents.*—Where a plaintiff basis his cause of action on a promissory note, which he alleges had been lost, he cannot prove the contents, unless he succeeds in proving the loss of the document, apart from the note in which the contract was recorded. *SIRAJ HUSAIN v. BULAKI RAM*, 5 A.L.J. 162=A.W.N. 1908, 91. (28 A. 298, *D.*)

(409)—S. 91—*Receipt for rent—No writing necessary.*—A receipt for rent is not a contract and the law does not require it to be in writing. *MOTI SAU KALOO SAV v. MADHO RAO*, 1 C.P. L.R. 16. [*Agreed*, 10 C.P.L.R. 48.]

(410)—S. 91—*Contract in writing—Admissibility of oral evidence as to terms.*—Where there is a proposal in writing for a contract to be entered into at a latter date, it is doubtful if oral evidence of terms, not to be found in the written proposal, is admissible. *MAUNG SHEW OH v. MAUNG TUN GYAW*, 9 C.W.N. 147, P.C.=82 C. 96=31 I.A. 188=8 Sar. 704.

(411)—S. 91—*Admissibility of independent evidence in suit on promissory note.*—There seems to be a consensus of rulings to the effect

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that independent evidence may be given of the original consideration, even when a pro-note has been executed and when for any reason the document is excluded. The reasonings of the several decisions apply not merely to unstamped documents, but to any case in which reliance cannot be placed on the pro-note, and in which the note is merely evidence of, or a collateral security for, an obligation already existing. *MRS. L. EWING v. G. WHITE*, U.B.R. 1897-1901, Vol. II, 391. (3 A. 717, 4 A. 135, 9 A. 351, 4 B. 443, 3 C. 314, 7 C. 256, 27 C. 851, 5 M. 167, U.B.R. 1897-1901, Vol. II, 390, 21 W.R. 1, *R.*) [*R.*, U.B.R. 1897-1901, Vol. II, 556, U.B.R. 1907, 1st Qr., Execution—Signing 1; *Superseded*. U.B.R. 1907, 3rd Qr., Evidence, 5.]

(412)—S. 91—*Construction of document containing contract of guarantee—Alteration with implied assent of obligee.*—Construction of a document containing a contract of guarantee is controlled by final expression of obligation written by obligor himself in his own language. *MAUNG PO THET v. S. R. M. M. ARNACHEL-LUM CHETTY*, U.B.R. 1897-1901, Vol. II, 385. (5 B.L.R. 111, 10 B. 489, 11 B.H.C. 203, 3 C. 220, *R.*)

(413)—S. 91—*Admissibility of evidence of fact that enhancement was agreed to be paid in consideration of improvement—See BEN. ACT VIII OF 1885, cl. (b) and proviso (3) of s. 29, 33 C. 607=4 C.L.J. 320=11 C.W.N. 62.*

(414)—S. 91—*See BEN. ACT VIII OF 1885, s. 88, 31 C. 1026=8 C.W.N. 923.*

(415)—S. 91—*See U.P. ACT XVIII OF 1876, CHAP. II, S. 9, 4 O.C. 365.*

(416)—S. 91—*See CAUSE OF ACTION, 61 P. R. 1888.*

(417)—S. 91—*See CIV. PRO. CODE, 1908, O. XX, r. 3, s. 99, 1 M.L.J. 478.*

(418)—S. 91—*Admissibility of oral evidence of terms of compromise under s. 375, Civ. Pro. Code—See CIV. PRO. CODE, 1908, O. XXIII, r. 3, 3 L.B.R. 243.*

(419)—S. 91—*See CIV. PRO. CODE, 1908, O. XLIII, r. 1 (n); O. XLVII, r. 7 (a) and (b), s. 115 (c), 49 P.W.R. 1911.*

(420)—S. 91—*Adoption — Anumatipatra—Mode of proof—See HINDU LAW—ADOPTION, 4 Ind. Cas. 400.*

(421)—S. 91—*See LIMITATION ACT, 1908, s. 19, 12 C. 267.*

(422)—S. 91—*Unregistered sale-deed—Use of the deed for collateral purposes—See LIMITATION ACT, 1908, arts. 132, 144, 13 Bom. L.R. 867.*

(423)—S. 91—*Deed declaring or effecting partition—Registration—Admissibility of unregistered deed—See PARTITION—GENERAL, 6 Ind. Cas. 346=12 O.L.J. 25.*

(424)—S. 91—*See PLAINT—AMENDMENT OF PLAINT, 131 P.R. 1883.*



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(425)—S. 91—Agreement inadmissible—Oral evidence barred—See REGISTRATION ACT, 1908, s. 17, 89 P.R. 1908=145 P.W.R. 1908.

(426)—S. 91—See TRANSFER OF PROPERTY ACT, 1882, ss. 4, 105, 107, 5 Ind. Cas. 562.

(427)—S. 91—Kabuliat without lease—Admissibility of oral evidence to prove agreement to execute lease—See TRANSFER OF PROPERTY ACT, 1882, ss. 105, 107, 9 O.C. 296.

(428)—S. 91—See NOS. 18, 28, 95, 272, 281, 282, 306, 307, *supra*.

(429)—Ss. 91, 92—Contract Act, s. 43—Construction of.—There is a difficulty in construing the words in s. 43 of the Contract Act "unless a contrary intention appears from the contract," because the word "contract," if taken literally in connection with the context, apparently applies to the contract made with the promise; but, if the words are read to mean that the contrary intention must appear on the face of the contract they virtually amount to a rule of evidence which it is not likely it was in contemplation to introduce into the Contract Act. And it seems more probable that the word "contract" was employed in a wide and general sense with reference to the whole of the transaction or transactions between all the parties in their several respective relations. S. 92 of the Evidence Act excludes evidence of any oral agreement for the purpose of contradicting, varying, adding to, or subtracting from, the terms of a contract which have been reduced to the form of a document "as between the parties to any such instrument or their representatives in interest." In the case of 10 A. 421 the words quoted above were construed as meaning between the parties to the instrument on both sides and not on one side only as between themselves. Possibly this was what was intended in enacting s. 92; but it may be observed that what the section itself says is not the parties to the contract but the parties to the instrument which, *prima facie*, would seem to include everyone concerned. POKAL GUNGUYAH v. ISMAIL MAHOMED MADAREE, U.B.R. 1892-1896, Vol. II, 284.

(430)—Ss. 91 and 92—Deed of sale—Oral evidence to prove the transaction to be a mortgage—Deed got executed by fraud—Deccan Agriculturists' Relief Act, XVII of 1879, s. 10-A—Retrospective effect—Benefit of the Act in second appeal.—Plaintiffs sued for the recovery of possession of lands with mesne profits, alleged to have been sold to them by the defendants under a deed of sale. Defendants averred that the plaintiffs, apprehending the operation of the Deccan Agriculturists' Relief Act, had got the defendants to execute a nominal sale-deed, and promised at the time to give an agreement in writing, *inter alia*, that the produce from the property would be appropriated for the liquidation of the debt, and that after that the plaintiffs would have no interest in the land, but, that until then, the land would be considered mortgaged to them, and that, without the

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agreement, the sale would be of no effect. It was also stated that the plaintiffs fraudulently worded the agreement and had that dishonest intention from start to finish. *Held*, that no evidence could be admitted of a contemporaneous agreement to treat the sale as a mortgage. The transaction, whether it be treated as a contract or an agreement, had been committed to the form of a document; that that document was before the Court, and the terms of ss. 91 and 92, Evidence Act, left no alternative to the Courts but to decide as they did. The deed is admittedly a sale deed and the appellants cannot be permitted to contend that it was intended to be something else. *Held*, also, that allegations having been made that the agreement, which had been carried into effect by the deed of sale, had been induced by fraud, any relevant facts offered in proof of those allegations would come, within the first proviso of s. 92, Evidence Act. *Held*, also, that, if the appellants were agriculturists, the provisions of s. 40-A of the Deccan Agriculturists' Relief Act will be applicable to them. The provisions of this section, *i.e.*, s. 10-A of the Deccan Act are retrospective, so far as they relate to procedure, and the law of evidence which is a branch of the law of procedure, now includes the special provisions of this section. PURSUMAL KHUSIMAL v. SADHUMAL KIMATIMAL, 3 S.L.R. 1=1 Ind. Cas. 935.

(431)—Ss. 91, 92—Sale-deed—Execution of pro-note for purchase-money—Suit on pro-note—Admissibility of contemporaneous oral agreement forming consideration for pro-note.—Plaintiff executed a sale-deed of lands to which he was not entitled, in favour of the defendant, and the latter being well aware that the plaintiff had no title, accepted the sale-deed and gave the plaintiff a receipt acknowledging that the possession of the lands had passed to him and also a promissory note for the purchase-money. Plaintiff now sued on the pro-note and the defence was failure of consideration because, as the defendant alleged, at the time of the execution of the sale-deed, the plaintiff expressly covenanted to put the defendant in possession of the lands and had not done so. The defendant desired to produce evidence of this oral agreement. *Held*, that the defendant was entitled to adduce evidence to prove the agreement in support of the plea set up by him, that consideration for promissory note failed in consequence of the non-performance of the agreement. SINGARACHARULU v. UPENDRAIYA, 10 M.L.J. 69.

(432)—Ss. 91 and 92—Question as to who were the parties to a contract, whether one of the terms of the contract—Oral evidence, admissibility of, thereon.—A question as to who the contracting parties or is not a question as to the 'terms of the contract,' within the meaning of ss. 91 and 92 of the Evidence Act; and it is open to a plaintiff to give (oral) evidence of circumstances which went to show that a defendant signed a bond on his own behalf and as



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the agent of his partner, another defendant. **VENKATASUBBIAH CHETTY v. GOVINDARAJULU NAIDU**, 18 M.L.J. 1=3 M.L.T. 259=31 M. 45.

(433)—Ss. 91, 92—See EXECUTOR, 21 B. 335.

(434)—Ss. 91, 92 — See PRE-EMPTION — GENERAL, P.L.R. 1900, p. 203.

(435)—Ss. 91, 92—Registration endorsement—Statement by executant made to the registering officer—Admissibility—See REGISTRATION ACT, 1908, Ss. 52, 58, 60, 14 O.C. 80.

(436)—Ss. 91, 95 and 97—*Demonstratio falsæ non-nocet*—Misdescription of survey number in sale-deed—Misdescription of premises.—The general rule laid down in s. 91 of the Act is, that, when the terms of a contract have been reduced to writing, no evidence shall be given in proof of the terms of the contract except the document itself, or, in certain cases, secondary evidence of its contents. But this rule is subject to the important exceptions contained in ss. 95 and 97. Where land with certain boundaries is sold and is wrongly described as containing a certain area, the error is regarded as a mere misdescription and does not vitiate the deed. The maxim *demonstratio falsæ non-nocet* applies. Where, in a sale-deed, the land sold is sufficiently identified by the description of its extent and assessment and the name of the registered pattadar, the addition of a wrong survey number may be disregarded and does not render it useless as a document of title. **KARUPPA GOUNDAN v. PERIATHAMBI GOUNDEN**, 2 M.L.T. 336=30 M. 397. (4 Bom. L. R. 871, R.)

(437)—Ss. 91, 101, 102, 110—Possession—Sale—Mortgage—Burden of proof—Evidence—Unregistered document.—By s. 110 of the Evidence Act the burden of proving that the person in possession is not the owner is thrown on the party who affirms that the possessor is not the owner. Possession is *prima facie* proof of ownership. Therefore a person alleging that the holder of land is not the owner, but a mortgagee, must prove his allegation. Where the document containing the transaction is inadmissible for want of registration, no other evidence of the terms of the contract can be received. **NGA SHWE YON v. NGA KAING**, L.B.R. 1872-1892, 133. [R., L.B.R. 1893-1900, 154.]

(438)—Ss. 91, 102, 114—Exclusion of evidence of contents of document other than document itself—Unstamped document excluded through refusal of party to pay stamp-duty and penalty under s. 34, Stamp Act—Effect of such exclusion—Burden of proof—Presumption as to usufructuary mortgage not carrying interest plus usufruct.—The original mortgage was contained in a document A, which had been admitted in evidence under s. 34 of the Stamp Act. Where the land mentioned in A was delivered to the mortgagees, a second document B, referring to A and incorporating it by implication, was endorsed on the other side of the

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paper. The defendant-appellant had refused to pay stamp-duty and penalty under s. 34 of the Stamp Act with respect to B, which was consequently not in evidence. *Held*, first, that the nature of the mortgage being usufructuary, there would naturally be *prima facie*, from the custom of the country and the circumstances of the case, a presumption that interest was covered by usufruct, and that the dependent mortgagees were under the obligation of rebutting it. *Held*, secondly, that there was no such rebutting evidence on record. The contract between the parties having been reduced to writing no evidence of it was admissible except the writing itself which was A & B. The execution of B apparently superseded A or absorbed it, and as B could not be proved under the provisions of s. 34 of the Stamp Act, neither could A. *Held*, thirdly, that if any secondary evidence was admissible it could only be a certain oral statement of a witness which contradicted the defence, while it would seem that the non-production of B in evidence logically involved a presumption unfavourable to the defendants under s. 114, illustration (g) of the Evidence Act. **SAYA PA v. MAUNG LU GALE**, U.B.R. 1897-1901, Vol. II, 396.

(439)—Ss. 91, 110—Wakf—Gift of property by descendants of founder under unregistered deed—Admissibility of parol evidence to prove factum of gift—See POSSESSION—ADVERSE POSSESSION, 4 Ind. Cas. 314=18 P.W.R. 1909.

(440)—S. 92—Oral evidence, admissibility of, to interpret clear terms of a bond.—When the terms of a bond are clear and unambiguous, parol evidence is not admissible to show that it was an assignment of future rent. **HRIDOY NATH PODDAR v. JOYRAM MAHTO**, 4 C.L.J. 402.

(441)—S. 92—Oral evidence to invalidate an agreement—Admissibility of.—Under proviso (1) to s. 92 oral evidence will be admissible for the purpose of invalidating a written agreement. **DHOLAN DAS v. RALYA SHA**, 85 P.R. 1898.

(442)—S. 92—Written contract—Exclusion, of oral evidence—Subsequent new oral agreement—Admissibility of.—The rule is that evidence of contemporaneous oral agreement to vary or to contradict a written instrument cannot be admitted. Under proviso (4) to s. 92, evidence of a subsequent oral agreement rescinding or modifying a contract, etc., in writing is not admissible, but the proviso does not exclude a distinct subsequent new oral agreement superseding the old contract in toto. **LAKHU RAM v. AMIR KHAN**, 14 P.R. 1889.

(443)—S. 92—Evidence of oral agreement, Admissibility of—Registered contract.—Evidence of oral agreement between the parties to a written and registered instrument, distinctly adding to its terms, another term which had been antecedently agreed to as one of the substantive parts of the whole contract witnessed by that instrument, is inadmissible under s. 92 of the Evidence Act. **SHAM LAL v. BANNI BEGAM**, A.W.N. 1886, 40.



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(444)—S. 92—*Mortgage—Oral agreement that mortgagee should be in possession in lieu of interest—Validity.*—Where there was a mortgage by which a fixed rate of interest was agreed to be paid, and there was a contemporaneous oral agreement that the mortgagee should go into possession of the property mortgaged in satisfaction of the interest, and he was let into possession and remained in possession under the terms of that agreement, *held* that this was not a case under s. 92 of the Evidence Act, that the real agreement was not one which contradicted, varied, added to, or subtracted from, the terms of the written agreement, that it was merely a provision as to how the interest should be paid; and that therefore the oral agreement was valid. *BINDRABAN V. UMRAO SINGH, A.W.N. 1887, 61.*

(445)—S. 92—*Oral evidence to vary the terms of a kobala.*—No evidence of any oral agreement is, under this section, admissible to vary the terms of a kobala which is on the face of it an unconditional sale. *RAM DOOLAL SEN V. RADHA NATH SEN, 23 W.R. 167.*

(446)—S. 92—*Executants of bond as principals, not competent to adduce oral evidence of their being mere sureties.*—This was a suit for the balance due under a mortgage deed. Some of the defendants pleaded that they were only sureties and that they were discharged by the transaction between the borrowers and the lender transferring the mortgaged land and bullocks, a transaction of which they had no knowledge. *Held*, that, under s. 92 of the Act, it was not competent for the above defendants as executants of the deed, in their capacity of principal debtors, to let in oral evidence to the effect that they executed the deed as sureties merely. *NGA SAING V. NGA LU AUNG, U.B. R. 1906, Evidence, 13. (10 A. 421, 25 A. 337, 3 C. 174, 8 C.W.N. 101, R.)*

(447)—S. 92—*Bond—Plea of 'immoral purpose'—Admissibility of such evidence.*—Under s. 92, proviso (1), any fact may be proved which would invalidate any document, such as fraud, illegality, etc. Therefore in a suit on a bond, a defendant pleading that it was invalid by reason of its having been given to secure money lent to promote an immoral purpose will be allowed to prove the same. *MUSSAMMAT ALLAJULAI V. OUNKAR LAL, 61 P.R. 1882.*

(448)—S. 92—*Promissory note on demand—Contemporaneous agreement in writing for payment by instalments—Evidence—Exclusion.*—In a suit for money due on a promissory-note payable on demand, the defendant pleaded a contemporaneous agreement in writing allowing the repayment by instalments: *Held*, that the contract was as contained in the two documents, and the defendant was entitled to prove the contract by showing that there was a duly executed contemporaneous agreement in writing between the parties. *D. NAGARDAS V. MOSES S. AROKKE, 12 Ind. Cas. 896.*

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(449)—S. 92—*Intention of parties—Court's finding as to same—Its power not to give effect—Statement of consideration—Not a term of transfer.*—Although it may appear to the Court that a transaction was intended by the parties to be a mortgage, it is still open to the Court not to give effect to it on account of the exclusion of evidence of oral agreement. (22 A. 49, 25 M. 7, R.; 2 M.W.N. 30, *Expl.*; 17 C. 291, 8 Bom. L.R. 761, *Cons.*; 13 C.L.J. 510, *Doubted.*) It is settled law that the statement of the consideration for a transfer of property is not one of the terms of the grant within the meaning of s. 92 of the Evidence Act, when the instrument is executed by the transferor only. *CHALLAVENKATA REDDY V. DEVABHAKTUNI, 1912, 1 M.W.N. 164.*

(450)—S. 92—*Written contract—Consideration recited to have been paid—Evidence to contradict payment of consideration.*—Where, in a suit for recovery of money based on an instrument which recited that "the borrower had taken the money and brought it into his own use," the defendant tendered evidence to prove that he had executed such instrument upon the understanding that it should not be binding upon him unless a certain condition precedent was performed by the plaintiff, *held* that such evidence was admissible. *KISHEN SAHAI V. CHANDI PRASAD, A.W.N. 1882, 93.*

(451)—S. 92—*Written contract—Evidence to vary—Parol evidence as to matter on which a document is silent.*—Where the plaintiffs brought a suit to recover damages for breach of contract, the defendants sought to show that the written contract was varied by adducing parol evidence as to the matter on which the document was silent, *held*, that such evidence was not admissible under s. 92, Evidence Act (I of 1872). *JADU RAI V. BHUBOTARAN NUNDY, 17 C. 173. [R., 114 P.L.R. 1901.]*

(452)—S. 92—*Payment of consideration—Contradiction of statement of fact in written instrument.*—Notwithstanding an admission in a sale-deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid. The provisions of the Evidence Act do not render inadmissible evidence that will contradict the statements of fact in a written document. Where a contract of sale mentions that the amount of consideration specified in it has been received by the vendor, it is competent to the vendor, under the provisions of the Evidence Act, to prove a collateral agreement that the purchase money should remain in the hands of the vendee for the purposes, and subject to the conditions alleged by him. *SAH LAL CHAND V. INDRAJIT, 22 A. 370, P.C. = 4 C.W.N. 485 = 27 I.A. 93 = 2 Bom. L.R. 553 = 7 Sar. 702. (On appeal from, 18 A. 168.) [F., U.B.R. 1897-1901, Vol. II, 400; R., 11 M.L.J. 318 = 25 M. 55, 25 M. 7 = 11 M.L.J. 370, 15 C.P.L.R. 24, 1 P.R. 1904 = 41 P.L.R. 1904, 27 A. 612 = 2 A.L.J. 360 = A.W.N. 1905, 129, 2 C.L.J. 338, 4 A.L.J. 441 = A.W.N. 1907, 181, 10 C.L.J. 27.]*



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(453)—S. 92—*Oral evidence of intention in construing deed.*—The oral evidence of intention is not admissible for the purpose of construing a deed or ascertaining the intention of the parties. **BALKISHEN DAS v. LEGGE, 2 Bom. L.R. 523.**

(454)—S. 92—*Contemporaneous oral agreement—Acts and conduct of parties—Acceptance of reduced rent—Waiver.*—*Per Curiam, J.*—The acts and conduct of the parties can only be proof either (1) of a contemporaneous oral agreement varying the terms of the registered contract, or (2) of a subsequent oral agreement having the same effect. In the former case the evidence is excluded by s. 92 of the Evidence Act, and in the latter case by proviso 4 to s. 92. (24 C. 20, 25 C. 603, 28 C. 256, 22 M. 261, R.) *Per Gupta, J.*—The mere acceptance of a reduced rent, though it may amount to a full acquittance of rent for the particular year or years for which the rent was paid, does not operate as a binding contract between the parties without proof of the agreement which formed the basis of the reduction granted. **RADHA RAMAN CHOWDHURI v. BHABANI PROSAD BHOWMIK, 12 C.L.J. 439=8 Ind. Cas. 790.**

(455)—S. 92—*Mortgage bond—Subsequent delivery of possession to mortgagee—Satisfaction of mortgagee's dues—Proof by oral evidence.*—Where, after the execution of a mortgage bond, the mortgagor placed the mortgagee in possession of the mortgaged premises, under an agreement by which the mortgagee was to continue in possession for seven years and to receive the profits in full satisfaction of his dues under the mortgage: *Held*, that, as the effect of the subsequent agreement was not to alter, contradict, add to or subtract from the terms of the original agreement, but merely to provide means for the satisfaction of the bond, the agreement could be proved by oral evidence, and s. 92 of the Evidence Act did not apply. **KAMLA SAHAI v. BABU NANDAN MIAN, 2 Ind. Cas. 13=11 C.L.J. 39. (9 A. 392, F.; 18 A. 168, 11 C. 486, R.; 22 A. 149, 27 I.A. 58, D.)**

(456)—S. 92—*Note of hand—Oral evidence to prove suretyship.*—Oral evidence to show that one of the executants of a note of hand signed it only as surety and that his liability was only to the extent of standing as surety for a month, is inadmissible under s. 92 of the Evidence Act. The defence of one of the executants in this case was that the payee was to recover the money from the principal debtor within a month after which the suretyship was to cease. *Held*, that this did not amount to a plea of the existence of a condition precedent to the attaching of liability, since the liability attached on the date of the note. **HAREK CHAND BABU v. BISHUN CHANDRA BANERJEE, 8 C.W.N. 101. [R., U.B.R. 1906, Evidence, 13.]**

(457)—S. 92—*Registered kabuliyat, Proof of—Contemporaneous oral agreement for reduction of rent—Conduct of the parties—Acceptance of*

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*the reduced rent, Effect of.*—Neither a contemporaneous oral agreement nor the subsequent acts and conduct of the parties can be proved under s. 92 of the Evidence Act to show that the rent is less than what was stated in the registered *kabuliyat*. (24 C. 20, 25 C. 603, 28 C. 256, D.; 28 C. 70, R.) [D., 2 C.L.J. 338; F., 2 Ind. Cas. 160.] The mere acceptance of a reduced rent, though it may amount to a full acquittance, cannot operate as a binding contract without proof of the agreement forming the basis of the reduction granted, and such an acceptance does not amount to such an agreement or release of a portion of the rent as to have a binding effect. (*Per Gupta, J.*) **RADHA RAMAN CHOWDRY v. BHOWANI PROSAD BHOWMIK, 6 C.W.N. 60. [F., 2 Ind. Cas. 160; R., 10 C.L.J. 570.]**

(457-a)—S. 92—*Oral evidence of acts and conduct of parties.*—Oral evidence as to the acts and conduct of the parties is admissible to show whether a certain deed is, as it purports to be, an out and out sale or a mortgage; but it is not admissible to show that a deed of sale was really meant to be a deed of mortgage and not a deed of sale. **ABDUL GHAFUR KHAN v. ABDUL KADIR, 114 P.L.R. 1901=72 P.R. 1901. (22 A. 149, 5 C.W.N. 326, 5 W.R. 68, F.; 12 A. 387, 14 A. 159, 4 B. 594, 10 C. 764, 9 C. 528, 13 M. 494, 16 M. 80, 19 A. 434, 25 C. 603, 2 C.W.N. 562, 7 B. 73, 6 C. 328, 17 C. 173, 176, R.)**

(458)—S. 92—*Oral evidence to prove executant of document a mere surety, whether admissible—Decree for contribution whether grantable.*—Where one of several mortgagors, after having been compelled to pay the mortgage debt, sued for the recovery of the amount from the other mortgagors on the ground that he joined in the mortgage only as a surety for the defendants, *held* that the plaintiff could adduce evidence, notwithstanding s. 92, to prove that he was a surety merely. (10 A. 421, F.) Where the plaintiff had failed to prove his contention that he joined the mortgage only as a surety, he would not be entitled to get a decree for contribution towards the amount of the debt satisfied by him. **SHAMSH-UL-JAHAN BEGAM v. AHMAD WALI KHAN, 25 A. 337=A, W.N. 1903, 64. [Diss., U.B.R. 1906, Evidence, 13; Overruled, 28 A. 482, P.C.=3 A.L.J. 360=10 C.W.N. 626=3 C.L.J. 481=8 Bom. L.R. 397=16 M.L.J. 269=1 M.L.T. 143=33 I.A. 81.]**

(459)—S. 92—*Oral evidence to contradict recital in deed—Right of both parties.*—Where one of the parties to a deed is, under any of the provisions of s. 92 of the Evidence Act, permitted to go into oral evidence, it is open to the other party also to rebut that evidence by oral evidence. Where a deed recited the payment of a certain consideration, and the plaintiff denied the passing of any consideration, and adduced evidence in support of his contention under the provisions of s. 92 of the Evidence Act, it was open to the defendants to



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go into oral evidence to show that there was some consideration for the deed though not the same as recited in the deed. **KAILASH CHANDRA NEOGI v. HARISH CHANDRA BISWAS**, 5 C.W.N. 188. (11 C. 486, 3 B. 159, R.)

(460)—S. 92—*Deed of sale—Recital that consideration was paid, though not actually paid—Suit for cancellation for consideration—Extrinsic evidence to show that the document is in reality a deed of gift, Admissibility of.*—The plaintiff, a Muhammadan lady, conveyed a certain portion of her property in favour of her children by means of a sale-deed. Though the consideration was not paid, the deed contained the recital that the whole consideration was received. The suit is for cancellation of the sale-deed or, in the alternative, for the consideration-money. The defendants pleaded that the document, though in the form of a sale-deed, was, in reality, a deed of gift, and was executed out of natural love and affection. *Held*, that extrinsic evidence was not admissible for the purpose of showing that a document which purports to be, and is, on the face of it, a deed of sale, is in reality a deed of gift. (22 A. 149, P.C., F.) If there is any controversy as to payment of consideration, then, extrinsic evidence is admissible. (22 A. 317, P.C., R.) *Held*, also, that, under the circumstances of this case, the plaintiff was entitled to a decree for the consideration-money. **FAIZ-UN-NISSA v. HANIF-UN-NISSA**, A.W.N. 1905, 129=2 A.L.J. 360=27 A. 612.

(461)—S. 92—*Nature of agreement inadmissible without registration, when original agreement is registered.*—Only those agreements come within s. 92 of the Evidence Act which affect the terms of the previous transaction, not indirectly, as a consequence of an independent and valid contract between some only of the parties, but directly by virtue of the consensus of those who alone are competent to rescind or modify the original contract, viz., all the parties concerned or all their representatives. The exception at the end of proviso 4 to s. 92 of the Evidence Act applies to any agreement whether executed or executory. **GOSETI SUBBA ROW v. VARIGONDA NARASIMHAM**, 27 M. 368. [F., 129 P.W.R. 1908; R., 17 M.L.J. 30=30 M. 231; D., 129 P.W.R. 1908, 10 C.L.J. 150.]

(462)—S. 92—*Contract in writing silent on a particular point—Admissibility of evidence of a contemporaneous oral agreement.*—Where a partition-deed, in which special provisions were made for giving means of access to various portions of the partitioned property, was silent as to means of access over the share in question, *held*, that an alleged contemporaneous oral agreement to add to the terms of the partition-deed was inadmissible in evidence by reason of s. 92 of the Act. **KRISHNAMARAZU v. MARRAJU**, 28 M. 495=15 M.L.J. 255.

(463)—S. 92—*Registration Act (III of 1877), s. 17, cl. (b)—Variation of terms of registered deed—Compromise in mutation proceedings varying the terms of registered deed—Admissibility.*—A mortgage was executed by one

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mortgagor on condition that the property could not be redeemed within 25 years. In the Revenue Court a co-owner of the mortgagor objected to mutation of names. The matter was compromised, the condition being that the objector withdrew his objections, and the mortgagees' names were entered in the revenue registers, and it was provided that the mortgage could be redeemed in Jeth of any year. In a suit for redemption brought within 25 years, *held*, that the compromise could not be admitted in evidence inasmuch as it purported to modify the terms of the registered mortgage, and that the terms of a registered deed of mortgage could not be varied except by a registered instrument. **SADARUDDIN AHMAD v. CHHAJJU**, 5 A.L.J. 717=31 A. 13=A.W.N. 1908, 264=1 Ind. Cas. 558.

(464)—S. 92—*Document, refusal of prayer to send for, prejudice—Oral evidence to contradict the terms of a conveyance, if admissible—Recital, incorrectness of, as to payment of consideration, proof of, by oral evidence.*—Omission by a Court to send for a document and to give an opportunity to a party to prove the same is not sufficient to set aside a decision, unless such omission has prejudiced the party who wanted the document to be proved. Although s. 92 of the Evidence Act prevents the admission of oral evidence for the purpose of contradicting or varying the terms of a contract, it does not prevent one of the parties to the contract from showing either that there was no consideration or that the consideration was different from that stated in a conveyance. **GOPAL SINGH v. LALOO LALL**, 10 C.L.J. 27=2 Ind. Cas. 953. (3 B. 159, 5 M. 6, 11 M. 213, 11 C. 486, 18 A. 168, R. & F.; 22 A. 149, P.C., D.) [F., 6 Ind. Cas. 477.]

(465)—S. 92—*Lease—Extrinsic evidence, admissible.*—Extrinsic evidence as to any oral assurances given by the grantor of the lease, that it was intended to last for ever, is admissible. Only the grantor may possibly be estopped from questioning the permanent character of the lease by reason of misrepresentation even on a point of law which is not clear and free from doubt. **NARSINGH DYAL SAHU v. RAM NARAIN SINGH**, 30 C. 883. (22 A. 149, P.C., R.)

(466)—S. 92—*Objections as to admissibility of evidence.*—Where a document records the terms agreed to at the time of the execution of another document, the parties being the same, there is no objection, under s. 92 of the Evidence Act, to the admissibility of the former document, notwithstanding that it contradicts, varies, adds to, or subtracts from, the terms of the latter document. **MUTHA VENKATACHELAPATI v. PYANDA VENKATACHELAPATI**, 27 M. 348. [D., 2 Ind. Cas. 930.]

(467)—S. 92—*Admissibility of evidence to vary or contradict terms of document—Evidence of acts and conduct of parties—Relaxing Indian Statute Law by applying principles of equity.*—The law in India generally is a codified law and, so far as the adjective law is concerned,



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the Codes are exhaustive, not only as to the rules to be followed, but also as to the extent of discretion vested in the Courts. There is little analogy between the *status* of the codified law and the position occupied the common law of England; and Courts in India are not justified in relaxing or avoiding the Statute Law in the same way, as Courts of Equity in England deal with rules of common law. The effect of s. 92 is to exclude evidence of every kind adduced to prove an oral agreement, of which proof is forbidden by the section, including the circumstantial evidence derived from the acts and conduct of the parties to the instrument in question. When an oral agreement of mortgage is put forward, whether it be to wholly supplant or merely to supplement the terms of a written sale clearly there is a *contradiction* of, or an *addition* to, the written evidence of the transaction, and that is sufficient to bring s. 92 into operation. The word "contradict" in that section must be given its ordinary meaning; and therefore, the distinction drawn by Messrs. Amir Ali and Woodroffe, *viz.*, that we cannot vary, add to, or subtract from the written evidence of the terms of a transaction, but we may wholly contradict it, by proof of an entirely different contemporaneous oral agreement, is not sound. **GUJARMAL RAMLAL v. SITARAM ARJUN**, 3 N.L.R. 19 (22 A. 149, 30 C. 738, R.; 4 B. 594, 16 M. 80, 25 C. 603, 28 C. 256, 28 C. 289, Diss.; 25 M. 7 F.)

(468)—S. 92—*Property exchanged—Payment of cash recited in sale deed—Whether evidence could be offered to prove actual transaction.*—Evidence is admissible to show that consideration, mentioned in a deed as having been paid, never passed, and also to show that the consideration specified in the deed was satisfied in a different way from that mentioned in the document itself. (18 A. 168, 22 A. 370. P.C., R.) Where, therefore a deed recited that a payment of Rs. 1,000 was made in cash, *held* that it could be shown that the payment was not made in cash, but in some other way. **MUHAMMAD YUSUF v. MUHAMMAD MUSA**, 4 A.L.J. 441 = A.W.N. 1907, 181.

(469)—S. 92—*Evidence to contradict statement in a registered kabuliati—Kabuliati not intended to be acted upon—Waiver—Rate of rent Evidence to contradict—Acceptance of the reduced rent.*—Oral evidence is not admissible for the purpose of contradicting a statement made in a registered *kabuliati* as to the amount of rent, but evidence is admissible to show that as between the landlord and the tenant, the *kabuliati* was never intended to be acted upon or enforced or that there was a waiver of some of its terms. [D., 2 Ind. Cas. 160, 10 C.L.J. 570] The evidence that since the execution of the *kabuliati* the tenant paid rent at a lower rate than that stated in the *kabuliati*, is admissible to show that the intention of the parties was that the *kabuliati*, from the very first was not intended to be acted upon or that there had been a waiver by the parties of the

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strict terms of the lease. **BENI MADHUB GORANI v. LALMOTI DASSI**, 6 C.W.N. 242. [D., 2 Ind. Cas. 160, 10 C.L.J. 570.]

(470)—S. 92—*Registered lease—Subsequent alteration by oral agreement—Agreement to be inferred from conduct.*—No oral agreement is admissible under s. 92 of the Evidence Act to vary the rent fixed by a registered lease. An agreement is none the less oral, because it is to be inferred from the conduct of the parties. **LAKHATULLAH SHEIKH v. BISHAMBUR, ROY**, 6 Ind. Cas. 577 = 12 C.L.J. 646.

(471)—S. 92.—*Decree of Civil Court—Evidence of subsequent oral agreement rescinding or modifying—Admissibility.*—Under no circumstances is evidence admissible to prove the existence of a distinct subsequent oral agreement to rescind or modify the decree of Civil Court, s. 92, Evidence Act, 1872, forbids the reception of such evidence, whether the decree be treated as a document embodying the terms of a disposition of property of not. **KARAN-SINGH v. KANHAILAL**, 6 N.L.R. 123 = 8 Ind. Cas. 279.

(472)—S. 92—*Registered mortgage deed, Varying the terms of.*—A registered instrument of mortgage takes effect against any oral agreement relating to the hypothecated property, and no parol agreement which purports to modify the terms of the contract of mortgage by reducing the amount recoverable thereunder, by taking away the right of sale, and by providing for the payment of the reduced debt by a sale, of other property, can be proved, in view of the provisions of s. 92 of the Act. **MAHARAJ SINGH v. RAJA BALWANT SINGH**, 3 A.L.J. 274 = A.W.N. 1906, 117 = 28 A. 508.

(473)—S. 92—*Oral agreement not admissible for subtracting from terms of written contract.*—Evidence of an oral agreement cannot be given for the purpose of subtracting from the terms of a contract reduced to the form of a document. **LACHMANSING v. MAKHAN PATEL**, 4 C.P.L.R. 154.

(474)—S. 92—*Oral evidence to vary a written contract.*—Where a mortgage-deed was sold free from incumbrance and a portion of the purchase-money was left in deposit with the purchaser, the latter giving a receipt embodying the real contract between the parties with regard to the deposit, *held*, evidence could not be offered of a separate agreement empowering the purchaser to pay off an attaching creditor of the decree. But evidence might be let in, to prove the object for which the deposit was made, or to explain the meaning of a sentence in the receipt. **KHETS DAS AGARWALA v. SHIB NARAYAN MURDA**, 9 C.W.N. 178.

(475)—S. 92—*Oral evidence to prove that a deed purporting to be a mortgage was intended to be a sale, Admissibility of—Representatives in interest of parties to the suit.*—*Held*, that oral evidence is not admissible between the parties to a deed which purports to be a mortgage, or



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their representatives in interest, to prove that it was intended to be a sale. **ZAKI UD-DIN KHAN v. AKRAM-UD-DIN KHAN**, 11 O.C. 95. (22 A. 149, R.)

(476)—S. 92—*Sale-deed—Construction—Oral agreement to treat it as a mortgage—Agreement cannot be proved unless fraud, etc., is alleged.*—Where parties enter into a sale-deed, it is not competent to them to prove a contemporaneous oral agreement to reconvey the property sold on payment of the sum advanced, in the absence of fraud, misrepresentation, or failure of consideration, etc., rendering the sale invalid. Where one party to a contract does not agree to any of its stipulations, and the other party induces him, not indeed to agree to it, but to agree to its formal insertion in the written contract, by representing that the stipulation in question would be in reality treated by him as a dead letter, it cannot be enforced, because the party induced had never assented to it and its inclusion in the written contract was the result of misrepresentation. It was the result of a misstatement of the intention of the party inducing, and such a misstatement is one of fact and an action of deceit may be founded on it. **SANGIRA MALAPPA v. RAMAPPA SANGAPPA**, 11 Bom. L.R. 1130=34 B. 59=4 Ind. Cas. 257.

(477)—S. 92—*Contemporaneous oral agreement that an out-and-out sale was to be a mortgage—Evidence of acts and conduct of parties, Admissibility of.*—Plaintiff, having executed a deed of sale of his lands to the defendant as an absolute and unconditional conveyance, now brought this suit asking for a declaration that a transaction was a mortgage and not an out-and-out sale and for an order that the defendant should reconvey the property to him on his paying the purchase-money into Court. On the side of the plaintiff, there was evidence to the effect that the transaction was entered into as a temporary sale to enable the defendant to raise money for the plaintiff and on the understanding that plaintiff was to be allowed to redeem the property whenever he could do so, the defendant having agreed, during the negotiations and when the deed of sale was executed, to allow the plaintiff to redeem at any time. There was also evidence of the acts and conduct of the parties tending to show that there must have been such an agreement between them. The Court of first instance, by its decree, allowed the plaintiff to redeem the property but the lower appellate Court reversed that decision on the ground that the above evidence to show that the transfer to the defendant was by way of mortgage or conditional sale, and not an outright sale, as the instrument of transfer purported to be, was inadmissible. On a reference to the Full Bench, on second appeal, of the question whether evidence of a contemporaneous oral agreement, or of the conduct of the parties, is admissible to show that a transaction reduced to the form of a deed of unconditional sale was in fact, or was intended to be, a

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conditional sale or mortgage. *Held*, that, in cases in which it is attempted to show by evidence of a contemporaneous oral agreement to that effect, that a transaction reduced to the form of a document and purporting, by that document, to be an absolute sale was in reality a mortgage or conditional sale the Courts cannot admit any such evidence, the same being excluded by the terms of s. 92 of the Act, unless when admissible as covered by one or more of the provisos to that section. (22 A. 149, P.C., F.) The evidence of the conduct of the parties is also inadmissible, as such evidence could be relevant only on the ground that the conduct leads to the inference that there was a contemporaneous oral agreement or statement between the parties that the absolute sale-deed was to operate only as a mortgage and not as a sale, but s. 92 of the Act enacts that no evidence of any oral agreement shall be admitted to vary the terms of the contract or grant, and no exception is made in the provisos in favour of evidence which consists of the acts and conduct of the parties from which an inference might be drawn that there was such an oral agreement. **MAUNG BIN v. MA HALING**, 3 L.B.R. 100, F.B. (25 M. 7, F.; 2 L.B.R. 1, overruled; 4 B. 594, 25 C. 603, 28 C. 256, 28 C. 289, Diss.; 15 C. 533, 32 C. 437, R.) [F., U.B.R. 1903, 3rd Q., Evidence, 15.]

(478)—S. 92—*Mortgage by way of conditional sale—Oral agreement converting mortgage by conditional sale into an usufructuary mortgage—Civ. Pro. Code, O. XLI, r. 23.*—Where a case is remanded under O. XLI, r. 23, the Judge of the Court to which the case is sent back has authority to form his own conclusions, irrespective of any finding arrived at by his predecessor at the original trial, in respect of matters which were not touched by the appellate Court. In a suit for redemption of a mortgage by way of conditional sale, evidence was adduced to show that the mortgagors and the mortgagee, had entered into an oral agreement by which the latter was put in possession of the mortgaged share plus a further fractional share on the understanding that profits were to be appropriated in lieu of interest. *Held*, that the alleged agreement, which in substance was one converting the mortgage by conditional sale into an usufructuary mortgage is in no sense such an agreement as is referred to in proviso (2) to s. 92 of the Evidence Act and the evidence adduced in proof of it was, therefore, inadmissible. *Held further*, that as the mortgage was created by a registered document, no such agreement can be proved under proviso (4) except by means of a duly registered document. **AJODHYA PRASAD v. JAGDISH SINGH**, 14 O.C. 321. (10 Ind. Cas. 196, D.)

(479)—S. 92—*Mortgage—Sale—Procedure.*—The duty of a Court is to give effect to the real intention of the parties, and in construing rules of evidence it should be remembered that they were enacted not to defeat, but to assist in attaining, that object. A party who



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sets up a contemporaneous oral agreement, as showing that an apparent sale was really a mortgage, shall not be permitted to start his case by offering direct parol evidence of such an agreement; but if it appear clearly and unmistakably, from the conduct of the parties, that the transaction has been treated by them as a mortgage and not a sale, and, thereupon, if it be necessary, to ascertain what were the terms of the mortgage, the Court will, for that purpose, allow parol evidence to be given of the original agreement. **RAMESH CHANDRA PAL v. NGA SAUNG**, 2 L.B.R. 1. (4 C.W.N. 153, R.; 4 B. 594, 9 C. 898, L.B.R. 1893-1900, 154, F.) [Overruled, 3 L.B.R. 100, F.B.]

(480)—S. 92—*Mortgage—Sale—Contemporaneous oral agreement.*—Mere verbal evidence of contemporaneous oral agreement, showing that an apparent deed of sale was really a mortgage is insufficient. Such evidence is not admissible against an innocent purchaser without notice of the existence of the mortgage. **MAUNG LU GYI v. MAUNG HLA PYU**, U.R.R. 1902-1903, Vol. II, Evidence, 1. (5 W.R. 68, 4 B. 594, 16 M. 80, 9 C. 898. R.) [R., U.B.R. 1908, 3rd Qr., Evidence, 15.]

(481)—S. 92—*Sale deed—Intention to treat as mortgage—Admissibility of evidence.*—Held, that a person who has executed a deed of sale cannot be allowed to produce oral evidence showing that the transaction was intended to take effect only as a mortgage, unless the evidence tendered is shown to be admissible under one of the provisions to s. 92. The embargo contained in s. 92 is applicable not only to direct evidence of a contemporaneous oral agreement, but also to an indirect evidence, showing by the acts and conduct of the parties that there was such an agreement. **MI GYWE v. KESHAN RAM JIBAN RAM**, U.B.R. 1908, 3rd Qr., Evidence, 15. (3 L.B.R. 100, F.B., F.; 22 A. 149, 25 M. 7, 4 B. 594, 30 B. 119, 30 B. 426, 5 C. 300, U.B.R. 1902-1903, Vol. II, Evidence, 1, R.)

(482)—S. 92—*Evidence—Admissibility—Absolute conveyance or mortgage—Fraudulent dealing with a third person's property—Notice that the property purporting to be conveyed belonged to a third person not a party to the conveyance—Extrinsic evidence of acts and conduct of the parties—Fraud.*—Section 92, Evidence Act, is applicable to an instrument "as between the parties to any such instrument or their representatives in interest," but it does not prevent the proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance. The respondents sued the appellants to recover possession of certain parcels of land under certain deeds which purported to be absolute conveyances. The appellants contended that the said conveyances were meant to be, and had always in fact been, treated by all parties con-

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cerned as mortgages only, and they tendered evidence of acts and conduct of the parties to that effect. That evidence was excluded by the Courts below under s. 92 of the Evidence Act. *Held*, on the facts in the case, that the evidence tendered consisted only of evidence relating to the acts and conduct of the parties, as distinguished from evidence of oral statements and conversations constituting in themselves some agreement between them, and its object was to show that, whatever the terms of the instruments might have been, none of the parties, had acted on them as effecting an absolute sale, but that, through a long course of mutual dealings materially affecting their respective positions, they had always treated the business between them as one of loans secured by mortgage; that the case for the appellants disclosed a charge of fraud against the respondents in relation to matters antecedent to the said deeds, on which much of the evidence tendered would certainly be material; and that the rejected evidence should be heard subject to any objections the respondents might be advised to take. **MAUNG KYIN v. MA SHWE LA**, (1911) 2 M.W.N. 30=14 C.L.J. 276, P.C.=13 Bom. L.R. 797=8 A.L.J. 1184.

(483)—S. 92—*Sale-deed—Representation that the deed would not be enforced as a sale-deed—Mortgage deed—Evidence—Indian Contract Act (IX of 1872), s. 17 (3)—Fraud—Proof.*—In a suit for a declaration that an apparent sale-deed executed by the plaintiff was a mortgage and for redemption, the lower Courts allowed the plaintiff to adduce evidence to prove that the defendant, at the time of the execution of the sale-deed, represented to the plaintiff that the sale-deed, would not be enforced as such: *Held*, that no evidence of a contemporaneous agreement, or promise, or representation inconsistent with the written document could be admitted. It was contended that the representation found proved amounted to fraud as defined in s. 17 (3), Contract Act. *Held*, overruling the contention, that there was no finding that the defendant, at the time of making the representation, had no intention of performing it. He might have made the promise in good faith and changed his mind afterwards, when he found the value of the property in dispute had increased and that it was more advantageous for him to rely upon the sale evidenced by the written document than upon the mortgage which the plaintiff alleged was the real agreement between the parties. **DAGDU SADU NAHAVI v. NAMA SALU**, 12 Bom. L.R. 972=8 Ind. Cas. 644.

(484)—S. 92—*Written instrument—Oral agreement to vary its terms—Sale-deed—Deed of mortgage—Fraud or misrepresentation—Party making a new case in appeal—Practice.*—The plaintiff sued to redeem certain lands, alleging that the deed which he had executed to the defendant though a sale-deed in form was in reality only a deed of mortgage, the defendant having promised at the time of the



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execution of the deed that he would allow redemption on payment of the money advanced. The defendant contended that the transaction was a sale. On these pleadings, the Court of first instance framed an issue, whether the sale-deed to the defendant was proved to be really a mortgage redeemable on the terms stated in the plaint. This issue was found in the negative. On appeal, the plaintiff contended that the frame of the issue was incorrect and that the case should therefore be remanded on the issue whether the deed was obtained or induced by the defendant by means of fraud or misrepresentation within the meaning of proviso 1 to s. 92, Evidence Act. *Held*, that the case of the plaintiff was that he signed the deed knowing it to be a deed of sale, but that there was at the same time an oral agreement made by the defendant that he (the defendant) would treat it as a mortgage and he (the plaintiff) relied upon that oral agreement; and that the case, therefore, fell within the prohibition enacted by s. 92 of the Evidence Act. *Held*, further, that the plaintiff sought to make a new case in so far as he endeavoured to base his case not upon a separate oral agreement, but upon some fraud which would invite the application of proviso 1 to s. 92 of the Act. *SOMANA v. GADIGEYA*, 13 Bom. L.R. 113 = 35 B. 231. (12 Bom. L.R. 972, 11 Bom. L.R. 1130, *F.*)

(485 & 486)—S. 92—*Deed of sale by way of absolute conveyance—Suit for redemption by vendor as on mortgage—Evidence to show that the sale was a mortgage.*—After having executed and registered a document in favour of the defendant which purported to be an absolute conveyance to him, of the plaintiff's lands, the latter brought a suit to redeem such lands urging that, though the said document was, on the face of it, an absolute conveyance, the transaction under it was really agreed upon between the parties to operate only as a usufructuary mortgage. Evidence of the subsequent conduct of the parties sought to be let in by the plaintiff for establishing that the sale was intended to be a mortgage was held inadmissible. Evidence of such conduct could be relevant only on the ground that it leads to the inference that there was a contemporaneous oral agreement or statement between the parties that the absolute sale deed was to operate only as a mortgage and not as a sale, and such evidence, having the effect of contradicting the terms of the contract of sale contained in the document, would be precluded by the provisions of s. 92 of the Indian Evidence Act. *ACHUTARAMARAJU v. SUBBARAJU*, 25 M. 7 = 14 M.L.J. 370. (27 I.A. 58, 22 A. 149, 26 I.A. 101, 22 M. 508, *F.*; 28 C. 256, *R.*; 28 C. 289, *Diss.*) [*F.*, 3 N.L.R. 19, 3 L.B.R. 100, *F.B.*, 8 Bom. L.R. 287; *R.*, 36 C. 193 = 5 C.L.J. 611, U.B.R. 1908, 3rd Qr., Evidence, p. 16, 2 Ind. Cas. 13; *D.*, 30 B. 426 = 8 Bom. L.R. 553.]

(487 & 488)—S. 92—*Oral evidence relating to documents—Sale—Mortgage.*—*Held*, that, not-

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withstanding the provisions of s. 92 of the Evidence Act, the defendants were entitled to show that a document purporting to be a deed of sale executed by them was intended to be a mortgage and not a sale. *RAM SARUP v. ALLAH RAKHA*, 107 P.L.R. 1905. (72 P.R. 1901 = 114 P.L.R. 1901, *F.*)

(489)—S. 92—*Sale deed—Instrument varying terms to be registered—Oral evidence not admissible.*—An instrument varying the absolute terms of a sale-deed cannot be allowed to affect the sale-deed unless it is registered and no oral evidence can be allowed to vary the terms of the deed of sale. *PANDU v. GUNESH-DAS KRISHNAJI*, 4 C.P.L.R. 84.

(490)—S. 92—*Agreement partly oral and partly by letter—Oral evidence, if admissible—See AGREEMENT*, 13 C.W.N. 326 = 6 M.L.T. 368 = 4 Ind. Cas. 85.

(491)—S. 92—*Registered agreement to refer to arbitration—Variation—See AWARD*, 14 C.L.J. 188.

(492)—S. 92—*Question whether a sale-deed was a deed of gift—Admissibility of evidence as to intention of parties—See BENAMI TRANSACTIONS—GENERAL*, 10 C.W.N. 570, P.C. = 3 A.L.J. 353 = 3 C.L.J. 484 = 8 Bom. L.B. 379 = 16 M.L.J. 166 = 1 M.L.T. 137 = 33 C. 773.

(493)—S. 92—*See CAUSE OF ACTION*, 5 P.R. 1896.

(494)—S. 92—*See CIV. PRO. CODE*, 1908, s. 11, O. XXIII, rr. 1, 3, 41 P.L.R. 1904 = 1 P.R. 1904.

(495)—S. 92—*See CIV. PRO. CODE*, 1908, s. 80, 67 P.R. 1894.

(496)—S. 92—*See CIV. PRO. CODE*, 1908, s. 86, 69 P.L.R. 1903 = 40 P.R. 1903.

(497)—S. 92—*See DEED—CONSTRUCTION OF DEEDS*, 8 Bom. L.R. 669.

(498)—S. 92—*Contemporaneous oral agreement, admissibility of evidence of—See EASEMENTS ACT*, 1882, s. 13, cl. (e), 28 M. 495 = 15 M.L.J. 255.

(499)—S. 92—*Admissibility of oral evidence as to a right of way being granted at a partition, when the deed of partition, which is registered, is silent as to the grant—See EASEMENTS ACT*, 1882, s. 13, cls. (e) and (f), 15 M.L.J. 225.

(500)—S. 92—*See INSOLVENCY—GENERAL*, 20 B. 636.

(501)—S. 92—*Alteration of terms of registered lease—Oral evidence—Conduct of parties—Payment of reduced rent—Evidence whether*



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admissible—See LANDLORD AND TENANT—MISCELLANEOUS, 8 Ind. Cas. 47.

(502)—S. 92—See LEASE—GENERAL, 25 M. 603, P.C.=29 I.A. 138=12 M.L.J. 479=6 C.W.N. 865.

(503)—S. 92—Deed of gift—Agreement contrary to the terms of the gift—Evidence to prove the agreement—See LIMITATION ACT, 1908, art. 91, 5 Ind. Cas. 497.

(504)—S. 92—Usufructuary mortgage—Arrangement as to mode of payment—Variation of terms—See MORTGAGE—USUFRUCTUARY MORTGAGE, 14 C.L.J. 507.

(505)—S. 92—Accommodation acceptor—S. 132 of the Contract Act—See NEGOTIABLE INSTRUMENTS—BILL OF EXCHANGE, 3 C. 174.

(506)—S. 92—Pro-note—Unconditional agreement—Evidence to vary terms—See NEGOTIABLE INSTRUMENTS—PROMISSORY NOTES, 9 Ind. Cas. 299.

(507)—S. 92—Oral evidence to prove deed of gift to be *donatio mortis causa*—Admissibility—See NEGOTIABLE INSTRUMENTS ACT, 1881, ss. 46, 47, 48, 50, 16 C.W.N. 666.

(508 & 509)—S. 92—Collateral agreement as to interest on a *hundi*, admissibility of evidence as to—See NEGOTIABLE INSTRUMENTS ACT, 1881, s. 80, 11 C.W.N. 105, P.C.=29 A. 33=17 M.L.J. 35=4 A.L.J. 29=1 M.L.T. 427=9 Bom. L.R. 1=5 C.L.J. 7.

(510)—S. 92—Deed of partnership—No extraneous evidence admissible to prove that members of a joint Hindu family were acting on behalf of the family—See PARTNERSHIP—SUITS RELATING TO PARTNERSHIP, 87 P.L.R. 1909=4 Ind. Cas. 929.

(511)—S. 92—See PARTNERSHIP—SUITS RELATING TO PARTNERSHIP, 12 B. 335.

(512)—S. 92—Registered lease—Subsequent alteration of rent by oral agreement—Not valid—See RENT, 2 Ind. Cas. 160.

(513)—S. 92—See RENT, 7 Ind. Cas. 842=12 C.L.J. 649.

(514)—S. 92—Evidence to prove that person signing a pro-note signed not only as principal but also as an agent to a principal not named—Admissibility—See RES JUDICATA—MISCELLANEOUS, 116 P.W.R. 1908.

(515)—S. 92—Real consideration in sale-deed different from the recital—Admissibility—See SALE—GENERAL, (1911) 2 M.W.N. 6.

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(516)—S. 92—See NOS. 18, 154, 281, 429, 430, 431, 432, 433, 434, 435, *supra*.

(517)—S. 92 (1)—Any fact may be proved which would invalidate a document.—The only question was whether the appellant (defendant) was entitled to produce oral evidence to prove that the contract on which the plaintiff sued was void as being illegal. The fact that the contract is not what it purports to be but an agreement for an unlawful object, is a fact which would invalidate the document on which the suit is brought. Evidence to invalidate the document is admissible. THIRUVENGADA RAJOO v MAUNG NYO, U.B.R. 1897-1901, Vol. II, 399. (12 B. 585, 9 C. 791. 17 M. 480, R.) [R. & F., U.B.R. 1897-1901, Vol. II, 400.]

(518)—S. 92 (1)—Where the only points for consideration are whether the defendant was entitled to plead that the deed on which the plaintiff sued was a fraudulent deed and therefore invalid under s. 23 of the Contract Act, and whether the defendant was estopped from denying the obligation, held that the defendant was entitled to prove any facts that would invalidate the contract. (U.B.R. 1897-1901, Vol. II, 399, U.B.R. 1897-1901, Vol. II, 544, R.) Notwithstanding an admission is a sale deed that the consideration had been received, it is open to the vendor to prove that no consideration had been actually paid. LE HU v. ELAHI BUX, U.B.R. 1897-1901, Vol. II, 400. (4 C.W.N. clvi, F.)

(519)—S. 92 (1)—Pre-emptor can show that transaction is really one of sale and ostensibly a mortgage—See PRE EMPTION—MISCELLANEOUS, 157 P.W.R. 1909.

(520)—S. 92, cl. 2—See EVIDENCE—PAROL EVIDENCE, 12 C.L.R. 163.

(521)—S. 92 (2)—Negotiable instrument silent as to interest—Separate oral agreement as to interest whether can be proved—See NEGOTIABLE INSTRUMENTS ACT, 1881, s. 80, 165 P.L.R. 1911.

(522)—S. 92 (4)—Partnership.—A partnership which has been constituted by a registered deed can be dissolved by an oral agreement. ABDUL RAHMAN v. ASGAR ALI, U.B.R. 1902-1903, Vol. II, Evidence, 5. (14 B. 472, F.)

(523)—S. 92, cl. (4)—Written contract—Transaction—Rescinding or modifying the same—Merger.—In a suit for redemption of the mortgage, the defendant pleaded a sale of the mortgaged property. Held, that s. 92, cl. (4) does not exclude evidence of sale; for the new contract does not rescind or modify the former one which is merely merged in the new one. BADHAWA MAL v. HIRA, 30 P.R. 1884. [R., 48 P.R. 1905.]



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(524)—S. 92, cl. (4)—*Oral agreement substituting a written contract—Admissibility of evidence.*—S. 92, cl. (4) does not exclude evidence of oral agreement substituting a new contract for a previous one in writing and registered. That clause refers only to an oral agreement to rescind or modify such contract. **JAGGAT SINGH v. DEVI DITTA MAL**, 169 P. R. 1883.

(525)—S. 92 (4)—*Evidence of conduct of parties oral or documentary, for showing cancelment of a registered mortgage—Admissibility—Suit for portions of property mortgaged whether maintainable*—S. 39, Contract Act.—Evidence of conduct of parties, oral or documentary, for showing cancelment of a registered mortgage, is shut out by s. 92 (4), Evidence Act. A mortgagee, remaining in possession of the mortgaged property for some time and losing it afterwards, is entitled to sue to recover the whole of the property. But she is not bound to sue for possession of the whole or any part of it, and if she chooses to be content with possession of a portion and to sue for that portion, no one can compel her to sue for more than she wanted, though her action would in no way affect the liability of the whole of the property comprised in the mortgage for the money advanced by her under the mortgage. **SRINIVASASWAMI AIYANGAR v. ATHMARAM AIYER**, 5 M.L.T. 84=19 M.L.J. 280=2 Ind. Cas. 612. (22 M. 261, F.)

(526)—S. 92 (4)—*Parol agreement by a purchaser of mortgagee's interest to pay consideration to a third party to the credit of mortgagee—Admissibility—Rights of mortgagee.*—A parol agreement between a mortgagee and the assignee of his interest, whereby the latter was to pay the consideration for the sale to third party to the credit of the mortgagee, is an attempted rescission of a contract, required by law to be in writing, by a subsequent oral agreement, which is forbidden by s. 92 (4) of the Evidence Act, and is inadmissible in evidence; nor can it be made the basis of a suit. (30 M. 231, 17 M.L.J. 30, 32 M. 281, 5 M.L.T. 84, 2 Ind. Cas. 612, *Appl.*) This does not, however, affect the mortgagee's rights under his mortgage. **IYETALY SURAYYA v. NALAMILI VENKANNA**, 9 Ind. Cas. 340.

(527)—S. 92 (5)—*Evidence of oral agreement varying terms of document.*—There is nothing to warrant any Court in transforming an ordinary and clearly expressed contract, in which the parties stand in the legal relation of creditor and debtors, into a contract of guarantee in which one of them, who on the face of the contract is a joint and several debtor, becomes the surety of the other, undertaking to discharge liability only in case of his default. **LU GALE v. MAUNG MO**, 2 L.B.R. 268. (8 O. W.N. 101, R.)

(528)—S. 92, proviso 1—*Evidence to prove mistake in agreement admissibility of, in a suit*

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*upon the agreement.*—Under proviso 1 to s. 92 of the Act, evidence may be admitted to prove that there was mutual mistake in the wording in an agreement and to prove what the real intention of the parties was, and such evidence as to the alleged mistake may be given not only in a suit for the rectification of the mistake, brought under s. 31 of the Specific Relief Act, but also, in a suit based upon the agreement itself. **S. NARAYANASAWMY v. JAMES D. RODRIGUEZ**, 3 L.B.R. 227. (2 C. W.N. 260, F.; 22 A. 149, 11 Bur. L.R. 281, R.)

(529)—S. 92, proviso (1)—*Oral evidence—Admissibility.*—Plaintiff alleged that he sold a bond to the defendant for Rs. 1,575, that he was paid Rs. 1,200 and that Rs. 375 was not paid, and sued the defendant for recovery of that amount. The sale-deed recited that the consideration of Rs. 1,575 had been received in full and details were given *viz.*, Rs. 600 on account of a decree of J and R, Rs. 600 on account of a decree of the purchaser against the vendor, and Rs. 375 on account of money taken previously for private expenses. The plaintiff's case was that Rs. 375 had not been paid, as it had been agreed that this sum should be paid if the purchaser realized the full sum due under the bond, the subject of sale, without suit. *Held*, that the plaintiff was entitled to prove that, as a matter of fact, he never received the sum of Rs. 375, and that the real understanding between the parties was what he alleged, and that proviso (1), s. 92 of the Evidence Act was applicable to the case as the fact that the plaintiff sought to prove touched the question of want or failure of consideration, and imputed to the defendant a fraud against the plaintiff in reference to the real understanding which existed between them when they executed the deed. **SHADAT KHAN v. DULOGIR**, A.W.N. 1886, 58. (11 C. 496, 3 B. 159, R.)

(530)—S. 92, proviso (1)—*Contract Act. s. 30 Oral evidence to prove contract void as wagering transaction. Admissibility of.*—A party to a contract, who alleges that the agreement is void on the ground that it is by way of wager, cannot be prevented from adducing oral evidence in support of his allegation. Upon the true construction of s. 92, proviso (1), the evidence is admissible. (9 C. 791, *overruled*; 28 L. A. 239=29 C. 461=5 C.W.N. 714, P.C., 3 Bom. L.R. 476, R.) *Per* Woodroffe, J.—Because s. 92, proviso (1) is not exhaustive but only illustrative and any fact may be proved which would invalidate a contract. **BENI MADHAB DAS v. SADASOOK KOTARY**, 9 C.W.N. 305, F.B.=1 C.L.J. 155=32 C. 437. [R., 3 L.B.R. 100, F.B.]

(531)—S. 92, proviso (1)—*Written contract—Contemporaneous oral contract—Admissibility of proof of existence of.*—An instrument purporting to be a contract in writing, which is executed on the avowed understanding of both parties, that it is not to be treated as the real



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contract between them, is not an agreement enforceable by law, and therefore is not a contract at all, and does not acquire greater legal force because it is an instrument in writing, and there is ample authority for allowing one party to prove by oral evidence that there was another and different contract, an oral one, which the parties entered into as the one which was to bind them. When an owner of property chooses to make two contracts, a sham one in writing and a real one verbally, and chooses to rely on the verbal contract when he also executes a different contract in writing, he prepares a danger for himself in case of dispute subsequently arising or if the property gets into the hands of third persons. But the question between himself and his own transferee becomes one of evidence as to whether such a case is made out, and though oral evidence is admissible to show this, the main point to be remembered is that the Courts do well to require cogent and convincing evidence to support such a case. *MA ZAINBI v. CASSIM ALI*, L.B.R. 1893-1900, 154.

(532)—S. 92, provisos (1) & (2)—*Oral evidence Admissibility of—Proof of real transaction—Contract Act, s. 65—Obligation of person receiving advantage under agreement known to be illegal.*—Where the plaintiff sold the property in suit to defendant No. 2 in the name of his wife, defendant No. 1, by a conveyance, in consideration of services rendered or to be rendered by defendant No. 2 in inducing his master L to sell certain property to the plaintiff: *Held*, that the defendant No. 2 was entitled to prove the real transaction by oral evidence, as the several transactions were connected together, and the portion of the contract was not embodied in the sale-deed, and also under s. 92, provisos (1) and (2), and also as defendant No. 2 was not a party to the sale-deed. *Held* also, that s. 65 of the Contract Act does not apply, where the object of the agreement was illegal to the knowledge of both parties at the time it was made, and that the present case did not fall within that section, as it did not appear that the agreement was "discovered to be void," or "became void" within that section. *NATH KHAN v. MUSAMMAT SEWAK KOERI*, 9 Ind. Cas. 161=15 C.W.N. 408.

(533)—S. 92, provisos 1 and 4—*Execution of sale-deed—Contemporaneous oral agreement not admissible to show that mortgage was intended—Oral evidence admissible to prove re-transfer of property to executant.*—When a party deliberately and with eyes open executes a deed of sale he cannot be allowed to set up against it an oral agreement that the sale was a mortgage. He may prove that a mortgage was intended but that by fraud, mistake or otherwise a deed of sale was executed, but he cannot when he intended to execute a sale deed or executed it, be allowed to prove an oral agreement that the sale was to be held to be a mortgage. Though by s. 92, proviso 1, the executant is prevented from proving such contem-

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poraneous oral agreement he can show that by subsequent acts of the parties, by his having repaid the purchase money and the purchaser having agreed in consideration thereof to reconvey the property, the property has been reconveyed to him. He may prove this by oral evidence. In such a case s. 82, proviso 4 applies, because the executant does not set up a subsequent oral agreement to rescind a registered sale but sets up a subsequent retransfer of the property to himself. *VITHOBA v. HOOKUMCHAND*, 2 C.P.L.R. 125.

(534)—S. 92, proviso 1 and s. 102—*See BOM. ACT XVII OF 1879, s. 12, 9 B. 520.*

(535)—S. 92, proviso (2)—*Mortgage—Oral agreement adding to the terms of a registered mortgage-deed—Admissibility in evidence—Degree of formality of document.*—Defendant mortgaged certain shops and their stock in trade to the plaintiff. The plaintiff alleged in the plaint that it was agreed that the mortgage should include the goods which might be brought into the shop subsequent to the date of the mortgage as well. It was found that the mortgage deed, though registered, was drawn up not by a lawyer, but by a petition writer. *Held*, that in considering the degree of formality of the document the fact that it was not drawn up by a skilled lawyer was of much more importance than the fact that it was registered, and that evidence of the alleged oral agreement was admissible under s. 92, proviso (2) of the Evidence Act. *S. N. NACHIAPPA CHETTY, v. A. K. A. M. CHOKALINGAM CHETTY*, 4 L.B.R. 240=14 Bur. L.R. 231.

(536)—S. 92, proviso (2)—*Rent kept in abeyance in kabuliat—Admissibility of evidence to prove reason—See LANDLORD AND TENANT—HOLDING OVER*, 7 Ind. Cas. 721.

(537)—S. 92, proviso 2—*Pro-note silent as to interest—Presumption—Oral evidence of contemporaneous agreement to pay interest—See NEGOTIABLE INSTRUMENTS ACT, 1881, s. 80, 17 M.L.J. 296.*

(538)—S. 92, proviso 3—*Suit on a pro-note—Plea of separate oral agreement—Admissibility in evidence of such agreement.*—In a suit on two pro-notes which contained the words "I promise to pay you hereafter," the defendant pleaded that there existed a separate oral agreement constituting a condition precedent to the attaching of the obligation and that the word "hereafter" in the two notes referred that agreement. *Held* by Boulnois and Lindsay, JJ., (Campbell, J., dissenting) that evidence of the alleged oral agreement was admissible in evidence under proviso 3 to s. 92. *KINLOCK v. ASA RAM*, 51 P.R. 1877.

(539) S. 92, proviso 3—*Deed of sale—Oral agreement—Deed to take effect after certain event—Condition precedent—Evidence—Admiss-*



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*bility.*—Where the plaintiff purported to sell certain land to the defendants under a deed of sale, and there was an arrangement; that the deed should take effect only if the defendants succeeded in getting possession of the property in a suit; *held* that oral evidence of the arrangement was admissible in evidence under s. 92, proviso 3, Evidence Act. **MAHALINGA AIYAR v. HYDER SAHIB, 9 M.L.T. 450.**

(540)—S. 92, proviso 3—*Promissory note—Absolute contract—Oral agreement to vary the contents of a promissory note.*—Proviso 3 to s. 92, does not intend to permit the terms of a written contract to be varied by a contemporaneous oral agreement; but having regard to illustrations (b) and (j), the proper meaning of that proviso is that a contemporaneous oral agreement to the effect that a written contract was to be of no force or effect at all, and that it was to impose no obligation at all until the happening of a certain event, may be proved. Where an oral agreement purports to provide that the promise to pay on demand in a promissory note, though absolute in its terms, is not to be enforceable by a suit, until the happening of a certain event, or, in other words, that the legal objection to perform the promise is to be postponed, such an agreement does not fall within proviso 3 of s. 92, I.E.A. **RAMJIBUN SEROWGY v. OGHORE NATH CHATTERJEE, 28 C. 401=2 C.W.N. 188.** (6 C. 433, 2 A. 598, F.) [R., 9 C.W.N. 178.]

(541)—S. 92, proviso (4)—*Evidence—Subsequent oral agreement detracting from or varying contract registered—Bond—Proof of payment before due date—Oral evidence of such payment admissible.*—Prior to the due date of a registered hypothecation bond securing Rs. 750, with interest, the obligor, the obligee, and a creditor of the latter, made an oral agreement whereby Rs. 600 due by the obligee to his creditor was appropriated towards the discharge of the bond debt. In a suit by obligor to recover the whole amount secured by the bond by enforcement of lien,—*held* that there was nothing in s. 92, proviso (4) of the Evidence Act or in any provision of law to debar the obligor from proving by oral testimony that he satisfied and discharged the bond in whole or in part before due date. **THAKUR RAI v. GULZARI RAM, A.W.N. 1890, 193.**

(542)—S. 92, proviso 4—*Registered lease-deed—Subsequent oral agreement varying terms of lease—Admissibility—Receipt of less amount for a year in full discharge as per oral agreement—Contract Act, IX of 1872, s. 63.*—Suit on a registered lease-deed for rent due for two years. The defendant alleged that as he was not realising proper income the plaintiff orally agreed to receive rent at a reduced rate. In support of his contention, the defendant produced a receipt acknowledging receipt of a less amount in full discharge for one of the two years. *Held* that, under proviso 4 to s. 92 of the Evidence Act, no evidence of such agreement was admis-

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sible and the defendant was bound to pay at the rate stipulated in the lease. Under s. 63 of the Contract Act, a promisee may remit in whole or in part the performance of the promise made to him or may accept instead of it any satisfaction which he thinks fit. The fact that he did so in pursuance of an oral agreement was immaterial and the discharge as such took effect under s. 63, independently of the prior oral agreement, which was not illegal, though it could not be proved under s. 92 of the Evidence Act. The plaintiff could not therefore claim the balance of rent for that year. No discharge having been given by him for the rent which became payable for the second year, the alleged oral agreement could not be relied on in respect thereto. **KARAMPALLI UNNI KURUP v. THEKKU VITTIL MUTHORAKUTTI, 26 M. 195.** [F., 30 M. 231=17 M.L.J. 30=2 M.L.T. 88, 129 P.W.R. 1908, 2 Ind. Cas. 160]

(543)—S. 92, proviso 4—*Agreement for maintenance under registered deed—Admissibility of oral evidence for modification of such agreement.*—Suit by step-mother against the step-son, to recover arrears of maintenance under registered deed, executed by the latter in favour of the former. The defendant pleaded that, having been unable to pay maintenance at the stipulated rate, he had come to an oral settlement with her, under which he gave her possession of certain land, to be enjoyed for her lifetime and that she had accordingly been in such enjoyment. *Held*, that the settlement pleaded is an agreement to rescind or modify the original agreement, within the fourth proviso to s. 92, and, as such, is inadmissible in evidence, and that she is entitled to future maintenance, at the rate stipulated in the original agreement. Although the defendant cannot prove the agreement to discharge the claim for maintenance in the manner alleged, he may yet prove that the arrears have been in fact discharged in that manner, by the plaintiff's enjoyment of the lands. **KALTIKA BAPANAMMA v. KISTNAMMA, 17 M.L.J. 30=30 M. 231.** (26 M. 195, 27 M. 368, F.) [R., 7 M.L.T. 278.]

(544)—S. 92, proviso (4)—*Registered kabuliyat—Oral agreement, if admissible to prove modification.*—A subsequent oral agreement, by which the plaintiff would get the money for costs and wasilat and would make a deduction from the rent corresponding to the amount received, is not admissible in evidence under proviso (4) of s. 92 of the Evidence Act to prove modification of terms of a registered kabuliyat. **BANKU BEHARY SANYAL v. SHAMA CHURN BHATTACHARJEE, 12 C.L.J. 442=8 Ind. Cas. 792.**

(545)—S. 92, proviso (4)—*Registered partition deed—Subsequent disposal of property mentioned therein—Oral evidence to prove it admissible—Land suit—Long delay in suing no abandonment in law—The Punjab Courts Act, XVII, of 1884, ss. 3 and 70—The Punjab Tenancy Act, XVI of 1887, s. 4—Indian Contract Act, IX of 1872, ss. 44, 62 and 63—Admissibility*

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of evidence in question of law within s. 70 (b).—K had three sons B, L, and N. On the 16th December, 1892, K executed a registered partition deed allotting certain lands in G to B and keeping the rest with him for L and N. This deed was also signed by B. It further provided that this remaining property will remain in K's possession with full power of disposal until his death. Among the lands reserved by K were a well called Sitalwala and a piece of land on Saidullahwala well at T. On the 24th March, 1893, K applied to the Revenue authorities for mutation of these lands in the name of B and on 3rd April, 1893, the Tahsildar ordered, and on 2nd May, 1893, mutation was accordingly effected. On the same 3rd April, the Tahsildar acting on another undated application of K directed mutation in B's favour of the lands at G mentioned in the said deed as given to him and was finally effected on 20th May, 1893. But no change was made in the Revenue records as to the other land which remained recorded as the property of K. Things remained in this state until 1900, when both K and B died. The latter left, C B a boy of 15 or so, who in May 1904, sued L and N for recovering possession of 10 bighas of land at G on the allegation that during his minority they wrongfully seized the land and incorporated it with their garden. L and N pleaded that Sitalwala and Saidullahwala wells were given to B, in exchange for 10 bighas. To this C B replied that it was an additional gift to his father B by K. Neither the application of 24th March, 1893, was forthcoming, nor was there any mention in the mutation proceedings based thereon that the said two wells were given in exchange. L and N wished to prove this point by oral evidence while C B contended that s. 92, proviso (4), barred them from doing so. *Held*, by majority (Chatterji and Rattigan, JJ.) that the agreement or grant by way of exchange in respect of the land in suit was, in point of fact, a subsequent isolated fresh transaction relating to that property alone, after the title to it and to the rest of the land granted by the deed of 1892 had completely vested in B, and therefore amounted to a re-grant of it by B to L and N and their father K, and could be proved by oral evidence. *Per* Johnstone, J.:—The evidence of the alleged exchange involves rescission or modification of the terms of the registered deed of 1892 and is therefore inadmissible. (169 P.R. 1883, 30 P.R. 1884, 14 P.R. 1889, 9 A. 249, 11 B. 47, 14 B. 472, F.; 22 M. 264, 26 M. 195, 27 M. 368, 5 C.W.N. 296, F.; 62 P.R. 1879, P.L.R. 1900, 459, R.) *Held*, also, that, a suit for land falling within the definition of land given in s. 4 of the Punjab Tenancy Act, XVI of 1887, is a "land suit" within s. 3 of the Punjab Courts Act, XVII of 1884. The fact that the land did not fall within this definition when the cause of action arose or some change occurred therein after institution does not make the slightest difference in the nature of the suit. (20 P.R. 1894, F.; 31 P.R. 1906, D.) *Held*, further, that in the absence of express abandonment there is

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no abandonment in Law within the period of Limitation. Of course long, unexplained delay in suing is relevant in certain cases. (85 P.R. 1892, 51 P.R. 1898, 43 P.R. 1901, F.) *Per* Johnstone, J.:—Question of admissibility of evidence is a point of law within s. 70 (b) of the Punjab Courts Act, 1884. CHAUDHRI BHAGWAN SINGH v. CHAUDHRI NARAIN SINGH, 129 P.W.R. 1908.

(546)—S. 92, proviso (4)—*See* MORTGAGE—GENERAL, 15 C.L.J. 61.

(547)—S. 92 (4)—Variation or modification of terms of contract, what amounts to—*See* MORTGAGE—REDEMPTION, 10 Ind. Cas. 196.

(548)—S. 92, proviso 4—*See* MORTGAGE—MISCELLANEOUS, 23 B. 248.

(549)—S. 92, proviso 4—Sanad granting hak—Re-grant of hak by endorsement on sanad—Endorsement, if requires registration—Admissibility of other evidence as to alleged re-grant—*See* REGISTRATION ACT, 1908, s. 17, 14 B. 472.

(550)—S. 92, proviso 5—Contract—Admissibility of evidence of custom or usage—Extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, only when the incidence which it is sought to import into the contract are consistent with the terms of the written instrument. If inconsistent, the evidence is not admissible under s. 92, proviso 5 of the Indian Evidence Act. J. G. SMITH v. LUDHA GHELLA DAMODAR, 17 B. 129. [R., 30 B. 1=6 Bom. L.R. 948.]

(551)—S. 92, proviso 6—*See* LIMITATION ACT, 1908, s. 19, 2 P.R. 1884.

(552)—Ss. 92, proviso 6, 93—Evidence—Documentary—Oral—Ambiguity.—The defendants renewed with the plaintiffs, who were their co-heirs in an estate, and added to, an existing mortgage of land and trees by an instrument which was worded in a peculiar manner but clearly mortgaged the interest of the plaintiffs whatever it might be, in the lands mentioned and the trees growing thereon. *Held*, that though the document was silent as to the precise extent of the interest at the time there was no reason why, when the question was what that interest was, the matter should not be proved by extraneous evidence. There was no actual necessity to specify the interest in the document. It was assumed to be known. Proviso 6 to s. 92 that "any fact may be proved which shows in what manner the language of a document is related to existing facts" could be applied to the case. MAUNG SAUNG v. MAUNG SO HLA, U B.R. 1892-1896, Vol. II, 359.

(553)—Ss. 92, 94—Evidence of conduct and acts of parties subsequent to contract—Admissibility—Estoppel.—A defendant can be allowed



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to prove conduct subsequent to the execution of document. Subsequent conduct of parties may serve: (i) to show what the real meaning of the contract was; or (ii) may operate as an estoppel when it amounts to part performance of the contract. (4 B. 594, 72 P.R. 1901, 22 A. 149, P.C., 5 W.R. 68, R.) Evidence of acts and conduct of the parties subsequent to the deed is admissible to show that something different from the written contract was intended by them. Where, in a suit, the defendant proved that the real contract was different from that set out in the pro-note sued upon, and it was also proved that the plaintiff never set the defendant right about the terms of the contract, but induced the defendant by his acts and omissions so to act as to injure his position, it was held that the plaintiff was estopped from setting up different terms. *BULAKI MAL v. FLOYD*, 27 P.R. 1911=118 P.W.R. 1911=191 P.L.R. 1911=10 Ind. Cas. 1004.

(554)—Ss. 92 (6) and 98—*See MORTGAGE—CONSTRUCTION OF MORTGAGE DEEDS*, 9 C. W.N. 710.

(555)—Ss. 92, 99—*Pre-emption, Suit for—Evidence to show the real nature of a transaction—Mortgage in form but really a sale—Pre-emptor not a party to the instrument—Party to an instrument not entitled to offer evidence to contradict the terms of a document.*—In a suit for pre-emption, based on a mortgage-deed, on the allegation that the mortgage was really a sale but thrown in that form in order to defeat pre-emption, the contention was that oral evidence should not have been admitted to show that the parties to the deed intended a sale and not a mortgage: *Held*, that, under ss. 92 and 99 of the Evidence Act, evidence could be given by the pre-emptor to show the real nature of the transaction, he being no party to the instrument. *CHHUTKO v. JUGGA SINGH*, 8 Ind. Cas. 501. (22 A. 149, 27 I.A. 58, 4 C.W. N. 153, 11 O.C. 176, 3 O.C. 215, R.)

(556)—Ss. 92, 99—S. 92, nature of barrier against extrinsic evidence provided by—When extrinsic evidence may be given—Effect of fraud and collusion—Suit for pre-emption—Transaction, whether sale or mortgage.—The barrier against extrinsic evidence provided by s. 92 of the Act is, by the express terms of the section itself, one to be used only as between the parties to the instrument, or by their representatives in interest. S. 99 expressly gives a free hand to persons who are not in the above category, and, by necessary implication when read with s. 92, gives similar freedom to the executants of documents against such strangers. The object of s. 92 is to bind an executant by his writing for the benefit of other party to the contract. Once the parties agree as to the nature and extent of their contract, s. 92 immediately goes out of the case. It exists only to control dispute between such parties or their representatives in interest. Either side may give extrinsic evidence to vary the terms of the document, if the issue

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regarding the real nature of the written transaction is one between the parties thereto and a third person not bound by the writing. The moment an issue can be raised as to whether or not an apparent sale is a mortgage, or the like, it necessarily opens the field of extrinsic evidence to both parties. It is always open in a pre-emption suit for an apparent vendor and vendee, if they are agreed that there has been no real sale, to prove as against the pre-emptor, that, what seems on the face of the writing to be a sale, was controlled by some agreement which bars, or places limitations on, the right of pre-emption. Such agreement may be fraudulent and collusive, but does not prevent its being put forward as a plea, and evidence being given to prove it. If the Court finds fraud and collusion, it will of course relieve the pre-emptor against it. That is a matter for adjudication in each particular case. The fact that a plea may be made fraudulently or collusively is not itself any reason for refusing to admit it, or evidence in support of it. *GANGA-BAI v. PANDOO*, 4 N.L.R. 115.

(557)—Ss. 92, 99—*Parol evidence—Oral evidence, Admissibility of—Deed of gift, true nature of—Parties—Strangers.*—The rule of exclusion of oral evidence, embodied in s. 92 of the Act, is limited in its operation to parties to the instrument, which is sought to be contradicted or varied, and to the representatives in interest. S. 99 enables strangers to an instrument to prove the real nature of the transaction by parol evidence. When, therefore, A purported to make a gift of land to his daughter, B, it was open to a creditor of X, the husband of B, to prove by oral evidence that the transaction was, in reality, a sale to X and that the property was, consequently, liable to be attached and sold in execution of a decree obtained against him. *JAGAT MOHINI DAI v. RAKHAL DAS BISOI*, 2 C.L.J. 338. (27 I.A. 93=22 A. 370, F.; 6 C.W.N. 60, D.; 28 C. 70, doubted & not F.) [F., 28 A. 473=3 A.L.J. 314=A.W.N. 1906, 89.]

(558)—Ss. 92, 99—*Suit for recovery of haq-i-chaharum—Sale alleged to be disguised as a usufructuary mortgage—Admissibility of evidence.*—The plaintiff sued to recover one-fourth of the price of a house alleged to have been sold by the first defendant to the second defendant, the claim being based upon a local custom. The transaction between the defendants was ostensibly not a sale but a usufructuary mortgage. *Held*, that the plaintiff, not being a party to the transaction was entitled to give evidence to show that what purported to be a usufructuary mortgage was not in reality such, but was in fact a sale. *BAGESHRI DAYAL v. PANCHO*, A.W.N. 1906, 89=3 A.L.J. 314=28 A. 473. (28 C. 70, Diss.; 2 C.L.J. 338, 27 M. 329, F.)

(559)—Ss. 92 and 99—*See PRE-EMPTION—GENERAL*, 127 P.L.R. 1902.



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(560)—Ss. 92 and 93—*See* PRE-EMPTION—RIGHT TO PRE-EMPT, 20 P.R. 1899.

(561)—Ss. 92, 102 and 114—*Circumstantial evidence, Value of.*—Circumstantial evidence is usually far more valuable in this country than direct oral testimony, and the retention of written securities, in the absence of very clear satisfactory explanation, quite over-balances any oral testimony in contradiction which is not of the strongest and most trustworthy character. When belief is not founded upon a sensible consideration of circumstances and upon reasonable inferences from such circumstances, it is apt to degenerate into childish cruelty. When a creditor is allowed to retain written evidence of an existing obligation the burden of proving satisfaction of the debt cannot be discharged without a reasonable explanation of such retention and the most trustworthy oral testimony of re-payment. *N. A. R. SITEAMBRAM CHETTY v. MAUNG PAUNG, U.B.R. 1897-1901, Vol. II, 402.*

(562)—Ss. 92, 115—Exclusion of other evidence to explain what the testator meant by Dharmarth—Estoppel of testator's heir—*See* WILL—GENERAL, 63 P.W.R. 1912.

(563)—S. 93—*Contract ambiguous on its face—Admissibility of evidence to show intention of parties—Civ. Pro. Code, s. 622.*—A District Judge held, that, a contract, compensation for breach of which was sued for, was ambiguous on the face of it. But, he held, that evidence was admissible to show the intention of the parties, and he acted upon such evidence. *Held*, this was in contravention of s. 93 of the Evidence Act, and illegal within the meaning of s. 622 of the Civ. Pro. Code. *JOMAN v. AH YU, 14 Bur. L.R. 58.*

(564)—S. 93—*See* CONTRACT ACT, 1872, s. 29, 1 A. 275.

(565)—S. 93—*See* No. 552, *supra*.

(566)—Ss. 93 and 94—*Document, Construction of—Ambiguity—Oral evidence as to contents of document.*—The plaintiffs owning two wells—Naiwala and Shahwala in a single *khata* No. 3, consisting of 814 *kanals*, 14 *marlas* sold land out of the *khata* which they described as half of well Naiwala, area 407 *kanals* 7 *marlas*, i.e. half of the whole *khata*—*khata* No. 3, *jama* Rs. 12-8-0 (i.e., the *jama* of half well Naiwala alone) and putting the price at Rs. 2,500, they sold, in addition to the land, the rights appurtenant to well Naiwala; well Shahwala was not mentioned. They claimed possessions of land of well Shahwala, on the allegation that the defendants had sued for pre-emption and got a decree for full half of the *khata*, i.e., half of both wells and of the land attached to both and executed the decree and obtained mutation without their being impleaded a party to the suit, while they had not sold any land of well Shahwala. The claim was dismissed on the

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ground that it amounted to a claim for rectification of a deed which could not be allowed under s. 31 of the Specific Relief Act, there being no mutual mistake about the terms of the deed, and that the amount of the price was unimportant. Market price of the half *khata* was appraised by a local commissioner appointed by Court at Rs. 4,000. *Held* that the claim was not one for rectification of the deed, and that the plaintiffs were entitled to a decree. *GHULAM MURTAZA v. FATEH SHAH, 130 P.L.R. 1910=8 Ind.Cas. 554.*

(567)—Ss. 93, 94, 95, 96—*Hand note—Stipulation to pay interest—Interest whether monthly or annual, extrinsic evidence to prove.*—A hand-note contained a stipulation to pay interest at 2½ per cent., but did not mention whether that interest was to be calculated annually or monthly or otherwise. *Held*, that evidence was properly admitted to show that the words meant that the interest should be calculated monthly. *MONMOTHA NATH CHADHURY v. NABIN CHANDRA SANYAL, 14 C.W.N. 1100=7 Ind. Cas. 214. (W.R. 1864, 379, F.)*

(568)—S. 94—Evidence of subsequent conduct—Evidence Act, s. 94—*See* EVIDENCE—MISCELLANEOUS, A.W.N. 1882, 54.

(569)—S. 94—*See* LEASE—MISCELLANEOUS, 3 Bom. L.R. 768.

(570)—S. 94—*See* NOS. 553, 566, 567, *supra*.

(571)—S. 95—*See* CONTRACT ACT, 1872, s. 63, 7 M.L.T. 392=20 M.L.J. 383=6 Ind. Cas. 758.

(572)—S. 95—*See* NOS. 436, 567, *supra*.

(573)—S. 96—*See* NO. 567, *supra*.

(574)—S. 97—*See* NO. 436, *supra*.

(575)—S. 98—*See* NO. 554, *supra*.

(576)—S. 99—*Enabling provision.*—S. 99 of the Evidence Act, being merely an enabling provision, cannot be held to prohibit the reception of evidence as to a fact in issue or a relevant fact admissible independently thereof. *PATHAMMAL v. SYED KALAI RAVUTHAR, 27 M. 329. [F., 28 A. 473=3 A.L.J. 314=A.W. N. 1906, 89.]*

(577)—S. 99—*See* Nos. 555, 556, 557, 558, 559, 560, *supra* ]

(578)—S. 101—*Onus of proof.*—The plaintiff sued the defendant alleging that he had lent the defendant a necklace on 9th July, 1897, and that the defendant refused to return it to him. The defendant denied the alleged loan and stated that on 31st July, 1897, the plaintiff pledged the necklace with him for Rs. 50. The onus of proving the alleged loan was laid on the plaintiff and that of proving the alleged pledge



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on the defendant. The plaintiff gave no evidence. The defendant swore to the truth of his case. *Held*, that the onus of proof was on the plaintiff which he failed to discharge. The defendant having totally denied the facts on which the plaintiff based his suit, the plaintiff was bound under s. 101 of the Evidence Act to prove the existence of those facts. **MAHADIN V. RAGHUBER SINGH, 2 O.C. 59.**

(579)—S. 101—See Nos. 15, 437, *supra*.

(580)—S. 102—*Burden of proof—Execution of bond admitted but consideration therefor denied—Bond admitting receipt of consideration—Effect of such admission.*—A suit for sale was brought on the basis of a hypothecation bond. The defendants, while admitting the execution of the bond, denied having received consideration therefor. But the bond expressly stated that the executants had received consideration. *Held*, that, when the execution of a bond is admitted and the bond contains an admission that consideration has passed, it is for the executant to get rid of the admission, which he has made in the bond. It is not enough for him to prove that, prior to the institution of the suit, he denied receipt of consideration, even though that denial was made before the Registering Officer. Such facts would not take the case out of the rule laid down in s. 102, illustration (3). **MAHABIR PRASAD RAI V. BISHAN DAYAL, 27 A. 71 = 1 C.L.J. 423.**

(581)—S. 102—See **HINDU LAW—PRESUMPTION OF DEATH, 11 B. 433.**

(582)—S. 102—See NOS. 398, 437, 438, 534, 561, *supra*.

(583)—Ss. 102, 78 (6)—*Old seal—Proof of correctness of copy.*—The mere presence on a document of the impression of a seal such as was in use by the Hultdaw, or High Court of the Burmese Government, is no sufficient proof of the correctness of the document as a copy, of the existence of an original, or of the genuineness of the transaction to which it purports to testify. Such evidence can be manufactured without any great difficulty and the Courts must be on their guard against its acceptance unless under proper tests and safe-guards. Suit for recovery of land mortgaged by the plaintiffs and redeemed by the defendants from the mortgagees. *Held*, that the burden of proof lay on the defendants. **MA MWE ZET V. MAUNG SAUNG, U.B.R. 1897-1901, Vol. II, 404.**

(584)—Ss. 102 and 106—See **CIV. PRO. CODE, 1908, O. XXI, r. 40, U.B.R. 1897-1901, Vol. II, 279.**

(585)—Ss. 102, 110—*Suit for redemption of mortgage—Long possession by alleged mortgagees without recognition of mortgagor's claim—Unsatisfactory evidence of mortgage—Necessity for*

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*strict proof in such circumstances.*—If people do not look after their own interests, it is not the business of the judicial tribunals to do it for them. It is not usual in Burma, or elsewhere for that matter, to make youths and maidens witnesses to business transactions. Where the defendants have been in possession for a great length of time, forty years or so admittedly, and possibly much longer, and the plaintiff comes forward to oust them on the strength of the flimsy evidence of two of his friends, who say that in the days of their youth, some forty years ago, they remember a mortgage of the land to defendant's predecessors. *Held*, that any man might be robbed of his own any day in this way if the Courts were to allow such evidence to prevail against all the presumptions of long possession and all the probabilities of ordinary life, and that the evidence was untrustworthy and insufficient. **MAUNG SAN GALA V. MAUNG TUN BYU, U.B.R. 1897-1901, Vol. II, 409.**

(586)—Ss. 102, 110—*Suit for redemption of mortgage—Burden of proof—Necessity for clear proof of existence of mortgage when disputed.*—It is the man out of possession who is bound to prove his rights and unless he does so distinctly and satisfactorily, and without room for reasonable suspicion, the Courts ought to refuse the relief sought. It is, of course, an easy matter to make a false document and put in it the names of dead men who cannot be called out to contradict. **MAUNG THIT V. MAUNG KIN, U.B.R. 1897-1901, Vol. II, 412.**

(587)—Ss. 102, 110—See **PLEADINGS, 6 O.C. 119.**

(588)—S. 105—*Retirement of dormant partner from partnership—Onus of proof—See PARTNERSHIP—GENERAL, 75 P.R. 1908 = 122 P.W.R. 1908.*

(589)—S. 106—*Suit for damages by legal representative of deceased person killed by accident while travelling in Railway—Negligence—Burden of proof.*—Where a suit was brought by the legal representative of a deceased person, who was killed at an accident, while travelling in the train of the defendant Company, the onus of proving that there was no negligence on the part of the Railway Company, lies on such Company. This decision is supported not only by the ruling in the case of the *Great Western Railway Company of Canada v. Braid* (1 Moore's Privy Council Cases, New Series, p. 101), namely, that the fact of a breach on a line of Railway is *prima facie* evidence of improper construction or maintenance which it is for the Railway Company to rebut, but also by the general rule of the law of evidence that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him (S. 106 of the Indian Evidence Act). **THE MADRAS RAILWAY COMPANY V. RATILAL KALIDAS, 4 M.L.T. 251.**



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(590)—S. 106—Wife holding benami for husband—Onus of proof—See BENAMI TRANSACTION—GENERAL, 17 M.L.J. 339.

(591)—S. 106—Fact specially in one's knowledge—Proof—Onus—See DELIVERY ORDER, 38 C. 127.

(592)—S. 106—See HINDU LAW—PRESUMPTION OF DEATH, 1 A. 53, F.B.

(593)—S. 106—Death of an infant son whether specially within the knowledge of the father—See HINDU LAW—REVERSIONERS, 11 Ind. Cas. 202.

(594)—S. 106—See NO. 584, *supra*.

(595)—S. 107—Claim as representative of one unheard for fifteen years—Onus of proof—Where certain persons contended that they were the representatives of P, a person unheard of for over fifteen years who was a descendant of V and who, if he had survived T, the last female owner, would have been a reversioner of V, and that in consequence they were entitled to a share in V's properties, *held* that the onus of proving that P survived T lay upon them. TRIAGARAJA MUDALIAR v. KANDASAMI MUDALI, 6 M.L.T. 153=2 Ind. Cas. 977=19 M.L.J. 502. (23 B. 296, 18 W.R. 303, 35 C. 25=11 C.W.N. 883=5 C.L.J. 649, R.)

(596)—S. 107—Presumption of life or death—Guardian and Wards Act (VIII of 1890), s. 17—Minor not heard of for some months—Mother appointed guardian.—The mother of a Hindu minor applied to be appointed guardian of the property of her minor son in the beginning of 1908. The minor was alive in December 1907, but was then kidnapped, and there was nothing to show what had become of him. The District Judge refused the mother's application on the ground that it was not proved that the minor was alive at the date when the application was made. *Held*, that the District Judge was wrong in presuming that the minor was dead, and that a guardian of property should be appointed. The High Court appointed the mother. MUSSAMMAT TIRPATI KUMAR v. MUSSAMMAT PATRABI, 1 Ind. Cas. 465.

(597)—S. 107—Nature of presumption under—See PARTITION—GENERAL, 11 C.L.J. 580=6 Ind. Cas. 244.

(598)—Ss. 107, 108—Person not heard of for seven years—Presumption of death—Time of death.—Though under ss. 107 and 108 of the Indian Evidence Act, the death of a person is to be presumed after an interval of seven years, there is no presumption as to time of his death. Therefore, if any one has to establish the exact time during these seven years at which the person died, he must do so by evidence, and can neither rely on the one hand upon the presumption of death, nor on the other upon the presumption of the continuance of life. RANGO v. MUDIYEPPIA, 23 B. 296. [R., 4 L.B.R. 77, P.C.=2 C.L.J. 236=15 M.

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L.J. 317=7 Bom. L.R. 892=2 A.L.J. 798=10 C.W.N. 33=33 C. 173=32 I.A. 177, 11 C.L.J. 580=6 Ind. Cas. 244.]

(599)—Ss. 107, 108—Presumption in the case of missing person, Extent of.—Ss. 107 and 108 of the Act lay down no rule as to the presumption of the exact time of the death of a missing person; so that, whenever the question as to the exact time of death arises, it must be dealt with according to the evidence and circumstances of each case, when the death is alleged to have occurred at any time not affected by the presumption of law as to the seven years. DHARUP NATH v. GOBIND SARAN, 8 A. 614=A.W.N. 1886, 239. (7 A. 297, 2 B.L.R. A.C. 134, 6 B.L.R. App. 16, 1 A. 53, R.) [R., 23 B. 296.]

(600)—Ss. 107, 108—Death—Presumption—Death at a particular time—No presumption.—The mere proof by the plaintiff that the widow was last heard of on a date prior to twelve years before suit cannot entitle him to get a decree. He must prove that the widow died within twelve years prior to suit. Where the question is not one of death, but death at a particular time, there is no presumption as to such time, but the party who has to make out death at a particular time, must prove it by evidence. VENKATA HANUMANULU GARU v. LACHCHAMMA, 14 M.L.J. 464.

(601)—S. 108—Presumption as to death—English law.—The presumption of death under s. 108 of the Evidence Act is a presumption that the man was dead when the question was raised, that is, at the date of the suit, and not at any earlier period. (35 C. 25=11 C.W.N. 883, 33 C. 173, *doubted* and *F.*) The English law is otherwise. NARKI v. PHEKIA, 11 C.L.J. 138=14 C.W.N. 341=37 C. 103=5 Ind. Cas. 709.

(602)—S. 108—Presumption of death—Burden of proof.—Section 108 of the Indian Evidence Act, 1872, according to its terms, does not require that the Court should hold the person dead at the expiration of the seven years therein indicated, but merely provides that the burden of proving that he is alive at the time of the suit is shifted to the person who affirms it. NARAYAN v. SHRINIVAS, 8 Bom. L.R. 226.

(603)—S. 108—Presumption as to death—Person not heard of for seven years—Time as to when presumption arises—Onus.—S. 108 of the Evidence Act makes provision for the question whether a man is alive or dead, that is, whether he is alive or dead when the question is raised, and not whether he was alive or dead at some antecedent date; the law raises no presumption as to the time of his death, and the presumption that may, in certain circumstances, be raised, is a presumption that the man is dead when the question is raised, and not a presumption that he was dead at some antecedent date. It



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is on the person, who alleges that the person was dead at antecedent time, to prove that fact by evidence. **FANI BHUSHAN BANERJI v. SURJAYA KANTA ROY CHOWDHRY**, 3 C.L.J. 649=11 C.W.N. 883=35 C. 25.

(604)—S. 108—*Evidence—Presumption of death—Burden of proof.*—The mere fact that the evidence adduced in any case went to show that a person had not been heard of for more than seven years by those who would naturally have heard of him if he had been alive, raises no greater presumption of his death than if the evidence had been confined to the exact period of seven years. In other words the only presumption is that such a person is dead. Where it was alleged that the person in question disappeared some 18 years ago, there could be no presumption that he died in the first seven years or in the last seven years. The presumption merely is that he was dead at the time the question, whether he was alive or dead, arose, the burden of showing that he was alive being thrown upon the defendants if it was necessary for them to do so. **MOHAMMAD SHARIF v. BANDE ALI**, 8 A.L.J. 1082, F.B. (8 A. 614, I'); 5 C.W.N. 139, 8 B. 266, 35 C. 25, 11 C.L.J. 580, R.)

(605)—S. 108 — *Rule of Mahomedan Law—Effect of s. 108—Redemption of mortgage—Divisibility.* — S. 108 of the Evidence Act supersedes the rule of Mahomedan Law that a man will be presumed dead only after 90 years from the date of his birth, as such rule is only a rule of evidence and not of substantive law. In the absence of a contract to the contrary a mortgage must be redeemed as a whole as it is an indivisible transaction. A co-sharer cannot sue to redeem his share only. **IMDAD ALI v. GHULAM JILANI**, 42 P R. 1892.

(606)—S. 108 — *Unheard of for seven years—Presumption of death—Presumption as to the time of death—Burden of proof—Effect of admitting absentee's death.*—S. 108 of the Evidence Act raises a presumption of death at the end of a continuous absence of seven years, and not at the time when the question is raised or the suit is instituted. The party, on whom the burden of proving the life of the absentee lies, cannot get rid of that burden by admitting the absentee's death at some subsequent time. **AKBARI v. BASHIR ALI**, 8 Ind. Cas. 55. (35 C. 25, 5 C.L.J. 649, 11 C.W.N. 883, 14 C.W.N. 341, 37 C. 103, 11 C.L.J. 138. 5 Ind. Cas. 709, 33 C. 173, 2 C.L.J. 236, 15 M.L.J. 317, 7 Bom. L.R. 892, 2 A.L.J. 798, 10 C.W.N. 33, 32 I.A. 177, 18 W.R. 303, 8 Bom. L.R. 226, R.)

(607)—S. 108—*Presumption of death of missing person—Onus probandi—See MAHOMEDAN LAW—INHERITANCE*, 2 C.L.J. 236, P.C.=15 M.L.J. 317=7 Bom. L.R. 892=2 A.L.J. 798=10 C.W.N. 33=33 C. 173=32 I.A. 177.

(608)—S. 108—*See NOS. 598, 599, 600, supra.*

(609)—S. 109—*Limitation Act, s. 28—Adverse possession.*—A possession of land, which begins

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by permission for 18 years, does not become adverse, even though the occupier pays no rent to the owner of the land. **MAUNG LIN v. MAUNG SHWE THAW**, U.B.R. 1892-1896, Vol. II, 363. (18 B. 256, 7 B. 40, 4 C. 314, 3 M. 118, 12 W.R. 175, 10 M.I.A. 47, R.)

(610)—S. 109—*See LANDLORD AND TENANT—PAYMENT OF RENT BY TENANT*, 4 C. 314=3 C.L.R. 119.

(611)—S. 109—*See PARTNERSHIP—SUITS RELATING TO PARTNERSHIP*, 11 P.R. 1897.

(611-a)—S. 109—*See NO. 638, infra.*

(612)—Ss. 109, 114, *illustration (d)—Presumption of continuance of same state of things—Tenancy, Termination of—No proof of definite term of notice to quit—Presumption of continuance of tenancy under circumstances.*—Where the sole question for determination was whether the tenancy of respondent in 1257 terminated with the end of that year or extended into 1258, *held*, that on the ordinary rules applicable to tenancy, appellant-plaintiff would be bound to give reasonable notice, say half-a-twelve month's, of his intention to determine the lease. Here there was no such notice, and no positive evidence of a definitely limited term of occupancy, so as to entitle appellant to re-enter at the end of the year without notice, and consequently it was impossible to grant the claim made for damages by respondent's continuing in occupation after the beginning of 1258. **MAUNG SAN PYI v. MAUNG TUN**, U.B.R. 1897-1901, Vol II, 414. [R., U.B.R. 1910, 2nd Qr., Civil, 14.]

(613)—S. 110—*Burden of proof—Title—Possession.*—Where plaintiff who averred that defendant had been in possession for over 20 years of certain land, and had regularly paid the Government revenue thereon during that period as the registered holder of the land in the *thugyi's* books, however, stated that during this period defendant had only been in permissive occupation, having rented the land from plaintiff without paying rent for it, and defendant, on the other hand, while admitting that the land was originally owned by plaintiff, asserted that plaintiff had sold the land out and out to him, and that he had been in adverse possession ever since for over 20 years, *held* that the burden of proof lay on plaintiff to establish her title and to show that defendant's occupation was permissive only and not adverse. **MA BA v. MAUNG KUN**, L.B.R. 1872-1892, 474. (1 A. 194, 10 M.I.A. 151, Appl.) [R., L.B.R. 1872-1892, 482, 494.]

(614)—S. 110—*Suit to recover a piece of land—Burden of proof of ownership.*—Where the plaintiff alleged a temporary gift and the defendant an outright gift, it was *held*, on the authority of s. 110, that the defendant, being in possession was entitled to retain the land, and that, as there was no trustworthy evidence adduced by the plaintiff that the defendant was not the owner of the land in question the defendant was not called upon to make out a



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title of his own. Secondary evidence of an unproduced unstamped document on which duty and penalty cannot be levied under the Stamp Act is inadmissible. Duty of appellate Court to give its reasons for believing the evidence of one side in preference to that of the other when the evidence is conflicting. **MAUNG NYO v. MAUNG HME**, U.B.R. 1892-1896, Vol. II, 371. [R., U.B.R. 1897-1901, Vol. II, 421, U.B.R. 1892-1896, Vol. II, 375 377, U.B.R. 1902-1903, Vol. II, Evidence, 7.]

(615)—S. 110—*Limitation Act, sch. II, art. 142—Burden of proof—Waste land.*—In a suit for possession of land on the ground of dispossession or discontinuance of possession, such dispossession or discontinuance of possession must be proved within 12 years of suit under art. 142 of the Limitation Act, and if that is not done, the claimant is not entitled to recover. **MAUNG NYUN v. MA NYEIN ZAN**, U.B.R. 1892-1896, Vol. II, 375.

(616)—S. 110—*Possession, Effect of—Title—Burden of proof.*—When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner. The preference of the Burmese for mortgage or sale, with the privilege of redemption, is a fact which cannot be made, as has been done here virtually to do duty for the proof required by law in each individual case. To oust a person from the possession of land on the ground of a mortgage, there must be clear and satisfactory proof of the existence of such mortgage and no presumption in favour of mortgage as against sale, according to the custom of the country, can supply the want of the necessary direct evidence. **MA HLA GYWE v. MA THAIK**, U.B.R. 1892-1896, Vol. II, 377.

(617)—S. 110—*Possession—Burden of proof.*—Where the defendant is in possession of land, there being no wrongful dispossession of plaintiff, and plaintiff asserts permissive occupation by defendant and defendant, asserts possession of land by gift outright, *held* that the burden of proof lies on the plaintiff. **MAUNG TUN v. MAUNG PA U**. U.B.R. 1902-1903, Vol. II, Evidence, 7. (U.B.R. 1892-1896, Vol. II, 371, U.B.R. 1897-1901, Vol. II, 421, R.)

(618)—S. 110—*Burden of proof—Onus probandi on the party out of possession—Shifting of onus.*—It was sought to eject the defendant from a house which had been in his possession for 5 years without interruption, on the ground that he first entered the premises temporarily with the permission of the plaintiff's father: in reply, the defendant alleged a sale: *Held*, that the burden of proving permissive occupation clearly lay on the plaintiff. The burden of proof should not be shifted unless the plaintiff has made out a *prima facie* case. **MI MYIT v. U CHAING**, 11 Ind. Cas. 777. (L.B.R. 1893-1900, 458, Appr.)

(619)—S. 110—*Burden of proof—Suit for redemption of mortgage.*—There is no presumption that the property left by a person long deceased

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is part of undivided estate. When land has been in the exclusive possession of others for a long period, the person asserting that it forms part of an undivided estate should be required to prove the fact. **MAUNG LU PE v. MAUNG LU GALE**, U.B.R. 1897-1901, Vol. II, 418.

(620)—S. 110—*Mortgagee—Length of possession—Presumption of ownership.*—The mere length of possession by a mortgagee is not in all cases of itself sufficient to justify the presumption that it has become proprietary. On the contrary, as between the mortgagor and the mortgagee, the reasonable inference ordinarily to be drawn will be that it has continued subject to the conditions of the mortgage-deed. But, where it was conclusively proved that the defendant had been forty years in possession, without interference, of the entire village, and that the present and former settlements were made with him, there arises a strong presumption of ownership, and it lies on the plaintiff to rebut this presumption by cogent and satisfactory evidence. **GULABI KUAR v. PIR BAKHSH**, A.W.N. 1881, 69.

(621)—S. 110—*Suit for redemption of usufructuary mortgage—Plea of adverse possession by defendant—Onus of proof—Civ. Pro. Code, 1882, s. 50 (= O. VII, rr. 1 to 6).*—There is a clear distinction as to the onus of proof between a case in which a plaintiff sues to obtain possession of land by redemption of a mortgage, and that in which the defence to a suit for possession of land is twelve years' adverse possession by the defendant. In each case, it is for the plaintiff to plead his title, and if that title is put in issue, he must make it out by at least *prima facie* evidence before the defendant can be put to proof of his defence. In the second case, where the defence is twelve years' adverse possession, the defendant must plead and make out the title he alleges, and thus show that the title of the plaintiff which otherwise had been proved or admitted was lost. But, as the very nature of a suit for possession of land by redemption of mortgage pre-supposes that the defendant or those whom he represents in title had lawfully obtained possession of the land, the plaintiff must show in his plaint and must support his case by at least *prima facie* evidence showing his title to possession at the date of the suit, and his right to disturb the possession of the defendant which had a lawful origin. **PARMANAND MISR v. SAHIB ALI**, 11 A. 438. (7 C.L.R. 364, 9 I.A. 99, 3 I.A. 85, 4 B. 89, 9 B. 137, 5 A. 84, 354, 8 A. 295, 7 A. 677, 1 A. 194, 10 M.I.A. 160, R.) [R., 18 A. 403, A.W.N. 1897, 129, 3 O.C. 173, 27 B. 271, 14 A. 193 = A.W.N. 1892, 55, 6 O.C. 119, 88 P.R. 1903, 18 A. 295, 20 A. 182 = A.W.N. 1898, 19, L.B.R. 1893-1900, 360, 11 P.R. 1909 = 51 P.L.R. 1909.]

(622)—S. 110—*Possession—Ownership—Burden of proof.*—Possession is *prima facie* evidence of complete ownership throwing the burden of showing that it is held on some inferior title, upon him who seeks to dislodge the possessor. **TARACHAND PIRCHAND v. LAKSHMAN BHAVANI**, 1 B. 91. [R., 9 B. 137,]



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(623)—S. 110—*Ownership of land—Burden of proof on person out of possession.*—Where there was no wrongful dispossession mere proof of ownership at some previous time would not throw the burden of proof on the defendant, but the plaintiff would be bound to prove a subsisting title. The plaintiffs claimed the suit land, alleging that they had placed the defendant temporarily in possession, at his request, some five years previously. The defendant denied the alleged permission and said that he had occupied the land, and cleared it about twelve years ago, with the subsequent acquiescence of a person who claimed to be the owner. *Held*, that the burden under s. 110, of proving their case, rested on the plaintiffs, and that they were not entitled to succeed, merely because the defendant failed to prove his title. *MAUNG MIN DIN v. MAUNG ON GAING*, U.B.R. 1897-1901, Vol. II, 421. (12 A. 46, U.B.R. 1892-1896, Vol. II, 234, 371, 400, 619, R.) [R., U.B.R. 1907, 4th Qr., Execution—Signing, 5, U.B.R. 1905, 4th Qr., Evidence, 7, U.B.R. 1902-1903, Vol. II, Evidence, 7.]

(624)—S. 110—*Burden of proof as to ownership—Land—Possession of—Thugyisa—Distinction between claims founded on official and on private title.*—The burden of proof imposed by s. 110 of the Evidence Act on the party out of possession of land seeking to oust the party in possession is not discharged by showing a title of ownership dependent upon the retention of official position under the Burmese Government. The title that must be established is an absolute private proprietary title. *MAUNG NWE v. MAUNG PO GYI*, U.B.R. 1897-1901, Vol. II, 416.

(625)—S. 110—*Suit based on title—Burden of proof as to wrongful dispossession.*—The word 'possession' contemplated by s. 110 of the Act is to be understood as opposed to juridical possession and to denote actual present possession and where, in suit for possession based upon title, there is also the allegation of wrongful possession obtained by the defendant, the burden of proof of the dispossession lies in the first instance on the plaintiff. But, on proof of his previous recent possession and dispossession by defendant and of his *prima facie* lawful possession on his own account, the burden of proof will be shifted to the defendant to prove title in himself and his right to oust the plaintiff. *MI EIN KIN v. NGA LA*, U.B.R. 1903, Evidence, 7. (20 W.R. 458, 7 I.A. 73, 5 O.L.R. 278, 12 A. 46, 25 B. 287, 20 C. 834, 23 M. 179, U.B.R. 1897-1901, 421, R.)

(626)—S. 110—*Possession—Suit by a person in possession for a declaration of ownership—Burden of proof—Effect of plaintiff's possession—Specific Relief Act (I of 1877), s. 9.*—The plaintiffs sued the Government for a declaration that a certain piece of land belonged to them and that they might be confirmed in their possession, alleging that they had purchased the site for Rs. 20 in 1888 from one D, whose

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father had mortgaged it for Rs. 20 to the plaintiff's father: *Held*, that the possession of the plaintiff's being peaceable and obtained without ousting any one, it was of such a character as to attract the presumption described in s. 110 of the Evidence Act, and was good against the whole world except the person who could show a better title, and that, as the Government had failed to establish their title to the land, the plaintiffs were lawfully entitled to its possession. *Per Jenkins, C.J.*—To say that a possession is not within the meaning of s. 110 of Evidence Act, unless it is a possession according to title, would be to render that section meaningless, and to introduce a doctrine subversive of the established principles of property law. In the case of a village site Government cannot rely on any general presumption and that as against the party in possession it must show title. *Per Ranade, J.*—Under s. 110, Evidence Act, possession, when long and continued up to a recent date, leads to a presumption of title. Where the conflict is between mere previous possession and recent actual possession, the fact of previous possession will not entitle plaintiff to a decree except in suit under s. 9 of Act I of 1877, brought within six months from dispossession. Where this period is exceeded before a suit is brought, and is less than the limitation law requires, he must make out a *prima facie* title. And s. 110 refers to the presumption to be made of ownership based on the circumstance of such possession, and allows the plaintiff with such *prima facie* title to claim a decree where no superior title is proved on the other side. It is in reference to such cases that it has been held that possession is evidence of title, and plaintiff who proves such possession and subsequent disturbance, shifts the burden of proof on the defendant when the *prima facie* title is made out. Where no such title is made out and plaintiff comes to the Court and asks for a declaratory decree, he cannot obtain that decree on the more ground that he was in possession, and the defendant had no title. Mere wrongful possession is insufficient to shift the burden of proof: *Held, by Witworth, J. (dissentiente)*, that the possession of the plaintiffs was not of such a character as under s. 110, Evidence Act, to put on the defendant the burden of proving that the plaintiffs are not the owners of the site that the possession alleged to have been exercised before the sale consisted merely of such acts as are permitted to any villagers in respect to an open space in a village, so long as no one is prejudiced by them and which would be permitted to an influential person, such as the patel of a village even if they were somewhat prejudicial to public convenience; that the actual possession taken after the execution of the deed of sale in 1888 was a merely wrongful act; and that, therefore, the plaintiffs were not relieved of the burden of proving their title which they had not proved. *HANMANTRAO v. SECRETARY OF STATE*, 2 Bom. L.R. 1111=25 B. 287.

(627)—S. 110—*Sale—Mortgage—Defendant in possession—Burden of proof.*—Where the land in suit is in the possession of the defendant,



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and the plaintiff alleges that it was mortgaged to the defendant's deceased husband and the defendant replies, that the transaction was an absolute sale with no reservation of the right to redeem. *Held*, that it is for the plaintiff to prove the mortgage which he alleges. *U NYO v. MA SHWE MEIK*, L.B.R. 1893-1900, 514. (L.B.R. 1872-1892, 482, 494, 642, *Cited*.)

(628)—S. 110—Burden of proof—Fraud—See CIV. PRO. CODE, 1908, O. XXI, rr. 58, 63, U.B.R. 1904, 4th Qr., Civil Procedure, p. 8.

(629)—S. 110—Person in possession—Effect of mutation after inquiry by Revenue officer—See CUSTOMS—PUNJAB—INHERITANCE, 120 P.W.R. 1909=4 Ind. Cas. 965.

(630)—S. 110—Suit for declaration of title—Proof of long possession—Presumption of ownership—Title—Burden of proof—See DECLARATORY DECREE, SUIT FOR—GENERAL, 6 M.L.T. 306=5 Ind. Cas. 121=4 Ind. Cas. 1070=20 M.L.J. 71=33 M. 173.

(631)—S. 110—Limitation—Suit by co-heirs for share of land—See LIMITATION ACT, 1908, arts. 123, 127, 142, 144, 2 L.B.R. 184.

(632)—S. 110—See MORTGAGE—CONDITIONAL SALE, L.B.R. 1893-1900, 85.

(633)—S. 110—See REGISTRATION ACT, 1908, s. 50, 25 A. 366=A.W.N. 1903, 81.

(634)—S. 110—See SPECIFIC RELIEF ACT, 1877, U.B.R. 1892-1896, Vol. II, 619.

(635)—S. 110—Possession for—Title, *prima facie* evidence of—Possessory suits—See TITLE, 5 C.L.R. 278.

(636)—S. 110—Duty of transferee—See TRANSFER OF PROPERTY, 5 L.B.R. 125.

(637)—S. 110—See NOS. 18, 225, 273, 282, 437, 439, 585, 586, 587, *supra*.

(638)—Ss. 110, 114, 109—See BURDEN OF PROOF—POSSESSION AND PROOF OF TITLE, 121 P.R. 1882.

(639)—S. 111—*Gift for pious purposes—Undue influence.*—The principle on which s. 111 of the Evidence Act is based is a long established doctrine of equity, and it has been repeatedly applied with special emphasis by the Lords of the Privy Council to transactions to which women of this country are parties. This was a suit to set aside, on the ground of undue influence, a deed of gift executed by the plaintiff, an old Hindu widow of 92 years, in favour of defendant, a Brahmin who was her spiritual guide. It was found that there was no tangible consideration for the gift, and also nothing to show that it was obtained *bona fide* and without improper influence. *Held*, that the gift should be set aside, under the circumstances. *MURARI v. RADHA BIBI*, A.W.N. 1884, 184.

(640)—S. 111—*Coercion, force and undue influence—Burden of proof.*—Facts showing real authority of the defendant over the plaintiff were proved, and that the former made use of

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his authority for the purposes of obtaining an advantage over the latter, which but for that authority he could not have obtained: *Held*, that these facts constituted undue influence:—*Held*, that persons, taking a benefit from another over whom they stand in a position of commanding influence, must take upon themselves the whole proof that the thing is righteous. *PARTAB BAHADUR v. SHEORAJ*, 1 O.C. 63.

(641)—S. 111—*Mortgage for money advanced for litigation—Burden of proof of good faith.*—The mere fact that the mortgagee was a money-lender and that the mortgage was executed for funds advanced during a litigation on behalf of the mortgagor, is not sufficient to create such a relation of active confidence between the mortgagor and mortgagee as to throw the burden of proof of good faith, under s. 111 of the Evidence Act, on the mortgagee. *THAKUR DAS v. JAIRAJ SINGH*, 26 A. 130, P.C.=31 I.A. 46=8 C.W.N. 569=8 Sar. 607. [R., 8 Bom. L.R. 652=31 B. 271.]

(642)—S. 111—*Position of pleader's clerk towards his master's clients.*—A pleader's clerk is not as a matter of course presumed to occupy the position of active confidence within the meaning of s. 111 towards his master's clients. *HIRALAL v. MT. DHAMMO KURMIN*, 9 C.P. L.R. 35. (15 C. 638, R.)

(643)—S. 111—Burden of showing good faith where one party stands in fiduciary relationship to another—Whether all accounts on which contract is based should be proved to be correct—See CIV. PRO. CODE, 1908, s. 2, 12 C.W.N. 1102=36 C. 493=2 Ind. Cas. 553.

(644)—S. 111—See HINDU LAW—GIFT, 25 A. 358=A.W.N. 1903, 70.

(645)—S. 111—See TRUSTS ACT, 1882, ss. 88, 95 (a), 96, 9 Bom. L.R. 606.

(646)—S. 112—*Mahomedan Law—Legitimacy.*—The section proceeds upon adopting the period of birth, as distinguished from conception, as the turning point of legitimacy; but, under the Mahomedan law, questions of legitimacy are referred to the date of the conception of the child and not to the period of his birth. *MUHAMMAD ALLAHADAD KHAN v. MUHAMMAD ISMAIL KHAN*, 10 A. 289.

(647)—S. 112—*Legitimacy—Period of iddat—Marriage of Mahomedan woman after iddat but before delivery—Child born 280 days after divorce or death of husband but less than six months after her re-marriage—Mahomedan Law.*—*Held*, that the ordinary period of iddat for Mahomedan woman is three months from the date of her divorce or from death of her husband. But if she be in the family way at the time of happening of either of these two events, the period of iddat extends to the date of delivery of a fully or partly formed child, whether it takes place before or after expiry of three months. A re-marriage before expiry of iddat is void; but it is irregular



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and not void if it takes place after the *iddat* period is over but before delivery. In the last mentioned case a child, born more than 280 days after the divorce by her first husband or his death, but less than six months after her re-marriage with the second husband, is to be considered legitimate under s. 112 of Act I of 1872 and is entitled to inherit her mother's second husband's property, particularly where he admits the child to be his. *NURUL-HASAN v. MUHAMMAD HASAN*, 107 P.W.R. 1910=78 P.R. 1910=146 P.L.R. 1910. (11 M.I.A. 34, 34 B. 111, 25 P.W.R. 1908, *Appr.* and *R.*; 35 P.W.R. 1909, 10 A. 289, *Diss.*; 133 P.W.R. 1907, *R.*)

(648)—S. 112—*Legitimacy, Question of—Burden of proof as to marriage of the parents lies upon person claiming legitimacy.*—It is upon the person who claims to be the legitimate issue of his parents to bring forward satisfactory evidence in support of their marriage. In such cases no certain inference can be drawn from the evidence as to the conduct of relations and friends. *THAKUR AMJAL ALIKHAN v. NAWAB ALIKHAN*, 9 Bom. L.R. 264=5 C.L.J. 1=17 M.L.J. 56.

(649)—S. 112—*Legitimacy of children—Child born during continuance of valid marriage—Presumption of legitimacy.*—Under s. 112 of the Act, there is a conclusive presumption that a child born during the continuance of a valid marriage is a legitimate issue of the parents, no matter how soon the birth be after the marriage. *UMRA v. MUHAMMAD HAYAT*, 79 P.R. 1907. [*R.*, 78 P.R. 1910=107 P.W.R. 1910.]

(650)—S. 112—*Legitimacy—Continuance of marriage—Presumption—Divorce—Burden of proof.*—It is a well-recognised rule of law that when a particular relationship is shown to exist, such as marriage, then its continuance must *prima facie* be presumed. For the purposes of s. 112 of the Evidence Act, the burden of proving that the divorce of the plaintiff's mother took place at a time which disentitles him from relying on the section lies on the defendants: it is not the plaintiff's duty to show when the divorce took place. If the defendants are unable to show that the divorce took place at a time which excludes the plaintiff from the operation of s. 112 then the conclusive proof in favour of the plaintiff arises and can only be displaced by its being shown that the parties to the marriage had no access to each other at any time when the plaintiff could have been begotten by the husband of his mother. *BHIMA v. DHULAPPA*, 7 Bom. L.R. 93.

(651)—S. 112—*Legitimacy of posthumous child—Proof of non-access—Burden of proof—Husband's serious illness.*—Under S. 112, I.E.A., the onus is on the claimant to prove that he was born within 280 days after the death of his father, and the burden of proving non-access between his mother and father is upon those who deny his legitimacy. The

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mere fact that the husband was, during the period within which the claimant must have been begotten, suffering from a serious carbuncle, does not in itself rebut the legal presumption under s. 112, I.E.A. *NARENDRA NATH PAHARI v. RAM GOBIND PAHARI*, 29 C. 111, P.C.=29 I.A. 17=6 C.W.N. 146=4 Bom. L.R. 243=8 Sar. 186. [*Cited*, 1 L.B.R. 284.]

(652)—S. 112—*Presumption of legitimacy—Onus of proof.*—One B died of small-pox after a few days' illness on the 16th May, 1895, and his widow gave birth to a son on the 4th January, 1896. In a suit by the reversionary heirs for a declaration that the child was not the son of B, *held* that the suit was governed by s. 112, Evidence Act, and the burden of proof was on the plaintiffs. *TIRLOK NATH SHUKUL v. LACHMIN KUNWARI*, 25 A. 403, P.C.=7 C.W.N. 617=5 Bom. L.R. 474=30 I.A. 152=8 Sar. 481. (29 C. 11), *R.*)

(653)—S. 112—*Presumption as to paternity of child born during coverture—Proof of mother's living with a person other than her husband rebuts the presumption—Liability of such person to maintain his illegitimate children.*—There is, of course, a presumption that children born of a married woman during the lifetime of her husband are the legitimate offspring of that woman and her husband but this is, after all, a mere presumption, and as such, rebuttable. So, where such a woman had admittedly lived for years together with another person and they both had admitted and asserted such children to have been born of them, *held*, the above presumption must be regarded as having been completely rebutted and the children being the illegitimate sons of such other person, he was bound to maintain them; and persons, therefore, who have come into possession of his properties on his death, are liable to give the children maintenance to the extent of the property that has so come into their hands. *BAHADUR SINGH v. YIRU*, 28 P.R. 1906.

(654)—S. 112—*Proof of non-access—Proof of illegitimacy.*—A sues B, his father, and C, the adopted son of B, for partition. B disowned A's paternity, and stated that his mother D lived separate from him for a long time and that he had no access to D during the period when A could have been conceived by her. B married a first wife, and again married D as he had no son by the former. They both quarrelled subsequently. D sued B for maintenance, and B met it by bringing one for restitution of conjugal rights, and became reconciled to each other. Though she lived in her mother's house, she was constantly visiting B in his house without the knowledge of the first wife. When D was under state of conception, B executed a deed of settlement in favour of C, in which he did not disown the legitimacy of A. *Held*, that (1) in these circumstances, the onus lay on B to prove non-access within the meaning of s. 112 of the Evidence Act, and the fact that B believed D to be guilty of infidelity and produced witnesses to prove it, did not discharge



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the onus. A's legitimacy must in these circumstances be presumed. CHIGURUPATI VENKATA SUBBAYYA v. CHIGURUPATI PEDDA NAGANA, (1911), 1 M.W.N. 312=10 Ind. Cas. 389.

(655)—S. 112—Child born 330 days after last access — Legitimacy — Presumption—See DIVORCE, 77 P.R. 1911.

(656)—S. 112—See NOS. 14, 150, *supra*.

(657)—S. 113—St. 24 & 25 Vic., c. 67, s. 25—*'Ultra vires.'*—St. 24 & 25 Vic., c. 67, s. 25, does not protect s. 113 of the Evidence Act, though it does not disallow it. The provision in s. 113, Evidence Act, that a notification in the Gazette of India of the cession of any portion of British territory to any Native State, prince or ruler shall be conclusive proof that a valid cession of territory took place on the date mentioned in the notification cannot be followed. DAMODAR GORDHAN v. GANESH DEVORAM, 10 B.H.C. 37.

(658)—S. 113—See CESSION OF BRITISH TERRITORY, 1 B. 367, P.C.=3 I.A. 102=1 A.C. 322=25 W.R. 261.

(659)—S. 114—*Admissibility of a bond bearing registration endorsement — Presumption — Registration Act (III of 1877), ss. 60, 75—Defective presentation — Second presentation after Judge's order.*—The production of a bond with the certificate of due registration endorsed thereon raises a strong presumption in favour of the due registration of the bond, and in the absence of clear proof that the requirements of law are not complied with, the Court is bound to admit the document in evidence. The onus does not lie upon the plaintiff of showing that the requirements of the Act were complied with. A document was presented for registration by a *karinda* of the person in whose favour it was executed. It was received for registration. Simultaneously with the presentation an application was made to summon the executants. They failed to appear, and the Sub-Registrar considering that execution was not admitted, refused to register the document. The matter came up before the District Registrar by means of an application under s. 73 of the Registration Act, and the presence of the executants having been secured, the District Registrar ordered that the document should be registered. The document was accordingly registered by the Sub-Registrar, but how it found its way back to him was not clear. *Held* (1) that it neither being admitted nor being proved that the *karinda* was not duly authorised, the certificate of registration afforded a presumption in favour of everything having been properly done, and consequently the initial presentation was not improper. (2) That the plaintiff's evidence on the matter of the second presentation being very vague, the presumption in favour of everything having been properly done was not rebutted, and even assuming that the document had been sent by the Registrar himself to the Sub-Registrar, the defect was one in procedure and did not vitiate the registration. RAM CHANDRA DAS v. FARZAND ALI KHAN, 9 A.L.J. 188. (4 I.A. 167, R.; 23 A. 233, P.O., 28 A. 707, D.)

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(660)—S. 114—*"Refused"*—*Effect of refusal.*—The effect to be given to the word "refused" on a registered cover as proof of tender of the packet to the addressee is one of fact. Each case must be decided under s. 114, Evidence Act, according to its circumstances. GOPAL v. KRISHNA, 3 Bom. L.R. 420.

(661)—S. 114—*Bond in obligor's hands—Presumption.*—Where a bond is in the hands of the obligor or who is not shown to have stolen it, it is rightly presumed that the obligation has been discharged. GUNESH CHUNDER SHAHA v. KHETOO MEAH, 22 W.R. 265.

(662)—S. 114—*Presumption cannot shift the burden of proof.*—Where the fact, giving rise to such a presumption as may be drawn under s. 114, is undisputed and no explanation negating the presumption is offered, the Court is justified in laying the onus proper where, but for the presumption, the onus could not be laid. But, where explanation negating the presumption is forthcoming, the Court is not in a position to draw the presumption until it has heard the evidence in support of the explanation and, therefore, must ignore the presumption for the purpose of determining where the onus proper lies, on the principle "when conflicting evidence on a point covered by a presumption of law is to be gone into, the presumption of law is *functus officio* as a presumption of law." Such a presumption, therefore, cannot shift "the burden of proof" in the strict sense of that term and the most that it can effect is a shifting of "the burden of evidence"—the burden of going forward with new evidentiary matter—and s. 4 of the Act indicates that it is for the Court, which is taking evidence, to decide whether such a presumption is strong enough to produce even that limited effect. PAKKOO MUSALMAN v. DAYALI, 1 N.L.R. 169. (29 C. 334, D.)

(663)—S. 114 — *Presumption, Extent of — Document alleged to have been lost by one of the parties, but loss not proved*—Q sued C to redeem a mortgage on payment of Rs. 115, a portion only of the mortgage-money, the balance. Q stated, having been paid to the mortgagee. He further stated that some of the payments would be proved if the mortgage-deed were produced as they were endorsed on that document. C did not produce the mortgage-deed but stated that it had been lost. He could not, however, prove the loss. *Held*, that, under the circumstances the presumption under s. 114 of the Evidence Act could not be pushed to the extent that the mortgage-deed, if produced, would have proved that only Rs. 115 remained due on the mortgage, the rest having been paid off to the mortgagee. QUDRAT ULLAH v. CHUNNI LAL, 13 Ind. Cas. 60.

(664)—S. 114—See ACT XL OF 1858, 1 C.W.N. 453.

(665)—S. 114—See BEN. ACT XI OF 1859, 10 C.W.N. 137=2 C.L.J. 325.

(666)—S. 114—See BEN. ACT IX OF 1880, s. 52, 13 C. 197.



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(667)—S. 114—See BEN. ACT IX OF 1880, s. 95, art. 2, sch. III, 30 C. 1033, P.C. = 30 I.A. 177 = 8 C.W.N. 1.

(668)—S. 114—See BOM. ACT II OF 1884, s. 57, 20 B. 732.

(669)—S. 114—See ALLUVION — FORMATION OF CHURS OR ISLANDS, 9 C.W.N. 111.

(670)—S. 114—See BURDEN OF PROOF—DOCUMENTS RELATING TO LOANS, SUITS RELATING TO, 20 B. 367.

(671)—S. 114—See BURDEN OF PROOF—MISCELLANEOUS, 30 C. 1 = 6 C.W.N. 688.

(672)—S. 114—Presumption of fact—See CHAUKIDARI CHAKRAN LANDS, 2 C.L.J. 107 = 32 C. 1107.

(673)—S. 114—Wrong-doer—Right to call in aid s. 114—See POSSESSION — ADVERSE POSSESSION, 8 A.L.J. 247.

(674)—S. 114 — Failure to produce title-deed—Presumption—See RIGHT OF WAY, 15 A. 270 = A.W.N. 1893, 151.

(675)—S. 114—See NOS. 25, 331, 363, 399, 438, 561, 612, 638, *supra*.

(676)—S. 114, cl. (e)—Warrant for arrest of judgment-debtor, by whom to be signed—Authority of Sheristadar to sign warrants, presumption.—From the mere fact that the warrant for the arrest of a judgment-debtor bore the signature of the Sheristadar, it cannot be presumed, under s. 114, cl. (e), Indian Evidence Act, that the Sheristadar had been duly appointed to sign warrants. Evidence of the fact of appointment is necessary. *Per Harington, J.*—S. 114, cl. (e), Evidence Act, authorises the presumption that a particular judicial or official act has been performed regularly, but it does not authorise the presumption, without any evidence, that the act has been performed. THE DEPUTY LEGAL REMEMBRANCER v. MIR SARWARJAN, 6 C.W.N. 845.

(677)—S. 114 (e)—Applicability of presumption under—See BEN. ACT VI OF 1870, ss. 60, 61, 9 Ind. Cas. 322.

(678)—S. 115—*Estoppel*.—In a suit for pre-emption in respect of a sale effected in June, 1897, it was contended on behalf of the pre-emptor that the vendee held no lands which gave him the right of suit having previously parted with all his land, and that he was estopped under s. 115 of the Evidence Act from showing that he held any such lands by an allegation made by him in a written statement filed on the 7th January, 1897 in a suit for pre-emption instituted by another person against him as vendee of certain land. *Held*, that s. 115 of the Evidence Act was not applicable until it was established that the vendee intentionally caused or permitted the pre-emptor to believe that he had no lands on the date he filed the written statement, and that in consequence of that belief the pre-emptor forebore to sue for pre-emption in respect of the land. MUHAMMADI v. GOKAL CHAND, 26 P. L.R. 1903.

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(679)—S. 115—"Intentionally" used in s. 115, meaning of.—The term "intentionally" is used in the Evidence Act (1872), for the purpose of declaring the law in India to be precisely that of the law of England. SARAT CHUNDER DEY v. GOPAL CHUNDER LAHA, 20 C. 226, P.C. = 19 I.A. 203 = 6 Sar. 224. (2 A. 809, 7 M. 3. *Disappr.*) [*R.*, L.B.R. 1893-1900. 512, 10 Bom. L.R. 403 = 33 B. 53, 129 P.R. 1908.]

(680)—S. 115—*Construction*.—The "belief" in the truth of a thing, referred to in the above section, is belief in a fact and not in a proposition of law. RAJ NARAIN BOSE v. THE UNIVERSAL LIFE ASSURANCE CO., 7 C. 594 = 10 C.L.R. 561. [*R.*, 14 B. 312.]

(681)—S. 115—*Principle of the law of estoppel*.—"It is a principle of natural equity which must be universally applicable that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice, or something which amounts to constructive notice of the real title, or that there existed circumstances which ought to have put him upon an enquiry that, if prosecuted, would have led to a discovery of it." Where the defendant and her husband intentionally permitted a certain person to hold himself out to the world as the owner of the land, the defendant was held to be precluded from denying such ownership against those, who have been led to act upon the belief of its truth. MA ZET v. MAUNG GYI NAO, U.B.R. 1892-1896, Vol. II, 379. (11 B.L.R. 53, 14 B. 558, D.) [*Not Obs.*, U.B.R. 1905, 4th Qc., Evidence, 3.]

(682)—S. 115—*Alienation by head of family—Acquiescence by others—Estoppel*.—The immoveable property of a *thugyi* family was disposed of by A, the *thugyi* at the time and the son of the eldest son of the prior *thugyi*. The co-heirs raised no objection, and the suit to set aside the alienation as invalid and recover the land was only brought by one of them, nine years afterwards. *Held* that, in the absence of rebutting evidence, the presumption was that the transfer had been made by the head of the family with the consent or acquiescence of all interested, and that it was binding on the claimant. MI MA NGA AT v. MAUNG PO TE, U.B.R. 1892-1896, Vol. II, 383. (L.B.R. 1872-1892, 39, 41 D.)

(683)—S. 115—*Settlement of accounts—Omission of item—Estoppel*.—Where a party obtained a settlement of mutual accounts on favourable terms, on the understanding that it was a final arrangement, and subsequently sued for an item as omitted, being the balance due on a document which ought to have been given up at the time, but was not produced by him either through oversight or intentionally, *held* that he was estopped from denying that the settlement



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included everything, unless he also gave up the benefit of the settlement on his side. **DAWOODJI BAMJI v. C.P.L. CHENA CURPEN CHETTY, U.B.R. 1892-1896, Vol. II, 387.**

(684)—S. 115—*Claim to land alleged to be ancestral — Family compact.* — By a family arrangement between the children of the same mother by different fathers, the income of the land in suit was divided into three equal shares among the representatives of the three different branches of the family, and this arrangement had lasted for upwards of thirty years. The plaintiff now sued for the whole of the property, as descended from her father alone. *Held*, that the plaintiff was estopped by the family compact from claiming more than a third share, **U. THUMANA v. MA SAING, U.B.R. 1892-1896, Vol. II, 390.**

(685)—S. 115—*Thugyi's Revenue Register No. IX, Counterfoil form-of—Entry in, of mutation of names—Document of title.*—It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate and a third person purchases it, for value, from the apparent owner, in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title unless he can overthrow that of the purchaser by showing either that he had direct notice or something which amounts to constructive notice of the real title; or that there existed circumstances which ought to have put him upon an inquiry that if prosecuted would have led to a discovery of it. The application of that general principle would need extreme caution in the case of an ignorant occupancy holder duped into allowing a person who pretends to be negotiating a loan for him to represent himself to the Revenue authorities as a purchaser of the holding, whilst such occupancy holder remains in possession and enjoyment. It would be illogical to hold that entries in the Government revenue records are made for purposes of revenue administration and are not documents of title (see the case of **Maung Shwe Lon v. Maung Shwe An, Printed Judgments, 68**); and at the same time to rule that the counterfoil Form IX in which a mutation of names after an alleged sale is entered by the Revenue Officer constitutes in the hands of the transferee in the revenue accounts a document of title the possession of which by the transferee enables a third person purchasing from the transferee to say that the original and real owner had allowed the transferee to hold himself out as the real owner with the legal consequences set forth in the ruling of the Privy Council in **11 B.L.R. 46. MAUNG LU GALE v. MAUNG KYAW YAN, L.B.R. 1893, 1900, 158.**

(686)—S. 115—*Estoppel — Estoppel caused by conduct of owner.*—If the owner of a piece of land stands by while another person professes to sell that land to a third party and he does not interfere, but allows that other person to hold

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himself out to be the owner of the land and to make a transfer of it, he is not to be heard afterwards for the purpose of destroying that purchaser's title by asserting the contrary, though he may upset that title if he can show either that the purchaser had notice of the title, constructive or actual, or that circumstances existed at the time of the purchase which, as a reasonable man, should have put him on his guard and suggested enquiry, which enquiry, if made, would have resulted in his ascertaining the title of the true owner. **MAUNG SA v. MA KYOK, L.B.R. 1893-1900, 512. (11 B.L.R. 53, 14 A. 362, F.) [R., 1 L.B.R. 196; Cited, 3 L.B.R. 18.]**

(687)—S. 115—*Estoppel by judgment—Judgment inter partes—Non-disclosure of title in a previous suit—Wrong belief not initially caused—Silence is fraud when there is duty to speak—Pleader not legally bound to disclose his title in subject of litigation—His moral and professional duty to disclose.*—A taluk was sold for arrears of revenue. The purchasers at the revenue sale sold it to the present plaintiff. The plaintiff first sued two persons, under s. 37 of Act XI of 1859, to avoid and annul the tenancy which they claimed in the lands and to eject them. These two persons had sold their right to the pleader, who appeared on their behalf and his brother-in-law. Neither the pleader nor his brother-in-law disclosed their purchase during the pendency of the suit. The plaintiff was successful in the litigation and obtained a decree for *khas* possession. He was, also, put in symbolical possession by the Court. On the allegation that he had subsequently settled with the actual cultivators of the lands, and that those cultivators were disturbed by the present defendants, i.e., the representatives of the pleader and his brother-in-law, above referred to, the plaintiff sued the defendants under s. 9 of the Specific Relief Act, but was unsuccessful. Hence the present suit for declaration of his title by purchase and for ejection of the defendants. The defendants chiefly contended that the previous suit was not binding on them, inasmuch as it was instituted against their vendors long after they had parted with all their interest in the property in suit. It was urged on behalf of the plaintiff that the decree in the previous suit was binding on the defendants either on the ground of estoppel or by reason of the fraudulent conduct of their predecessors in title. *Held*, the doctrine of estoppel is not applicable to this case. It cannot successfully be contended that the previous judgment was *inter partes* and consequently binding upon the present defendants. It is not sufficient that the predecessors in interest of the present defendants did not disclose their title during the pendency of the previous litigation. There must be the further allegation, on the plaintiff's part that he was induced to institute the previous action against persons who had parted with their interest in the property in suit, in reliance upon some representation, act or omission on the part of the predecessors of these defendants.



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S. 115 does not apply to a case in which a belief has not been initially caused. (4 O.W.N. 283, R.) *Held*, also, that the omission of the predecessors of the defendants in not disclosing their right by purchase is not to be regarded as fraudulent. "A duty to speak, which is the ground of liability, arises wherever and only where silence can be considered as having an active property that of misleading." No doubt, from a moral and professional point of view, it was not right on the part of the pleader in the previous suit "to have kept the plaintiff in the dark and to have made him persevere in his mistake." There was no legal obligation on him to apprise the plaintiff of his mistake. *Held*, further that though plaintiff cannot succeed on the ground of estoppel and fraud, he will be entitled to a decree if the allegation, made by him in the plaint, that the predecessors of the defendants, after their alleged purchase, did not take possession of the property, but intentionally allowed their vendors to continue in possession as before and, consequently, in ignorance of the transfer, be instituted the previous suit against the original tenants, be found in his favour. The suit was remanded for disposal in the light of the above observations. JOY CHANDRA BANDOPADHYA v. SRINATH CHATTOPADHYA, 1 C.L.J. 23=32 C. 357, P.C. [R., 1 C.L.J. 337, 7 C.L.J. 604, 6 C.L.J. 621.]

(688)—S. 115—*Estoppel—Fraud thrown to other party—False representation—S. 19, Contract Act.*—S. 115 does not apply to a case where the statement relied upon is made to a person, who knows the real facts, and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties. A false representation, made to a person who knows it to be false, is not such a fraud as to take away the privilege of infancy. (*Nelson v. Stocker*, 1859, 4 Deg. and I. 458, R.) This principle is recognised in the explanation to s. 19 of the Contract Act. MOHRI BIBEE v. DHARMODAS GHOSE, 30 C. 539, P.C.=30 I.A. 114=7 C.W.N. 441=5 Bom. L.R. 421=8 Sar. 374. [F., 4 N.L.R. 28; R., 28 B. 393, 5 Bom. L.R. 1091, 6 Bom. L.R. 1043, 3 N.L.R. 72, U.B.R. 1907, 2nd Qr., Contract, 5, 12 C.W.N. 1036=8 C.L.J. 261, 5 A.L.J. 674=A.W.N. 1908, 267=31 A. 21.]

(689)—S. 115—*Estoppel—Promise de futuro—Contract.*—Section 115 of the Evidence Act requires that to create an estoppel there must be a representation by means of declaration, act or omission that a thing is true, i.e., that the representation is as to some state of facts alleged to be at the time actually in existence. If the representation relates to promises *de futuro*, it can be binding not as an estoppel, but as a contract. JETHABHAI v. NATHABHAI, 6 Bom. L.R. 428=28 B. 399.

(690)—S. 115—*Decree—Execution—Interest—Payment of interest—Admissions—Contract Act (IX of 1872), ss. 65, 73.*—Where in an application to execute a decree which provides for no interest, the decree-holder puts in a prayer as to the award of interest, and the

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judgment-debtor accepting his liability to pay the decretal debt as well as interest obtains from time to time adjournments from the Court to enable him to pay the amount, he (the judgment-debtor) cannot at a later stage of the proceedings dispute the item of interest and is bound to pay interest from the date on which he admitted his liability to pay interest. NARAYAN v. RAOJI, 6 Bom. L.R. 417=28 B. 393.

(691)—S. 115—*Estoppel—Pre-emption—Waiver of right—Withdrawal of money.*—When vendors left certain money with vendee for payment to a creditor, the plaintiff, a co-sharer in the village, who withdrew the money and brought a suit to pre-empt the property, *held* that the withdrawal of money could not operate as a waiver of pre-emptive right. The plaintiff by taking the money did not acquiesce in the sale. (2 A.L.J. 145, 9 A. 234, R.) When the principles of the law of estoppel, by which the Courts in India are to be governed, are found in s. 115 of the Act, there is no need to fall back upon the analogies of the Mahomedan Law in a case of pre-emption arising between the Hindus. AJUDHIA CHAUDHARI v. CHHATARPAL LAL, 4 A.L.J. 210=A.W.N. 1907, 83. (5 A. 197, R.)

(692)—S. 115—*Estoppel against a minor.*—If a minor, by his conduct, allow his mother to act as the guardian of her sons and manager of the family property and to mortgage it, it is immaterial for the purposes of estoppel that his conduct was due to a mistaken impression as to his age. NADHUBHAI v. MULCHAND, 3 Bom. L.R. 535.

(693)—S. 115—*See ACT VI OF 1882, s. 58. 26 M. 79=12 M.L.J. 439.*

(694)—S. 115—*Withdrawal by landlord of money deposited by transferee of holding—Recognition of transfer—Estoppel—See BEN. ACT VIII OF 1885, ss. 170, cl. (4), 171, 9 Ind. Cas. 619.*

(695)—S. 115—*Not repealed by s. 13 of the Punjab Laws Act (IV of 1872) as regards pre-emption suits—See PUN. ACT IV OF 1872, s. 13, 185 P.L.R. 1905.*

(696)—S. 115—*See U. P. ACT XXII OF 1881, ss. 36, 39, A.W.N. 1893, 192.*

(697)—S. 115—*See BUDDHIST LAW—HUSBAND AND WIFE, L.B.R. 1872-1892, 49.*

(698)—S. 115—*Effect of s. 258, C.P.C. (1882)—See CIV. PRO. CODE, 1908, O. XXI, r. 2, 12 Bom. L.R. 686=7 Ind. Cas. 940.*

(699)—S. 115—*See CIV. PRO. CODE, 1908, sch. II, r. 20, U.B.R. 1897-1901, Vol. II, 293.*

(700)—S. 115—*Estoppel against a minor—False and fraudulent misrepresentation by a minor—Principles of liability—See CONTRACT ACT, 1872, s. 11, 5 A.L.J. 674=A.W.N. 1908, 267=31 A. 21=1 Ind. Cas. 704.*



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(701)—S. 115—Contract by minor—Estoppel—See CONTRACT ACT, 1872, ss. 11, 64, 65, 9 Ind. Cas. 124=4 S.L.R. 250.

(702)—S. 115—Taking active interest in partnership business and holding out as partner to strangers how far constitute estoppel under—Fraud or negligence whether essential—See CONTRACT ACT, 1872, ss. 240, 245, 10 C.W.N. 313.

(703)—S. 115—Estoppel by conduct, inducement by other party to act, necessity of—Decrees, basis for priority of—See DECREE—GENERAL, 9 A. 413=A.W.N. 1887, 48.

(704)—S. 115—See EJECTMENT, SUIT FOR, 13 C.L.J. 479, 29 C. 871.

(705)—S. 115—See FRAUD—GENERAL, 2 C.W.N. 18.

(706)—S. 115—Whether acquiescence under a mistake will constitute an estoppel—See HILL TRACTS, 9 C.W.N. 553, P.C.=1 C.L.J. 460=28 M. 130.

(707)—S. 115—Hindu Law—Alienation by widow for necessity—Reversioner's consent and attestation—Suit by reversioner for declaration that sale does not affect his rights—Estoppel—See HINDU LAW—WIDOW, A.W.N. 1888, 294.

(708)—S. 115—Estoppel—Instalment decree—Acceptance of instalments paid on dates other than the due date—See INSTALMENTS, 3 S.L.R. 137=4 Ind. Cas. 479.

(709)—S. 115—See JURISDICTION—CAUSES OF JURISDICTION, 70 P.R. 1906.

(710)—S. 115—See LANDLORD AND TENANT—MISCELLANEOUS, 7 Bom. L.R. 27=29 B. 580.

(711)—S. 115—See MINOR—GENERAL, 13 C.L.J. 228, 3 Bom. L.R. 535.

(712)—S. 115—Intention an essential element—Benami purchase—Real owner not estopped against pre-emptor—See PRE-EMPTION—MISCELLANEOUS, 4 Ind. Cas. 488.

(713)—S. 115—Estoppel—Effect of recital in a deed, in an action not founded on it but wholly collateral to it—Promise whether can be the foundation of estoppel—See TRANSFER OF PROPERTY ACT, 1882, s. 5 (a), 11 O.C. 301.

(714)—S. 115—See TRANSFER OF PROPERTY ACT, 1882, s. 41, A.W.N. 1906, 182=3 A. L.J. 534, 12 Bom. L.R. 457=6 Ind. Cas. 898, 7 A.L.J. 967=7 Ind. Cas. 442.

(715)—S. 115—See NOS. 100, 153, 562, *supra*.

(716)—Ss 115, 68, 69—Estoppel, admissions made in former litigation, amounting to—Admissions—Res judicata—Civ. Pro. Code, s. 13, explanations 1 and 11—Will executed before U.P. Act I of 1869—Will, evidence of execution of, by Mahomedan talukdar—Succession Act, s. 50—Codicil, Proof of execution of—Act I of 1869, s. 19—Mahomedan Law—Witnesses, adjournment of case to enable plaintiff to summon

**Evidence Act (I of 1872)—continued.**

—Witness, non-attendance of, on date, fixed for his examination—Evidence—Plaintiff, failure of, to produce his evidence in time—Civ. Pro. Code, s. 158.—On the 16th March 1862, C.B. executed a will which purported to make a general bequest of her property to the defendant, at the same time providing that the plaintiff was to have four specified villages. On the 14th June, 1876, she, it was alleged, executed a codicil, which purported to revoke the will as regards the four villages. In September, 1877, C.B. brought a suit against the plaintiff for possession of the four villages. The plaintiff, it was alleged, admitted the genuineness and validity of the two deeds in that suit. The suit was decreed against the plaintiff on the 30th July, 1878. C.B. died on the 20th May, 1886. The plaintiff claimed to recover possession of the property as C.B.'s heir under Act I of 1869 and the Mahomedan Law. She denied the genuineness and validity of the will and codicil. The defendant traversed her allegations as to these deeds and alleged that she was estopped by the judgment in the suit between her and C.B. from denying the genuineness and validity of the deed. He did not produce any of the persons who testified to the execution of the deeds or to the admission of their execution by C.B. In the course of the trial of the suit, the Court, on the application of the plaintiff for an adjournment of the hearing of the suit to some other date in order to enable her to have her witnesses summoned for examination, fixed a period of time for the examination of her witnesses and summoned certain witnesses for certain days of such period. The witness summoned for the first of such days did not appear on that day. The Court refused to adjourn the case for the plaintiff's witnesses summoned to attend on the following days, and having heard arguments decided it. *Held* that, having fixed a period of time for the examination of the plaintiff's witnesses, and having summoned certain witnesses for certain days of such period, the Court could not properly refuse to adjourn the hearing of the suit from one of those days to another of them, on the ground that the plaintiff, had failed to cause the attendance of a witness on the day fixed for his examination, that therefore the plaintiff was entitled to have her witnesses summoned for examination. *Held*, that the plaintiff's admission in the suit between her and C.B. regarding the genuineness and validity of the deeds, did not amount to an estoppel. *Held*, that in the former litigation there being no decision that the documents were genuine and valid, the question as to their genuineness and validity could not be held to be *res judicata*. *Held*, that the will having been made before Act I of 1869 came into force, the provisions of that law were not applicable to it. The Mahomedan Law does not appear to require that a will if reduced to writing shall be attested. The provisions of ss. 68 and 69, Indian Evidence Act, were therefore not applicable to the will: and that the admission of the plaintiff in the suit brought by C.B. was



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sufficient proof of the will. *Held* further, that the codicil having been executed after Act I of 1869 came into force, the provisions of s. 19 of that Act, of s. 50 of the Indian Succession Act, and of s. 68 of the Indian Evidence Act were applicable to it. *Held*, therefore, that there was no evidence of the execution of the codicil by C. B. MUSAMMAT NAJBAN BIBI v. SAIYAD RAZA HUSAIN, 4 O.C. 408.

(717)—Ss. 115, 116—*Estoppel—Lease*.—Two persons mortgaged certain property, and five years later joined with another person in executing a lease of certain lands including a portion of the mortgaged property. In a suit on the mortgage to which the lessee was made a party-defendant, *held* that the lessee was not, owing to the lease taken by him five years after, estopped from showing that the mortgagors were not, at the date of the lease, entitled to the whole of the property comprised in the mortgage. PROSUNNO KUMAR SEN v. MAHABARAT SAHA, 7 C.W.N. 575.

(718)—Ss. 115, 116—*See LANDLORD AND TENANT—MISCELLANEOUS*, 5 Bom. L.R. 274=27 B. 515.

(719)—Ss. 115, 116, 117—*Estoppel—Heir entering on wakf property*.—Some of the heirs of a deceased person who entered upon possession of the property as valid *wakf* are not, as against the remaining heirs, barred by the rule of estoppel from disputing the validity of the *wakf*. ALAMGIR KHAN v. KAMARUNNESA KHANUM, 4 C L.J. 442.

(720)—S. 116—*Estoppel of tenant—Res judicata*.—This was a suit for the recovery of a house and Rs. 4-4-0 as rent thereof, on the allegation that it was let to the defendant at a monthly rental, and the defendant had executed a *kabuliyat* in the plaintiff's favour. The defendant, on the other hand, denied the plaintiff's title to the property and his own tenancy. Previous to this suit, the plaintiff had brought another suit for recovery of rent and obtained a decree. In that suit, it was found as a fact that the defendant had actually executed the *kabuliyat*. *Held*, that the defendant having been adjudged a tenant in the former suit, the question was *res judicata*, and that being so, the defendant was estopped, under s. 116 of the Evidence Act, from denying the title of the plaintiff at the beginning of the tenancy. CHHADAMMI v. PARBATI, A.W.N. 1884, 274.

(721)—S. 116—*Abandoned land—State land—Declaration by Collector—Upper Burma Land and Revenue Regulation*, ss. 23 (2), 24 (1).—State land in Upper Burma is very similar to waste land in Lower Burma except that under s. 25 (a), occupancy rights, conferring the status of a landholder cannot be acquired by mere length of possession, and the rules provide for the issue of leases instead of grants. Register XIX (a) is used for State lands. Register XIX (b) is the Annual Record of Rights for a village of "non-State lands." Under s. 24 (1) a declaration by the Collector is necessary before abandoned lands can be treated as State. Where

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Government is not a party to the suit the person who is shown as the registered owner of land in Register XIX (b) is clearly entitled to eject his tenants and to recover the land. MAUNG NI v. MAUNG TAING, L.B.R. 1893-1900, 631.

(722)—S. 116—*Suit for rent—Defendant tenant's plea that the landlord was only a benamidar—Estoppel*.—In a suit for rent, instituted by the person, in whose favour a tenant has executed a lease, the tenant is estopped by s. 116 from raising a plea that the ostensible landlord was only a *benamidar* for somebody else. The question of a lessor's title is wholly foreign to a suit of this nature. BOGAR v. KARAM SINGH, 141 P.R. 1906=96 P.L.R. 1907=13 P.W.R. 1907. (7 B.L.R. 723, F.; 7 B.L.R. 720, 24 W.R. 44, Diss.)

(723)—S. 116—*Benami transactions—Tenant—Defence of benami, not available*.—A tenant cannot deny the title of the landlord from whom he has been holding, and to whom he has bound himself to pay rent, either by alleging that he is a mere *benamidar*, i.e., an agent or trustee for some one else not mentioned in the lease or rent-note, or in any other way; s. 116, Evidence Act, applies to *benami* transactions also. MEER JANGOO v. CHOTE SAHIB, 6 N.L.R. 161. (24 W.R. 44, Diss.; 7 B.L.R. 720, 6 M.L.A. 53, R.)

(724)—S. 116—*Landlord and tenant—Estoppel of tenant denying landlord's title—Possession without title—Ejectment suit against wrong-doer—Limitation Act (IX of 1908), s. 28—Extinguishment of right—Right declared by decree—Execution of the decree barred—Right remains though the remedy is gone*.—By s. 116, Evidence Act, a tenant is only precluded, "during the continuance of the tenancy," from denying that the landlord had "at the beginning of the tenancy" a title to the property, the subject of the tenancy. The words of the section leave it open to the tenant to show that his landlord's title has subsequently expired. Prior possession, however short, is sufficient *prima facie* title in ejectment against a wrong-doer. But mere possession is not sufficient where it is shown that the title is out of the plaintiff. Where the right to property has been established by a decree for possession, the barring of the right of execution does not extinguish the right (s. 28 of the Limitation Act, 1908). The remedy may be gone, but the right remains. BALA KUSHABA v. ABAI AMRITA VAGHMODE, 11 Bom. L.R. 1093.

(725)—S. 116—*Estoppel by a tenant—Lease executed by a tenant in the name of the benamidar—Landlord, the real owner under this section*.—Where a lease is executed by a tenant in favour of the *benamidar*, the real owner, rather than the *benamidar*, must be regarded as the landlord for the purposes of this section. A person, having admitted that he is a *benamidar* and not having shown any right to sue under the general law, has no right to sue the tenant



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for rent, and in such a suit the tenant can deny his right to sue. *KUPPU KONAN v. THIRUGNANA SAMMANDAM PILLAI*, 31 M. 461. (30 M. 245, F.) [R., 7 M.L.T. 177.]

(726)—S. 116—*Estoppel—Licensee and licensor—Suit for use and occupation—No relationship during period in suit.*—A licensee cannot be permitted under s. 116 of the Evidence Act to deny that the licensor had a title to the possession of the property at the time when the license was given to him to enter, though there was no relationship of licensor and licensee subsisting between the parties during the period sued for. *DUKHIMONI DAS v. TULSI CHARAN*, 13 Ind. Cas. 512.

(727)—S. 116—Facts necessary to constitute estoppel of tenant—See *BEN. ACT VIII OF 1885*, ss. 153, 186-A, 9 Ind. Cas. 806.

(728)—S. 116—See *MORTGAGE—REDEMPTION*, U.B.R. 1892-1896, Vol. II, 561.

(729)—S. 116—See *TITLE*, L.B.R. 1893-1900, 4.

(730)—S. 116—See NOS. 13, 717, 718, 719, *supra*.

(731)—Ss. 116 and 117—*Estoppel by agreement—Grantor and grantee—Possession obtained from a grantor without title—Title subsequently acquired by purchase—Denial of grantor's title—Constructive trust.*—The defendant having obtained possession of some land under a deed of sale from P, who had no title to it, afterwards perfected his title by purchase from the real owner. In a suit for recovery of possession of the land brought by the plaintiff, claiming to be a subsequent purchaser from P on the ground that the previous purchase by the defendant was a fraudulent one. *Held*, that the defendant was not estopped from denying P's title and setting up his own as purchaser from the real owner. *Per Rampini, J.*—The estoppel only exists so long as the grantee claims under the title of his grantor alone. *Per Woodroffe, J.*—Ss. 116 and 117 of the Evidence Act or not exhaustive of the doctrine of estoppel by agreement. The ground of the rule of estoppel laid down in *Dalton v. Fitzgerald*, (1897) 1 Ch. 440, S. C. on appeal, (1897) 2 Ch. 86, and similar cases examined. The principle of the rule in such cases is that where property is taken under an instrument and the taking possession is in accordance with a right, which would not have been granted except upon the understanding that the possessor should not dispute the title of him, under whom the possession was derived, there is an estoppel. The ground of the rule of estoppel in the case of bailees, tenants, licensees and acceptors of bills of exchange indicated. *RUP CHAND GHOSE v. SARBESSUR CHANDRA CHUNDER*, 10 C.W.N. 747=3 C.L.J. 629=33 C. 915.

(732)—S. 117—See *ESTOPPEL—ESTOPPEL BY CONDUCT*, 4 C.W.N. 283.

(733)—S. 117—See NOS. 719, 731, *supra*.

(734)—Ss. 120, 132—See *ACT IV OF 1869*, ss. 51, 52, 4 A. 49=A.W.N. 1882, 41.

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(735)—Ss. 123, 124—Privilege attaching to an official publication—See *ACT OF STATE*, 6 Bom. L.R. 131.

(736)—Ss. 123, 124 and 162—*Income Tax Act (II of 1886)*, ss. 14, 26 and 38—*Statement before Income Tax Collector—State-documents—Official communication—Privilege—Officer's liability to bring documents—Court's power to record evidence—Validity of reasons for non-production—Disclosure to Court no breach of official confidence—Documents produced on process of law.*—Statements made before the Income Tax Collector do not relate to affairs of State and so are not governed by s. 123 of the Evidence Act. The Income Tax Collector, summoned to produce, is bound to produce the books in his possession, in spite of the rules made under s. 38 of the Income Tax Act, forbidding disclosure. (26 B. 281, R. & Appr.) Under s. 162 of the Evidence Act, a witness should not decline to bring documents to Court on the ground of privilege. Under the same section, the Court has power to inspect the documents for the purposes of deciding objections regarding production or admissibility. The provision relating to the non-disclosure of information, given or obtained "in official confidence," does not apply to the production of documents in a Court of Justice. Rule 15, framed under s. 38 of the Income Tax Act, is meant only for the guidance of the Income Tax Officers, and not for the preclusion of any evidence being given in a Court of Justice. Orders under s. 14 or s. 26 of the Income Tax Act, determining the amount of income tax are not privileged documents. Documents produced or statements made under process of law cannot be said to be made or given "in official confidence." *VENKATACHELLA CHETTIAR v. SAMPATHU CHETTIAR*, 4 M.L.T. 317=32 M. 62=19 M.L.J. 263=1 Ind. Cas. 705.

(737)—S. 124—See NOS. 735, 736, *supra*.

(738)—Ss. 124 and 162—S. 15 of the *Charter Act*—S. 115 of the *Civ. Pro. Code*—*Powers of the High Court to revise interlocutory orders.*—In this case the plaintiff summoned an Engineer to produce certain documents addressed to him by a subordinate officer, in the District Munsif's Court of Mayavaram. The Engineer forwarded the documents along with a letter to the Munsif, in which he said that "the production is not in the interest of public service." Thereupon the District Munsif ruled that the documents were privileged within the meaning of s. 124, Evidence Act, and even refused to inspect them under s. 162. The plaintiff preferred a revision petition against that order to the High Court. A preliminary objection was taken that the High Court has no power to revise such an order. *Held*, that s. 15 of the Charter Act is sufficiently wide to cover a case of this nature. (31 M. 60, 28 M. 28, F.) *Quære* :—Whether s. 115 of the *Civ. Pro. Code* of 1908 was intended to apply to interlocutory orders. On the merits, *held*, that what the Engineer intended to convey by his



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letter was that in his opinion the production of the documents would be detrimental to the interests of the public within the meaning of s. 124 of the I.E. Act; and that the inspection of the documents was entirely within the Munsif's discretion under s. 162, and it cannot be said in this case that his refusal to inspect them was an improper exercise of discretion. **NAGARAJA PILLAI v. VYTHIANATHA IYER, (1911) 2 M.W.N. 369.**

(739)—S. 126—*Communication to attorney—Privilege.*—A communication to an attorney to be privileged, must be of a confidential or private nature. Such a communication made in the presence and hearing of the opposite party or made to the attorney not exclusively in his character as attorney of the party making it, but addressed to him also as attorney of the opposite party, is not privileged. **MEMON HAJEE HAROON MAHOMED v. MOLVI ABDUL KARIM, 3 B. 91. [R., 18 B. 263.]**

(740)—S. 126—*Mukhtear and clerk—Confidential communications.*—In cases where mukhtears act as pleaders for their clients, s. 126, Evidence Act, applies to them also, and statements made to them by their clients are privileged. **ABBAS PEADA v. QUEEN-EMPRESS, 25 C. 736 = 2 C.W.N. 484.**

(741)—S. 126—*Pleader—Communication by client—Privilege.*—A pleader cannot claim privilege under s. 126 of the Evidence Act, against disclosing statement made to him by a person, if the same is not made to him in the course and for the purposes of his employment as a pleader: and the fact that the pleader has been acting as a professional adviser to the party, makes no difference. **EMPEROR v. BALA, 4 Bom. L.R. 460.**

(742)—S. 126—*Solicitor—Client—Privileged communication—Statements made by a client to his solicitor for communication.*—S. 126 of the Evidence Act, 1872, has no application where the statement made by a client to his solicitor is made not as confidential but for the purposes of communication. **EMPEROR v. RODRIGUES, 5 Bom. L.R. 122.**

(743)—S. 126—*Scope of—Practice—Civ. Pro. Code, 1882, s. 130.*—Under the Evidence Act, 1872, in regard to certain documents when they are absolutely privileged, the Court has no power whatever to order production. But under s. 130 of the Civ. Pro. Code, 1882, the Court does possess the discretion, and the discretion is to be exercised according to the practice of the Court. And although a document may not be such as passed directly between the legal adviser and the client, yet it is of such a nature as to make it quite clear that it was obtained confidentially for the purpose of being used in litigation and with a view to being submitted to legal advisers, when the Court will not compel the production of such a document. **VISHNU v. NEW YORK LIFE INS. CO., 7 Bom. L.R. 709.**

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(744)—S. 126—*Professional confidence statement made by client's to pleader in—Disclosure without client consent—Impropriety—Inadmissibility in evidence.*—Plaintiff sought to prove that defendant, who had recovered a decree for possession of property against certain third parties, was plaintiff's benamidar, and for that purpose examined defendant's pleader in that suit, who deposed that defendant had informed him that he was plaintiff's benamidar: *Held*, that the statement of the pleader, having been made without his client's consent, was inadmissible in evidence under s. 126, Evidence Act. The pleader acted improperly in disclosing without his client's consent communications made to him in confidence as pleader. **BAKAULLA MOLLAH v. DEBIRUDDIMOLLAH, 16 C.W.N. 742.**

(745)—S. 126—*See CIV. PRO. CODE, 1908, O. XI, r. 14, 7 Bom. L.R. 709.*

(746)—S. 126—*See MORTGAGE—FORM OF MORTGAGES, L.B.R. 1872-1892, 412.*

(747)—S. 126—*See No. 11, supra.*

(748)—Ss. 126, 127—*Communication to a pleader's clerk, whether privileged.*—Though a communication contained in a letter is not addressed to a pleader direct, but to his clerk, s. 127, I.E.A., extends to such a communication, the same confidential character that attaches to a communication to a pleader under s. 126. (Per *Banerjee, J.*) **KAMESHWAR PERSHAD v. AMANUTULLA, 26 C. 53 = 2 C.W.N. 649.**

(749)—Ss. 126, 127—*Evidence of advocate's clerk—Professional misconduct.*—It is misconduct from a professional point of view for an advocate, after being consulted in his capacity of advocate about a case and after learning particulars of the case as stated by one side, to undertake the case in the interest of the opposite party. The fact that there was no definite agreement by the first party makes no difference. The evidence of the advocate's clerk is inadmissible under ss. 126 and 127 of the Evidence Act. **MAUNG MYA U v. SUN SINGH, U.B.R. 1897-1901, Vol. II. 368. [Expressed, U.B.R. 1910, 3rd Qr. Civil, 50.]**

(750)—S. 127—*See NOS. 748, 749, supra.*

(751)—Ss. 130, 90—*Evidence, Admissibility of—Evidence Act, s. 130—Witness not producing document—Warrant, Application for—Non-payment of process-fee—Statement by third party as to right, Admissibility of—Evidence Act, s. 90, Scope of—Erroneous reason as to applicability—Interference in second appeal—Road-cess return, Admissibility of—Recital, Absence of—Person not party.*—When a plaintiff caused summonses to be served upon the witness who had custody of the original and was called upon to produce it, but did not comply with the order of the Court, an application was made for the issue of a warrant against the witness, which was rejected as no process-fee was paid for the service of the writ: *Held*, that it did not amount to a default on the



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part of the plaintiff, and he was entitled to use the certified copy of the document as secondary evidence. (14 C.L.J. 120, R.) A statement by the grantor, who was the landlord of the plaintiff, in the schedule to the lease, that, on the boundary of the land demised, was the holding of the predecessor of the plaintiff, is admissible in evidence against the defendant, although he was not a party to the transaction evidenced by that document. (14 C.L.J. 467, R.) When the reasons assigned by the lower appellate Court as to the applicability of the provisions of s. 90 of the Evidence Act are erroneous in law, the High Court can interfere in second appeal. (11 C. 539, R.) Under s. 90 of the Evidence Act, it is not obligatory upon a Court to assume that the document produced is genuine, merely because it purports to be thirty years old and is produced from proper custody. The Court has a discretion in the matter, but that discretion must be judicially exercised. The Court has first to consider whether, in the circumstances of the particular case, the document has been produced from the custody which may be deemed proper. When this is found in favour of the party who has produced the document, the question arises, whether the Court should, in the exercise of the discretion vested in it, raise the presumption of genuineness with regard to the document. The absence of the name of the predecessor of the plaintiff from the category of tenants mentioned in the road-cess return is evidence against the plaintiff. *IMRIT CHAMAR v. SRIDHARI PANDEY*, 15 C.L.J. 7. (4 C.W.N. ccvii, R.; 10 C. 1024, 7 C.L.R. 356, 30 C. 231=30 I.A. 1, Expl.)

(752)—S. 132—*Defamatory statement in the course of a deposition when privileged—Penal Code, s. 500.*—The accused, while deposing before a Magistrate, was asked by the cross-examining pleader "whether Kanu had asked pardon of Haider Ali in a *punchayet*" and in the course of his answer he made the following statement which was false, viz., Haider Ali admitted in the *punchayet* that Kanu beat him with a wooden shoe." Held, that the statement of the accused was defamatory under s. 500 of the Penal Code and was not privileged under s. 132 of the Evidence Act, as it was a voluntary statement not relevant to the issue in the case in which he deposed and was not elicited by the pleader putting questions, and as, further, the accused was actuated by malicious motives against Haider Ali. *HAIDAR ALI v. ABRUMIA*, 9 C.W.N. 911=2 C.L.J. 105=2 Cr. L.J. 439. (21 C. 392, F.; 17 B. 573, 11 M. 477, 17 B. 127, R.)

(753)—S. 132—*Privilege of witnesses in answering questions—Effect and scope of expression "compelled to give"—Indian Oaths Act (X of 1873), s. 14.*—S. 132 of the Indian Evidence Act (I of 1872) makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer, and gives him a

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protection in the latter cases only. If protection is allowed in every case in which a witness gives an answer, the words "be compelled to" in the proviso to the section are quite superfluous. The insertion of those words shows that protection is afforded only to answers which a witness has objected to give or which he has asked to be excused from giving, and which then he has been compelled by the Court to give. Per *Birdwood, J. (dissentiente)*.—S. 132 of the Evidence Act, read with s. 14 of Act X of 1873 (Indian Oaths Act), compels a witness to answer criminating questions, and he is protected by the proviso to s. 132 from a criminal prosecution for any offence of which he criminales himself directly or indirectly by his answer, except a prosecution for giving false evidence by such answer. It is not only when a witness asks to be excused from answering a criminating question, and his request is refused, that he is "compelled to give" the answer within the meaning of the proviso. The compulsion is operative whether he asks to be excused or gives the answer without so asking. *QUEEN-EMPRESS v. GANU SONBA*, 12 B. 440. [F., 21 C. 392; R., 13 B. 600.]

(754)—S. 132—Answers not objected to—No privilege—See ACT XVIII OF 1879, ss. 13, 40, 6 M.L.T. 253, F.B.=3 Ind. Cas. 344.

(755)—S. 132—See NO. 734, *supra*.

(756)—S. 133—See CIV. PRO. CODE, 1908, O. XLI, r. 27, U.B.R. 1897-1910, Vol. II, 309.

(757)—S. 135—See NO. 15, *supra*.

(758)—Ss. 137, 138 and 154—Examination of defendant as witness for plaintiff at the very outset of the case. propriety of—See RES JUDICATA—MISCELLANEOUS, 116 P.W.R. 1908.

(759)—S. 138—See NO. 758, *supra*.

(760)—S. 145—*Entries made by witness in another's account book on his dictation, inadmissibility of, to contradict witness.*—Where a person employed by another for the purpose of writing up his account books had made entries therein on information furnished by that other person such entries could not be regarded as previous statements made by him in writing which could be given in evidence to contradict him as a witness. *MUNCHERSHAW BEZONJI v. THE NEW DHURUMSEY S. & W. COMPANY*, 4 B. 576.

(761)—Ss. 146, 150—*Cross-examination—Question reflecting on third party—Jurisdiction of Court to report—Counsel, Instructions to—Privileged document—Full Bench—Jurisdiction to direct or hold inquiry about conduct of Counsel—Division Bench, whether has got power.*—When a question in cross-examination reflects not on the witness but on a third party, s. 150 of the Evidence Act, which must be referred back to s. 146, can have no application. The instructions to Counsel are a privileged document belonging to the client, and Counsel is prohibited from disclosing what is contained in those instructions



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as being of a confidential nature. The question whether a Counsel has exceeded the license given him for the purpose of conducting his client's case, is one that can only be dealt with by a Full Bench. **PEARY MOHUN DAS v. DONALD WESTON**, 9 Ind. Cas 599. (10 M. 28, 2 Bom. L.R. 3, R.)

(762)—S. 150—See NO. 761, *supra*.

(763)—Ss. 150, 152—Powers of the Court to keep counsel within control — See **LEGAL PRACTITIONERS—ADVOCATE**, 2 Bom. L.R. 3.

(764)—S. 152—See NO. 763, *supra*.

(765)—S. 154—See NO. 758, *supra*.

(766)—S. 155—See NO. 33, *supra*.

(767)—S. 155 (3)—“Which is liable to be contradicted,” meaning of—Impeaching the credit of a witness, evidence in reply.—The words, “which is liable to be contradicted,” in s. 155 (3) Indian Evidence Act, mean “which is relevant to the issue.” The claim of the plaintiff being opposed on the plea of limitation, she put in evidence an entry in a koran in proof of her date of birth, and in the cross-examination of a witness for the defence she put to him a letter supporting her case and purporting to have been written by her father to that witness. The genuineness of the koran and of certain words in the letter being denied by that witness, on the proposal on behalf of the plaintiff to give evidence, in reply, impeaching the credit of the witness, *held* that, as regards koran but not as regards the letter, evidence might be given; the reason for not permitting to give evidence as regards the letter being that no substantive evidence having been given about it before the plaintiff's case had been closed. **KHADIJAH KHANUM v. ABDOOL KUREEM SHERAJI**, 17 C. 344.

(768)—S. 157—Dying declaration—Complainant remaining alive—Deposition—Corroboration.—Where a person making a dying declaration chances to live, his statement cannot be admitted in evidence as dying declaration under s. 32 of the Evidence Act, but it may be relied on, under s. 157 of the Evidence Act, to corroborate the testimony of the complainant when examined in the case. **EMPEROR v. RAMA SATTU**, 4 Bom. L.R. 434.

(769)—S. 157—See NOS. 28, 33, 94, 155, *supra*.

(770)—Ss. 157, 159, and 160—Admissibility of *pyatpaing* in evidence—Transaction whether sale or mortgage—Burden of proof—Mutation of names in revenue register.—Where the question is whether a transaction is a sale or a mortgage, and a person sues to redeem the property on the ground that the transaction is only a mortgage, but the defendant contends that it is a sale, the burden of proof rests on the defendant to prove the sale, at any rate, in the first instance. If mutation of names has taken place, the *pyatpaing* or outer foil of the revenue register of mutations, if not signed by the owner of the land, is not admissible in evidence to prove the report of the transaction

**Evidence Act (I of 1872)—concluded.**

made to the headman or surveyor, who maintains the register. (1 L.B.R. 260, R.) But if such officer is called as a witness and gives evidence of the terms of the report from his own memory, then such *pyatpaing* is admissible in order to corroborate his testimony under s. 157. The *pyatpaings* must often be of considerable use also under ss. 159 and 160 of the Act. **SHWE PAN v. MAUNG FO**, 3 L.B.R. 280. (3 L.B.R. 5, R.)

(771)—S. 159—Register containing particulars of lost bonds—Document to refresh memory of witness.—Where, the plaints in suits upon bonds by the same plaintiff having been destroyed by fire, while under the Court's custody, through no fault of the plaintiff, suits were re-instituted upon duplicate copies of the plaints prepared from a register containing particulars of the lost bonds, *held*, that the register, though it might not be secondary evidence of the contents of the bonds, was a document that might be used for refreshing a witness's memory under s. 159 of the Evidence Act. **TARUCK NATH MULLICK v. JEAMAT NOSYA**, 5 C. 353.

(772)—S. 159—See NO. 770, *supra*.

(773)—S. 160—Practice as to admitting secondary evidence.—The question whether secondary evidence was in any given case rightly admitted is one which is proper to be decided by the Judge of first instance and is treated as depending very much on his discretion. His conclusion should not be overruled except in a very clear case of miscarriage. **NINGAVA v. RAMAPPA**, 5 Bom. L.R. 708=28 B. 94.

(774)—S. 160—See NO. 770, *supra*.

(775)—S. 161—See NO. 19, *supra*.

(776)—S. 162—See NOS. 736, 738, *supra*.

(777)—S. 163—Document—Inspection—Evidence for both parties.—Where a party to a case calls for a document from the other party and inspects the same under s. 163 of the Evidence Act, 1872, he takes the risk of making it evidence for both parties. **MAHOMED v. ABDUL**, 5 Bom. L.R. 380.

(778)—S. 167—Copy of deposition of living witness—Improper admission—New trial.—The improper admission of the copy of a deposition of a living witness is not, *ipso facto*, ground for a new trial, where there is ample evidence to justify the decision independently of the evidence so admitted. **WOOMA KANT BUKSHEE v. GUNGA NARAIN CHOWDHRY**, 20 W. R. 384.

(779)—S. 167—See NO. 308, *supra*.

**Evidence, Bankers' Books Act.**

See ACT XVIII OF 1891.

**Examination.**

Board of examiners, discretion of—Mandamus—Jurisdiction of the Court to interfere—See **LEGAL PRACTITIONERS—ATTORNEY**, 12 C.W. N. 873=4 M.L.T. 157=35 C. 915.



**Examination—concluded.**

Pledership examination—Board of examiners—Standard of marks required for pass certificate raised without notice to candidates—Application by unsuccessful candidates for revision of list of successful candidates—See PLEADERSHIP EXAMINATION, 9 A. 611, J.B. = A.W.N. 1887, 148.

**Examination of witnesses.**

See COMMISSION.

See WITNESS

See ACT XVIII OF 1879, s. 36, 26 M. 596.

See COSTS—SPECIAL CASES, 14 C. 219.

**Excavations.**

Power of a tenant holding under a permanent lease to make—Injunction — Damages—See LANDLORD AND TENANT—MISCELLANEOUS, 9 C.W.N. 255.

**Exchange.**

(1)—*Deed of exchange—Registration.*—A deed of exchange, the first part of which merely recites what had already taken place and the other parts of which simply provides a penalty if either party fails to carry the arrangement to its full effect is not a compulsorily registrable document. AMIR-UD-DIN v. JAMAL UD-DIN, 26 P.R. 1891. [R., 48 P.R. 1905 ; D., 120 P.R. 1894.]

(2)—*Exchange—Addition of small sums of money—Effect—Two sale deeds.*—An exchange does not change its character if in order to equalise the properties exchanged a small sum of money is added ; nor does an exchange alter its nature because it is effected by two contemporaneous deeds of sale such being the usual method of effecting an exchange. NATHU MAL v. HAR DIAL, 97 P.R. 1900.

Of holdings among tenants—Alteration in the area of holdings—Road cess return—See BEN. ACT IX OF 1880, s. 4, 11 C.W.N. 211.

Of occupancy rights—Suit by tenant for declaration that he is occupancy tenant by exchange—Jurisdiction—See PUN. ACT XVI OF 1887, s. 77 (3) (d), 139 P.R. 1906 = 110 P.L.R. 1907.

Of parts of property liable to partition—Effected during suit for pre-emption—Binding nature of—on pre-emptor—See U.P. ACT III OF 1901, s. 233, 10 O.C. 363.

Exchange—Mercantile usage in Tuticorin—Proof—See CONTRACT ACT, 1872, ss. 49, 77, 151, 11 M. 459.

See COURT FEES ACT, 1870, s. 34, 7 C.W. 704 = 30 C. 921.

Costs awarded by decree of Privy Council, rate of, in estimating—'For the time being,' meaning of—See EXECUTION OF DECREE—PRIVY COUNCIL. EXECUTION OF ORDERS AND DECREES, OF, 8 A. 650 = A.W.N. 1886, 249.

See EXECUTION OF DECREE — PRIVY COUNCIL, EXECUTION OF ORDERS AND DECREES OF, 23 C. 357, 25 C. 283 = 2 C.W.N. 89.

**Exchange—concluded.**

Suit upon covenant in registered deed of exchange of lands—Special contract to indemnify on deprivation—See LIMITATION ACT, 1908, arts. 83, 113, 116, 18 M.L.J. 477 = 5 M. L.T. 211 = 31 M. 452.

See LIMITATION ACT, 1908, ART. 113, 9 M.L.J. 137.

Of land—Pre-emption — *Lis pendens*—See PRE-EMPTION—RIGHT TO PRE-EMPT, 30 P.R. 1911.

See TRANSFER OF PROPERTY ACT, 1882, s. 119, 9 M.L.J. 137.

**Excise.**

Selling rate of Excise Opium. Rye. Cir. No. 5, 25 W.R. Rev. Cir. 30.

**Excise Act.**

See ACT XXII OF 1881.

See ACT XII OF 1896.

See BEN ACT VII OF 1878.

**Excise and Licensing Act, Bengal.**

See BEN. ACT VII OF 1878.

**Excise and Licensing Act Amendment Act, Bengal.**

See BEN. ACT II OF 1903.

**Exclusion from Inheritance.**

See HINDU LAW—INHERITANCE.

**Exclusion of Time.**

See LIMITATION ACT, 1908, s. 12.

**Excommunication.**

See RIGHT OF SUIT—CASTE QUESTIONS, SUITS CONCERNING.

Is a defence to an action of restitution of conjugal rights—See CASTE, 9 Bom. L.R. 451 = 31 B. 366.

Declaration as outcaste illegally made — Damages—See DEFAMATION, 12 M. 495.

See JURISDICTION—ECCLESIASTICAL JURISDICTION, L.B.R. 1872-1892, 70.

See JURISDICTION OF CIVIL COURTS, 23 B. 122, 13 M. 293.

**Execution in Presidency-towns of Mufassal Process Act.**

See ACT XXIII OF 1840.

**Execution of Decree.**

1.—GENERAL.

2.—APPEAL, REVIEW, ETC., EXECUTION OF DECREE AFTER.

3.—APPLICATION FOR EXECUTION AND POWERS OF COURT.

4.—EFFECT OF CHANGE OF LAW PENDING EXECUTION.



**Execution of Decree—continued.****5.—EXECUTION BY COLLECTOR.****6.—EXECUTION BY OR AGAINST REPRESENTATIVES.****7.—EXECUTION OF DECREE ON OR AFTER AGREEMENTS OR COMPROMISE.****8.—JOINT DECREES, EXECUTION OF.****9.—MAINTENANCE.****10.—MODE OF EXECUTION.****11.—NATIVE STATES, DECREES OF, COURTS OF.****12.—NOTICE OF EXECUTION.****13.—PRIVY COUNCIL, EXECUTION OF ORDERS AND DECREES OF.****14.—STAY OF EXECUTION.****15.—STEP IN AID OF EXECUTION.****16.—STRIKING OF EXECUTION PROCEEDINGS.****17.—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION.****18.—MISCELLANEOUS.**

See CIV. PRO. CODE, 1908, SS. 36 TO 74, AND OO. XXI AND XXXVIII.

**—1.—General.**

See ARREST.

See ATTACHMENT.

See BURDEN OF PROOF—EXECUTION OF DECREE.

See CIV. PRO. CODE, 1908, SS. 36 TO 74, O. XXI, SCH. III.

See COLLECTOR.

See LIMITATION ACT, 1908, ARTS. 181 TO 183.

See RES JUDICATA—RES JUDICATA IN EXECUTION PROCEEDINGS.

See SALE—SALE IN EXECUTION OF DECREE.

(1) — *Court of law — Practice — General principles.*—No Court of law would show any desire to throw obstacles in the way of creditors obtaining payment of their just claims. At the same time, the Court must insist that creditors in executing their decrees shall proceed in a legal and proper manner. *In the matter of SHARD*, 28 C. 374.

(2) — *Duty of Court—Court to execute decree as far as possible.*—Where a decree-holder applies for execution, the Court to which the application is made should not reject it on light grounds, and even where a decree is not quite intelligible, the Court must as far as possible construe it in a fair and reasonable spirit so as to advance instead of impeding its execution. *AHILYABAI v. KASHINATH*, 5 Bom. L.R. 802.

**Execution of Decree—continued.****—1.—General—continued.**

(3) — *Civ. Pro. Code of 1859 and 1877, s. 230—Execution* — Execution applications should be dealt with under the law which is in force at the time execution is sought. The procedure laid down in s. 230 of the new code applies only to applications under that section. The effect of the last clause is to preserve to decree-holders, for a definite period, the right in respect to recovery which they possessed under the old law. *BYRADDI SUBBAREDEI v. DASAPPA RAU*, 1 M. 403. [D., 6 C. 504]

(4) — *Difficulty in carrying out decree not to deter its being passed.*—A Court should not be deterred from making a necessary decree from the difficulties to be expected in carrying it out. *PURAPPANALINGAM CHETTI v. NALLASIVAN CHETTI*, 1 M.H.C. 415. [R., 29 M. 1; D., 32 M. 167 = 19 M.L.J. 59 = 2 Ind. Cas. 341 = 4 M.L.T. 486.]

(5) — *Non-existence of decree—Execution sanctioned in ignorance—Effect.*—If there is no decree capable of execution, an order of attachment passed in ignorance or the act of parties done under a misconception will not enable a party to execute. *RAM DHAN v. JALAL*, 143 P.R. 1890.

(6) — *Execution of decree—Application not specifying mode of assistance from Court, defective—Civ. Pro. Code (Act V of 1908), O. XXI, r. 11, cl. (2) (j).*—An application for execution of a decree, which does not specify the mode in which the assistance of the Court is required, is defective, and unless the defect is remedied the application must be dismissed. (19 B. 34, F.) On such a defective application, the Court should abstain from deciding whether or not the decree is capable of execution. *SATISH CHANDRA MOOKERJEE v. PURNA CHANDRA DUTT*, 11 Ind. Cas. 696.

(7) — *Execution of decree—Partition—Civ. Pro. Code, 1882, s. 396—Incomplete decree not capable of being executed.*—The decree passed in a suit for partition of non-revenue paying property was to the effect that the plaintiff was entitled to get possession of a one-fifth share of the property set forth in the plaint, but it did not go on to specify and define the particular one-fifth share allotted. *Held*, that the decree in this shape was incapable of execution, and that the proper course was to send the case back in order that the decree might be completed by definition by metes and bounds of the shares allotted thereby. *GANGA RAM v. MUHAMMAD ALI*, A.W.N. 1803, 187. (20 A. 311, A.W.N. 1899, 124, R.)

(8) — *Execution of decree—Sale—Non-service of notice on judgment debtor—Civ. Pro. Code (Act XIV of 1882), s. 248—Sale bad.*—The omission to give notice under s. 248 is a grave irregularity sufficient by itself to justify a reversal of the sale, if a proper proceeding is taken in that behalf. Such omission does not nullify the sale, in the sense that the judgment-debtors become thereby entitled to ignore the sale as if



**Execution of Decree—continued.****—1.—General—continued.**

it had never taken place; the true position is that, if an application is made to set aside the sale, and it is proved that the judgment-debtor has been prejudiced, the sale cannot be supported. *SHAM SUNDAR SINGH v. JHUMAT SHAH*, 11 Ind. Cas. 893. (25 B. 337, 27 I.A. 216, 5 Ind. Cas. 390, 11 C.L.J. 489, 14 C.W.N. 560, *Rel. on.*)

(9)—“*Equitable execution*”—*Appointment of receiver.*—The appointment of a Receiver at the instance of a judgment-creditor is “equitable execution.” *FINK v. MAHARAJ BAHADGOR SINGH*, 26 C. 772=4 C.W.N. 27. [*R.*, 10 O.C. 268 (B).]

(10)—*Dismissal of execution proceedings in default—Decree holder's right to get restoration—Act V of 1908, s. 141, rules 8 and 9 of Order IX—Act XIV of 1882, s. 647, Explanation.—Held.* that s. 141 of Act V of 1908 does apply to proceedings under execution of decree. An application for execution dismissed in default under rule 8 of Order IX can be restored under its rule IX. *NIHAL CHANDA v. CHAND SINGH*, 3 P.W.R. 1912 (37 P.R. 1862, *overruled*; 7 Ind. Cas. 241, *F.*)

(11)—*Decree. Execution of—Previous application dismissed for default—Civ. Pro. Code. (Act V of 1908), s. 141 and O.IX r.9.*—Successive applications for execution of a decree are admissible, even though a previous application may have been dismissed for default. *ASIM MANDAL v. RAJ MOHAN DAS*, 13 C.L.J. 332. (12 C.L.J. 6, *Diss.*)

(12)—*Act VIII (B.C.) of 1869, s. 34—Execution of rent-decree—Procedure.*—S. 34 of the Rent Act VIII (B.C.) of 1869 gives the Civil Court a concurrent jurisdiction under the Civ. Pro. Code, and enables a decree-holder, in a suit for arrears of rent, to proceed either under the general powers conferred under the Code or under the Rent Law. *KRISTORAM ROY v. JANOKEE NATH ROY*, 9 C.L.R. 324. (3 C.L.R. 551, P.C., *F.*)

(13)—*Application for transfer of decree for execution in another Court, whether application for execution—Bengal Tenancy Act (VIII of 1885), sch. III, part III, art. 6—Limitation—Execution of restitution order—Civ. Pro. Code (Act V of 1908), s. 151—Inherent power of Court—Court not to override express provisions of law.*—An application to the Court, which passed a decree, for the transfer of the decree for execution to another Court, is not an application for execution of the decree. (16 C. 744, *F.*) An order of the appellate Court, ordering the respondent to pay a portion of the appellant's costs which had been awarded against the latter in the Court below, made in a suit for rent between the landlord and tenant, falls directly within the purview of art. 6 of part III of sch. III of the Bengal Tenancy Act. S. 151 of the Civ. Pro. Code, 1908, does not authorize a Court to override the express provisions of any law. *RAJ KUMAR SEN v. ANNODA CHARAN SEN*, 9 Ind. Cas. 246.

**Execution of Decree—continued.****—1.—General—continued.**

(14)—*Execution—Court executing the decree.*—*Per Batty, J.*—A Court executing a decree cannot question the jurisdiction of the Court which passed it. *TRIMBAKRAO v. BALWANT-RAO*, 7 Bom. L.R. 659=30 B. 101.

(15)—*Execution proceeding—Want of bona fides—Onus of proof—Proceedings ineffectual—Mistake—Limitation.*—Where in execution proceedings, a charge is made of want of *bona fides*, it lies upon the party making that charge to substantiate it by evidence satisfactory to those who have to decide the question. In considering whether certain execution proceedings were *bona fide* or not, their Lordship of the Privy Council cannot be confined to a particular attempt to revive the execution, but must look at the whole course of the proceedings, and when they find that the first proceeding to obtain execution was not only prosecuted but prosecuted with effect and a large sum obtained and that in the third attempt, when the defendant set up the defence of limitation and attempted to bar the proceeding, the decree-holder had successfully opposed him in two Courts, going up to the High Court, their Lordships thought that the case afforded strong evidence of a *bona fide* desire to execute the decree. Where, in execution of a decree, a proceeding is taken which is ineffectual because of some mistake in the particular step which has been advised, if it was a step which the plaintiff had taken to enforce his decree, it protects him from the operation of the Statute of Limitations. *BENODERAM SEN v. BROJENDRO NARAIN ROY*, 13 B.L.R. 169, P.C.=21 W.R. 97.

(16)—*Act XXIII of 1861, s. 11—Execution of decree—Separate suit.*—The plaintiff claiming under a *wuseuthnamah* from his father, the alleged sole proprietor, sued for possession and declaration of title in respect of certain property sold in execution, alleged to have been taken out fraudulently, during his minority, of a decree barred by limitation. *Held*, that the question ought to have been raised in the Court executing the decree, and not in a separate suit, the latter course being contrary to Act XXIII of 1861, s. 11. *NOJABUT ALI CHOWDHRY v. SHEKH MOHA BUSSEEROOLLAH CHOWDHRY*, 11 B.L.R. 42=20 W.R. 5. (5 B.L.R. 68, *R.*) [*F.*, 23 W.R. 257, 24 W.R. 45.]

(17)—*Execution of decree—Questions to be determined in—Separate suit relating to property sold in execution—Legal representative—Civ. Pro. Code, s. 244.*—A Hindu widow, having only a life-interest in her husband's property, mortgaged a portion of it to the appellant for a certain sum of money. The appellant brought a suit against her to recover the mortgage-money by sale of the mortgaged property. To this suit, on her death during the proceedings, the respondents were made defendants, as her legal representatives. A decree was passed against these defendants to be satisfied out of the



**Execution of Decree—continued.****—1.—General—continued.**

deceased widow's personal estate in their hands. In execution of this decree, a portion of the mortgaged property was sold by auction and purchased by the appellant. The respondents brought a suit against the appellant for possession of the property purchased by him at the auction sale, on the allegation that it did not form part of the widow's estate, but belonged to the estate of her husband. *Held*, that the appellant was entitled to retain the property purchased by him. Whether the property formed part of the widow's estate or belonged to the estate of her husband was a question which ought to have been decided in execution, and could not be made the subject of a separate suit by the respondents. The provisions of s. 244, Civ. Pro. Code, make no distinction in this respect, between representatives brought on the record before, and representatives brought on the record, after decree. *GAJADHAR PARSHAD v. AMBIKA SAHAE*, 1 O.C., Sup. Vol. 61.

(18)—*Question for Court executing decree—Separate suit—Suit by judgment-debtor for declaration as to payment of decretal amount and to set aside order refusing certification of such payment—Civ. Pro. Code, ss. 244, 258—Plea taken first in second appeal—Costs.*—A judgment-debtor applied to the Court executing a decree to call upon the decree-holder to certify the receipt of payment in part of the decretal amount under s. 258 of the Civ. Pro. Code. The Court dismissed the application on the ground that it was beyond time. The judgment-debtor brought a suit for cancellation of this order, for disallowance of the decree-holder's objection, and for a declaration that the alleged payment had been made and that the application for a certificate had been presented within time. *Held*, that the question involved being one relating to the execution, satisfaction or discharge of the decree, within the meaning of s. 244 of the Code, could not be made the subject of a separate suit, and that the suit must, therefore, be dismissed, notwithstanding that the defendant's plea to this effect was made for the first time at the stage of second appeal; but that, in consequence of the defendant's delay in taking the plea, each party must pay his own costs. *TULSHA v. BADRI DAS*, A.W.N. 1889, 95.

(19)—*Execution of decree—Civ. Pro. Code, 1877, s. 244—Excess money collected in execution—Separate suit.*—Excess money unduly collected, as due under a decree, is recoverable by application to the Court executing the decree and not by separate suit. *PARTAB SINGH v. BENI RAM*, 2 A. 61, F.B. (1 A. 388, Diss.; 1 B.L.R. 138, 4 B.L.R., A.C., 111, D.) [F., A.W.N. 1881, 79, 2 O.C. 315, 24 A. 291=A.W.N. 1902, 67; D., 5 A. 94=A.W.N. 1882, 188, 7 A. 170, F.B.=A.W.N. 1884, 319.]

(20)—*Execution of decree—Question of title between decree-holder and third person.*—Where, in the course of execution of a decree, a question of title is raised, not only as between the

**Execution of Decree—continued.****—1.—General—continued.**

parties to the decree, but also as between either of them and a third party, such question cannot be decided by the Court executing the decree, but can only be decided in a separate suit. *PUSAI v. MAHADEO PRASAD*, 6 A. 12=A.W.N. 1883, 173.

(21)—*Holder of money-decree—Suit against stranger to recover amount by sale of property in his possession on ground that it is judgment-debtor's—Execution.*—The holder of a money decree against S brought a suit against G, brother of S, to recover the amount of the decree by sale of certain property, on the ground that, though the property was in the possession of G, it was the judgment-debtor's property and was therefore liable to be sold in execution of his decree. The plaintiff before bringing the suit did not institute any proceedings in execution for the attachment of the property. The plaintiff alleged that his cause of action for the suit arose when, by inspection of the Revenue Records, he found that G was entered as owner of the property. *Held*, that the plaintiff should have proceeded in the execution department in the manner directed by the Code, and have sought to execute his decree against S in the ordinary course, when, if G had objected and succeeded, the plaintiff would have had his statutory right of action, that the suit was not one for a mere declaration that the property belonged to S, plaintiff's judgment-debtor under his decree, but to bring the property to sale as against G, and that therefore the suit was not maintainable. *DAMMAR SINGH v. GAYADAT*, A.W.N. 1887, 193.

(22)—*Decretal amount paid by judgment-debtor out of Court—Failure to certify—Attempt to execute decree—Payment of amount over again by judgment-debtor—Suit for recovery of amount paid out of Court—Civ. Pro. Code, (Act V of 1908), O. XXI, r. 2.*—A judgment-debtor paid the decretal amount to the decree-holder out of Court. The latter did not certify the payment, but attempted to execute the decree. The judgment-debtor, to save his property from attachment, paid into Court the amount over again, and sued the decree-holder for the recovery of this amount. *Held*, that he was entitled to recover the amount which he had paid outside the Court to the decree-holder. *SHYMA CHARAN CHOWDHURY v. CHAITANYA CHARAN CHOWDHURY*, 11 Ind. Cas. 1. (13 W.R. 69, F.B., 5 B.L.R. 233, F.)

(23)—*Payment by judgment-debtor out of Court to decree-holder—Question whether can be gone into in execution proceedings—Claim for refund by judgment-debtor.*—A judgment-debtor, to settle all disputes, paid to the decree-holder out of Court a certain sum which was to be credited against the amount of the decree, and he alleged that that would have the effect of leaving a very considerable balance in his favour. *Held*, that the Court could not possibly go into that question in execution proceedings, that there is no machinery provided



**Execution of Decree—continued.****—1.—General—continued.**

by the Civ. Pro. Code which in such a case allows for a refund in execution proceedings, that as to any claim which the judgment-debtor may have against the decree-holder for a refund of the moneys which he alleged he had overpaid, he was at liberty to take such steps as he may be advised, and that it was open to the judgment-debtor to make an application to the lower Court for refund of any sums which he may have paid under the orders of the lower Court after the satisfaction of the decree. **AKHIL CHANDRA BISWAS v. MATHURIA DEBYA**, 11 Ind. Cas. 200

(24)—*Agreement, before proceedings, not to recover costs of future decree, question relating to existence and validity of, determinable in execution and not by separate suit.*—This was an application for execution of a decree in a suit on an award directing the defendants to pay plaintiff's costs. Defendant answered that before the commencement of the proceedings for filing the award which was filed with his consent there was an agreement that any such costs as the Court might award should not be recovered from him. The Court of first instance refused to raise any issue on the ground that it was not open to it in execution proceedings to go behind the decree. The question was referred to the Full Bench, whether the existence and validity of such an agreement ought to be determined in execution under s. 244, Civ. Pro. Code, or in a separate suit. *Held* that, as the agreement under consideration had been pleaded by the defendant with the object of staying the execution of the decree in regard to costs awarded as against him, the enquiry fell within the terms s. 244 of the Code as finally amended in 1888 and was not to be made the cause of action for a separate suit. **LALDAS v. KISHORDAS**, 22 B. 463. [*Diss.*, 31 C. 179; *R.*, 31 C. 480=8 C.W.N. 395; *D.*, L.B. R. 1893—1900, 621, 29 C. 810=6 C.W.N. 838, 31 M. 467=18 M.L.J. 542=4 M.L.T. 229.]

(25)—*Execution of decree—Mesne profits subsequent to date of suit—Interest not awarded by decree—Question relating to execution—Act XXIII of 1861, s. 11.*—In a suit for land and mesne profits up to date of suit, the Court gave a decree for the land and profits up to date of suit, but was silent as to profits subsequent to the date of suit. In execution, the decree-holder claimed mesne profits subsequent to suit with interest thereon and interest on the amount of mesne profits already decreed. The defendant having appealed against the decree prayed for a stay of execution pending the result of the appeal, and gave a security bond undertaking to account for mesne profits subsequent to suit. Plaintiff having now put in an application for execution for such subsequent mesne profits, and interest thereon as well as for interest on the amount of mesne profits originally decreed, the defendant contended that the decree was silent both as to subsequent mesne profits and interest thereon. *Held*, (1) that the giving of the security bond

**Execution of Decree—continued.****—1.—General—continued.**

made the question relating to subsequent mesne profits one relating to execution of the decree, within the meaning of s. 11 of Act XXIII of 1861, and that, in any event, it precluded the defendant from raising the objection that mesne profits were not payable under the decree: (2) that there having been a consensus of decisions in the Indian High Courts that s. 11 of Act XXIII of 1861 meant that, where a decree is silent as to subsequent mesne profits or interest, the same could not be recovered in execution, the Judicial Committee held that construction as settled law, and refused to run counter to such a long course of decisions and settle the question in execution, whatever their opinion might have been if the question had been *res integra*. **SADASIVA PILLAI v. RAMALINGA PILLAI**, 15 B.L.R. 383, P.C.=24 W.R. 193=2 I.A. 219=3 Sar. 519. [*F.*, 5 C.L.R. 189, 5 C. 563, 11 A. 228=A.W.N. 1889, 53, 2 C.W.N. 254; *Appr.*, 9 C. 112=12 C.L.R. 41; *R.*, 25 W.R. 215, 3 C. 602, 5 C. 27=4 C.L.R. 29, 7 B. 341, 7 B. 448, 7 M. 400, 13 C. 283, 17 C. 968, 20 C. 22, 19 B. 532, 22 B. 42, 101 P.L.R. 1901=63 P.R. 1901, 28 B. 393, 31 C. 822, 2 C.L.J. 499, 7 Bom. L.R. 954, 8 O.C. 370, 4 C.L.J. 311=10 C.W.N. 830, 34 C. 886=11 C.W.N. 879=6 C.L.J. 95, 71 P.W.R. 1907=61 P.L.R. 1907=29 P.R. 1908, 1 Ind. Cas. 48, 11 O.C. 235; *D.*, 3 A. 535, 6 A. 623.]

(26)—*Execution of decree—Mesne profits—Godown—Letting value—Profits of business carried therein—Correct principle for assessment of mesne profits—Measure of damages—Special damage—Claim in suit.*—The measure of compensation which a decree-holder can claim as mesne profits in respect of a godown is the annual income from the property during the time the judgment-debtor withheld possession, and the income is to be measured by the value of the use of the property, that is, the letting value of the godown as a whole, and not by what the judgment-debtor received or might have obtained by the business he carried on in the premises. **KAMINI KUMAR RAI v. KRISHNA CHUNDRA SAHA**, 10 Ind. Cas. 312.

(27)—*Execution—Declaratory decree—Decision as to executability of—Whether decree—Appealability—First order deciding executability—Appeal against, in time—Subsequent order appointing Commissioner to carry out former order—No appeal—Effect.*—A decree provided that the 'first defendant shall enjoy land yielding 126 muras of rice.' The District Judge held, on an execution application, that the decree could be executed by setting aside lands that yield 126 muras of rice and directed that this should be done and ordered the appointment of a Commissioner to prepare lists of the lands. An appeal was made in time against the District Judge's order on the ground that the District Judge was wrong in construing the decree as one that was not purely declaratory. Before the presentation of the appeal, the District Judge passed another



**Execution of Decree—continued.****—1.—General—continued.**

order directing delivery of possession of the lands in accordance with the Commissioner's report, and no appeal was preferred against the second order. *Held*, that the first order as to whether the decree was executable or not was a decree under s. 47, Civ. Pro. Code, read with s. 2, Civ. Pro. Code, and as such appealable. (28 M. 355, *F.*; 14 M.L.J. 359, *D.*; 6 A. 269, 23 A. 152, 14 C.L.J. 35, *R.*) The determination of a mere issue by the execution Court prior to the passing of the final order would not be regarded as an adjudication between the parties against which an appeal would lie; that the second order which merely carried out the first order could not effect the right of appeal against the first order. (18 M. 421, 19 M. 479, *F.*; 32 C. 1023, 36 C. 762, 32 A. 225, 8 A.L.J. 604, *Diss.*; 30 A. 479, 12 C.W.N. 590, *R.*) When the law gives a person two remedies, he is entitled to avail himself of either of them, unless they are inconsistent. (13 C.W.N. 1197, 12 C. 45, *R.*) Where a right and jurisdiction are conferred expressly by statute, they cannot be taken away or cut down, except by express words or necessary implication. **LAKSHMI v. MARUDEVI**, 10 M.L.T. 437.

(28)—*Execution of decree—Order adjourning sale—Direction to stay execution in certain event—“Decree”—Appeal—Civ. Pro. Code, ss. 2, 244.*—In execution proceedings for sale, the following order was passed: “That the sale be adjourned. The Collector of Basti be required to strike off the execution case, if, within the term to be fixed by him, none of the persons applying for execution files a certificate to recover the debt.” *Held*, upon appeal against this order, that it was an order, only for postponement of sale and as such was not a decree within the meaning of ss. 2 and 244 of the Civ. Pro. Code, so as to be appealable, and that the portion of the order as regards striking off of the execution was only a direction to the Collector, which it was not absolutely necessary that he should follow. **CHAMPA LAL v. MAHESH SITLA BAKSH SINGH**, A.W.N. 1898, 82.

(29)—*Decree, Execution of—Decree of appellate Court—Order of remand under s. 562, Civ. Pro. Code—Order of appellate Court reversing remand—Limitation Act, sch. II, art. 179—Civ. Pro. Code, ss. 2, 562.*—The plaintiff in a suit for arrears of rent obtained a decree in the Assistant Collector's Court for a certain amount on the 19th August, 1896. The plaintiff appealed from this decree to the District Judge, who, on the 4th October, 1897, made an order of remand under s. 562, Civ. Pro. Code. The defendants appealed from the order of remand to the Court of Judicial Commissioner. Before the appeal was decided, the Assistant Collector, acting under the order of remand, passed a decree in favour of the plaintiff on the 20th January, 1898, for a larger amount than he had previously decreed. On the 18th April, 1898, the Judicial Commissioner set aside the order of remand and restored the first decree of the Assistant Collector. On the

**Execution of Decree—continued.****—1.—General—continued.**

6th April, 1901, the plaintiff applied for execution of the first decree. It was contended by the defendant that the application for the execution of the first decree was barred by the law of limitation. *Held*, that the order of the Judicial Commissioner, dated the 18th April, 1898, was a “decree” within the meaning of the definition of that expression in s. 2 of the Code of Civil Procedure, that it was the final decree of the appellate Court, and that, under art. 179, sch. II, Indian Limitation Act, the period of limitation would run from its date. *Held*, further, that where there has been an appeal, the decree which should be executed is the decree of the appellate Court. **LAL RAGHURAJ SINGH v. HAR PARSHAD**, 5 O.C. 301.

(30)—*Execution of decree—Claim—Subsequent failure—Second application, whether can be treated as continuation of the previous application—Application for execution—Attachment subsisting, Effect of—Whether second application to be treated as continuation of first.*—Where a claim is at first successful but ultimately unsuccessful, that is, the decree-holder succeeds in removing the bar placed on his application for execution, his subsequent application can be rightly treated as a revival or continuation of the first application for execution. But where the claim is subsequently successful, the subsequent application cannot be treated as a continuation of the previous application before the claim was put forward, because it was open to the decree-holder, during the pendency of the suit of the claimant, to take proceedings in the same manner as he has adopted after the termination of the suit. (17 C. 269, *F.*; 23 C. 437, 33 C. 699, *Diss.*; 20 B. 175, *R.*) Where an application for execution has been dismissed, although the attachment has been kept in force, it is not open to the decree-holder to apply for execution any length of time afterwards and contend that the subsequent application is one made in continuation of the previous application. **KEDAR NATH v. PRODYOT KUMAR**, 11 Ind. Cas. 48.

(31)—*Execution of decree—Application in continuation of last application—Progress of application interrupted by appeals of judgment-debtor—Running of time when obstacle removed—Limitation Act IX of 1908, sch. I, art. 181.*—The last previous application to execute a decree was made on July 3rd, 1902. On the objection of the judgment-debtor which was overruled by the first Court, the High Court remanded the case and a Commissioner having been appointed, it was ascertained that the judgment-debtor was entitled to a certain deduction, and so, on June 29th, 1907, the objection of the judgment-debtor was allowed in part. On the same day, the Court passed the following order: “Case put an end to after decision of the objection.” The judgment-debtor again appealed to the High Court, but his appeal was dismissed on March 4th, 1910. On December 16th, 1910, the decree-holders put in their present application to execute the decree:



**Execution of Decree—continued.****— 1.—General—continued.**

*Held*, that the present application was one to continue the execution proceedings, further progress in which had been interrupted by the two appeals of the judgment-debtor to the High Court, that there was nothing in the law to compel the decree-holder to proceed with execution during the pendency of an appeal, more especially, when the amount for which execution should be levied was contingent on the decision of the appellate Court; that art. 181 of the Limitation Act of 1908 applied, and that the application was not barred. *SHEIKH MAHOMED v. WILLIAM ALFRED THOMAS*, 11 Ind. Cas. 972. (32 I.A. 102, 1 C.L.J. 381, 27 A. 334, 2 A.L.J. 397, 7 Bom. L.R. 433, 15 M.L.J. 258, 9 C.W.N. 601, 6 Ind. Cas. 537, 37 C. 796, 15 C.W.N. 337, 12 C.L.J. 328, 23 C. 437, 23 C. 397, *Rel. on.*)

(32)—*Suit decreed in part and remanded in part—Incomplete decree—Limitation for execution.*—Where a case is partly decreed and partly remanded for further investigation, the period of limitation runs from the date of the last judgment by which the whole decree became final and not from the date of the incomplete decree. *SHAIK FUZL IMAM v. DOOLUN SINGH*, 5 W.R. Mls. 6.

(33)—*High Court confirming decree of lower Court—Decree capable of execution—Limitation—Suit in furtherance of decree*—Where the High Court on appeal simply confirms the order of the Court below, the decree to be executed is substantially a decree of the Court from whence the appeal came, and the only decree of the High Court is that part of the order which relates to costs. The twelve years' limitation does not therefore apply to the decree except as to that part of the case which gave costs to the appellant, and the three years' limitation applies to the substantive decree. [*R.*, 7 B.L.R. 704] A decree was passed on the 18th December, 1862 and awarded possession of certain lands to the plaintiff on condition of his depositing in Court a sum of Rs. 2,600. The defendant appealed specially to the High Court, which on the 8th January, 1864, dismissed the application with costs and confirmed the order of the Court below. The first application made to execute the decree appears to have been on 21st November, 1865. The Judge considered the application not to have been made *bona fide*, because it was a condition precedent to execution, that the judgment-creditor should have deposited the Rs. 2,600 which the order of the Court directed him to do; and that, not having done so, his application could not be said to have been a *bona fide* application within the meaning of the Limitation Act and that therefore the decree was barred. But whilst his application was pending, the judgment-creditor, on the 21st December, 1865, brought a suit to recover *wasilat* from the defendant on the ground that Rs. 2,600 had already been paid by,

**Execution of Decree—continued.****— 1.—General—continued.**

the usufruct of the land and there was a surplus of collection due to him, amounting to Rs. 518, and obtained a decree on the 13th June, 1865. *Held*, that such a suit, brought whilst execution proceedings were pending and in furtherance of the original decree, would be a proceeding to keep the decree alive, and the execution was not barred by limitation. *TAFUZZAL HOSSEIN KHAN v. BAHADUR SINGH*, 7 B.L.R. 706, Note.

(34)—*Execution of decree—Civ. Pro. Code, 1877, s. 230—Civ. Pro. Code, 1882, s. 230.*—An application for the execution of a decree under s. 230 of the Civ. Pro. Code, 1877, having been granted, a subsequent application was made for the first time under s. 230 of the Civ. Pro. Code, 1882, within three years after that Code came into force, and more than twelve years from the date of the decree. *Held* by *Straight, Brodhurst and Tyrrell, JJ.*, that the application might be granted, as it was the first under the Code of 1882, and the first made after the expiration of twelve years from the date of the decree, and as it was not barred by the last paragraph of s. 230 of that Code, which barred only the execution of decrees barred under the limitation law then in force. *Held* by *Stuart, C.J.*, and *Oldfield, J.*, that the application should not be granted, being barred by limitation, the effect of the last paragraph of s. 230 of the Code of 1882 being to bar the execution of decrees which would have been barred under the third paragraph of s. 230 of the Civ. Pro. Code, 1877. *MUSHARRAF BEGAM v. GHALIB ALI*, 6 A. 189. F.B. = A.W.N. 1884, 22. [*Diss.*, 12 C. 559; *Not F.*, 9 M. 454, 11 B. 524; *F.*, 8 A. 536, 8 A. 419; *D.*, 6 A. 388.]

(35)—*Resjudicata, Principle of—Adjudication—Opportunity to challenge—Judgment-debtor not apprised of notice under s. 248, Civ. Pro. Code (Act XIV of 1882)—Step-in-aid of execution Application to take—Time, Running of.*—The principle which underlies the decision in the case of 8 Cal. 51 P.C., is applicable, unless it is proved that the judgment-debtor had an opportunity to challenge the validity of the execution proceedings, and, in spite of such opportunity, failed to avail himself of it. Where, therefore, notice issued under s. 248, Civ. Pro. Code, 1882, was not personally served upon the judgment-debtor and he was not otherwise apprised of such notice, with the result that he came to know of the execution proceedings for the first time when his moveables were attached at the instance of the decree-holder, and he preferred objection to execution soon after, the principle was inapplicable. Limitation runs from the date when an application is made to the Court to take a step-in-aid of execution, and not from the date when the Court disposes of the application. *MOCHAI MANDAL v. MESERUDDIN MOLLAH*, 13 C.L.J. 26 = 9 Ind. Cas. 218. (10 C.L.J. 479, *R.*)

(36)—*Decree—Execution—Step-in-aid of execution—Pendency of darkhast—Another darkhast—Intermediate darkhast barred by limitation—*



**Execution of Decree—continued.****—1.—General—continued.**

*Res judicata.*—A decree passed in 1898 was sought to be executed thrice between its date and 1901. The fourth *darkhast* was made in 1903, but it was not decided by the District Court till the 2nd August, 1905, and, the decree-holder took a step-in-aid of its execution on the 10th October, 1906. In the meanwhile, in 1904, a fifth *darkhast* was made, but it was rejected by the Subordinate Judge as time-barred. In 1907 the present *darkhast* was filed, but the lower Court held it to be barred by *res judicata* by the order passed in the *darkhast* of 1904. *Held* (i) that the right of the decree-holder to proceed in execution on the strength of the order, dated 2nd August, 1905, in his favour could not be affected by the order of the Subordinate Judge's Court passed in the *darkhast* of 1904, because the latter was the order of a lower Court and it was passed in a *darkhast* which could not have a legal validity so long as the *darkhast* of 1903 was kept alive by proper proceeding; (ii) that, therefore, the present *darkhast* was in time. *BALKRISHNA WAMNAJI GAVANKAR v. SHIVA CHIMA MHATRA*, 13 Bom. L.R. 230.

(37)—*Decree, Execution of—Construction of decree—Estoppel—Res judicata.*—In execution of a maintenance decree, the decree-holder made applications for sale of certain properties, alleging that they were liable to be sold under the decree. The judgment-debtor had notice of these applications but did not object to the sale. In a subsequent application for sale, it was contended that the decree did not authorise the sale of property. *Held*, that the plea was untenable. *KONDAMA NAIDU v. VENKA-LAKSHMI*, 10 Ind. Cas. 632. (24 M. 683, R.)

(38)—*Sale proclamation—Receipt of single payment—Deduction of the amount twice—Error in stating amount due in sale proclamation—Right to correct amount—Absence of prejudice—No estoppel.*—Where a judgment-creditor, who received only a single payment of Rs. 112 towards the satisfaction of his decree, deducted the amount twice while applying for execution for the balance due, and entered the amount arrived at by such erroneous deduction in the sale proclamation, and where no one was prejudiced by such erroneous entry: *Held*, that the judgment-creditor was not estopped from contending that he was paid the amount only once. *SRINIVASA ROW v. SAMA ROW*, 10 M.L.T. 90.

(39)—*Applications for execution of declaratory decree erroneously granted after notice—Subsequent application, whether can be objected to.*—A decree declared that defendant was bound to pay plaintiff certain sum per annum. Several applications were made by plaintiff for execution of the decree. All the applications were granted after notice to the defendant. On a subsequent application for execution, defendant objected that the decree was not capable of execution. *Held* that the previous orders had determined, whether rightly or

**Execution of Decree—continued.****—1.—General—continued.**

wrongly, that the decree was executable. As the judgment-debtor had notice of the applications on which those orders were passed, he was bound by them. *SUBBARAMA AYYAR v. NAGAMMAL*, 24 M. 683. (19 M. 54, 8 I.A. 123, 8 C. 51, F.) [R., 27 P.L.R. 1905.]

(40)—S. 282—*Execution of decree—Arrest—Discharge—Further execution.*—After a debtor has been arrested in execution of a decree and discharged at the request of the creditor, his personal property may be taken in execution under the same decree. *JANOKI SINGH ROY v. KALOO MUNDUL*, B.L.R. Sup. Vol. 889=9 W.R. 178.

(41)—*Execution of decree—Arrest of judgment-debtor—When allowable.*—Ordinarily, if for a number of years a decree-holder is active in trying to execute his decree, and if the failure to recover the decretal money is due to the obstruction and bad faith of the judgment-debtor, there would be good ground for ordering arrest. But where there is no bad faith in the conduct of the judgment-debtor and there is no reason whatever to suppose that he wishes to keep the decree-holder out of his money, the Court should grant the judgment-debtor a reasonable time within which to pay the money due under the decree, and if during this time the judgment-debtor shows negligence and has not proceeded with necessary vigour, the question whether or not he deserves arrest should be reconsidered. *BISHEN DAS v. JIVA RAM*, 153 P.W.R. 1911.

(42)—*Decree obtained in Sonthal Pargannahs—No arrest in execution—Transfer of decree to Court outside Sonthal Pargannahs—Whether decree may be executed by arrest of judgment-debtor.*—A decree, which was obtained in the Court of the Deputy Collector of Deoghur in the Sonthal Pargannahs and which could not have been executed by arrest of the judgment-debtor in any of the Courts in the Sonthal Pargannahs, may be executed by his arrest, when it is transferred to any Court for execution outside the Sonthal Pargannahs. *DEOSARAN LAL SINGH v. PRAYAG RAM*, 10 Ind. Cas. 538.

(43)—*Practice—High Court's decree—District Munsif cannot in execution extend the time allowed by the decree for making a certain payment.*—Where a District Munsif was asked to execute a decree passed by the High Court, *held*, he had no power to extend the time allowed for payment in the decree, such extension can be granted only by the Court which passed the decree. Where the decree contains a direction to the decree-holder to pay Rs. 50 within a certain time, it must be read as a condition precedent to the execution of the decree. *MOHIDEEN KUPPAI v. MARIAM KANSI*, 1911, 2 M.W.N. 240.

(44)—*Consent-decree—Decree binding endow- ed property—Judgment-debtor, no interest in property—Shebait, if can object to execution—*



**Execution of Decree—continued.****—1.—General—continued.**

*'Representatives'—Civ. Pro. Code, (Act V of 1908), s. 47—Appeal—Trustees, Powers of.—* When a decree is obtained against the properties of an endowment, the decree is not against the idol, but against the *shebait* in his character as representative of the idol. Where the plaintiff has obtained a consent-decree against S, on the assumption that he was, at the time the decree was made, the *shebait*, and seeks to execute the decree against the properties of the endowment in the hands of another *shebait*, it is open to the latter to urge the objection that the decree cannot be executed against the properties in his hands, unless it is established that he is the representative of the original judgment-debtor. *Held*, also, that, as the decree-holder obtained the order in their favour as properly made in execution proceedings, they could not impugn the appeal as incompetent on the ground that the order could not have been made under s. 47. Civ. Pro. Code, 1908. When a decree has been obtained against a person on the allegation that he is the *shebait* or High Priest of a temple, and that decree is sought to be executed against the successor of the judgment-debtor, it is open to the person against whom the application for execution is made, to shew that the decree was obtained against a person who was, either as a matter of fact or of law, not the *shebait* or High Priest of the temple, and that consequently it is not capable of execution against the properties of the endowment in his hands. The question falls within s. 47 of the Code. When a suit has been instituted and a decree made for the execution of a trust, the powers of the trustees are thenceforth so far paralysed that the authority of the Court must sanction every subsequent proceeding; consequently the trustee cannot commence or defend any action or suit, or interfere in any other legal proceeding, without first consulting the Court as to the propriety of his intended action. The position is different if a suit has merely been instituted, but a decree not yet made. Though a consent decree is just as binding upon a party to the proceeding as a decree after a contentious trial, yet a consent order is mere creature of agreement, and, if greater sanctity were attributed to it than to the original agreement itself, it would be to give the branch an existence independent of the tree; the consent order is only the order of the Court carrying out an agreement between the parties. The consent decree sought to be executed was, under the circumstances of the case, in no way binding the properties of the endowment. UMESHANANDA DUTTA JHA v. MOHENDRA PRASAD JHA, 14 C.L.J. 337. (15 C.W.N. 725, F.)

(45)—*Execution of decree—Question as to who is legal representative of decree-holder—Civ. Pro. Code, 1882, s. 244—Appeal—Partition decree—Right of widow.*—Where a Hindu brought a suit for partition of the family property and a decree was passed in the suit, and he died subsequent to the decree, and his widow, his uncle, and the latter's son applied to be

**Execution of Decree—continued.****—1.—General—continued.**

brought on the record as his legal representatives, and the Court made an order staying execution and referring the parties to a regular suit to have their respective rights determined, *held* that an appeal lay from the order of the Court and that the widow was entitled *prima facie*, there having been in point of law a partition between her husband and his co-parceners. CHINNATHALU v. VIRUTHACHA PILLAI, 8 M.L.J. 37.

(46)—*Death of decree-holder during pendency of execution proceedings—Order directing deceased to pay costs—Legal representative not on record—Property of deceased attached in execution of order for costs.—Held*, that an order in execution—which is the basis of subsequent proceedings—passed against a person who was then dead, is an absolute nullity and cannot be the foundation for any later orders. ABDUR RAHMAN v. KISHNA MAL, 161 P.W.R. 1911. (7 P.R. 1889, 78 P.R. 1891, 5 Ind. Cas. 523, 2 A.L.J. 71=1 C.L.J. 584=7 Bom. L.R. 1=9 C.W.N. 201=32 C. 296, R.)

(47)—*Execution by executor—Probate obtained—Debt not mentioned in inventory, Effect of.*—A person who has obtained probate of the will of the deceased fully represents the estate of the deceased and is entitled to execute a personal decree in favour of the deceased although no mention of it was made in the inventory. Such omission does not take away his representative character with reference to it. CHHOTI NARAIN SINGH v. MUSSAMMAT RAMESHWAR KOER, 6 C.W.N. 796.

(48)—*Adjustment of decree by one decree-holder—Other decree-holders not parties to arrangement, whether barred from executing decree.*—An adjustment of a joint decree by one of the three decree-holders cannot bind the other decree-holders if they are no parties to it, and the latter are entitled to execute the decree in spite of that arrangement. BHAIROON PRASAD v. BRIJ MOHAN, A.W.N. 1886, 55.

(49)—*Execution of decree—One decree-holder respondent not properly represented—Decree not void.*—The mere fact that one of the persons in whose favour there was a valid decree was not represented at the instance of the judgment-debtor in his appeal is not sufficient to render the decree void and incapable of execution. GOBARDHAN SAHI v. MAHABIR SINGH, 9 A.L.J. 290.

(50)—*Execution of decree against several defendants with separate liability—Limitation.*—Where one person jointly interested with others in land is compelled to pay Government revenue in excess of his proper share, each co-sharer is bound to refund so much as he ought himself to have paid; and this obligation is to be enforced by a suit against all the co-sharers in which the amounts of their several liabilities are to be declared by the Court. *Held* that, where a decree is not a joint one against all the defendants, but a separate one, as against each batch of defendants, the proceedings against



**Execution of Decree—continued.****—1.—General—continued.**

one batch have no effect towards keeping alive the separate decrees against other batches. **KHEMA DEBEA v. KUMOLAKANT BUKSHI, 10 B.L.R. 259, Note=10 W.R. 10. [F., 12 A., 110.]**

(51)—*Decree, Execution of—Civ. Pro. Code, (XIV of 1882), s. 230—Decree for payment of money and in default for sale of property—Construction of document—Decree against principal and surety.*—A decree was passed against three persons as lessees and another person as their surety, making the money payable by the lessees in the first instances in certain instalments and in the event of their default, provided that it might be recovered by sale of the property mortgaged by the surety. The lessees having defaulted, the decree holder applied more than 12 years from the date of the decree to execute the decree by sale of certain immoveable property belonging to one or other of the lessee defendants: *Held (Karamat Husain, J.)*—that the decree, so far as the lessee-defendants were concerned, was a decree for payment of money, and consequently barred by limitation. Per *Chamier, J.*—that there was no jurisdiction in s. 230, Civ. Pro. Code, for splitting up the decree, the terms of which went beyond the terms of an ordinary decree for payment of money, and therefore, it was not barred by limitation. **MAHARAJA OF BENARES v. LALJI SINGH, 9 A.L.J. 79. (22 A. 401, Appl.)**

(52)—*Execution—Application against a minor judgment-debtor not properly represented, Effect of—Renewal of the application by a subsequent application—Limitation.*—A mortgage decree was passed in 1882 against S, who died in 1882. An application for execution was put in against the heirs of S, one of whom was a minor, in 1891. The mortgaged property was put to sale and was purchased by the decree-holder himself. R, the minor representative of S, brought a suit in 1893 for setting aside the sale, on the ground that she was not properly represented in the execution proceeding. The sale was thereupon set aside so far as her interest was concerned. The decree-holder, then, made an application in 1910 to review the application of 1891 for execution against R. *Held*, that the application of 1891, to which R was a party but was not properly represented, was of no effect as against her and could not be revived as against her. The decree, therefore, was time-barred as against R. **MOHAMMAD ISMAIL KHAN v. RASHID-UN-NISSA, 12 Ind. Cas. 628. (2 A.L.J. 276, 18 A. 482, 4 C. 415, 3 C.L.R. 46, 3 A. 484, 7 M. 595, D.)**

(53)—*Execution of decree—Attaching creditor—Only person entitled to execute—Original decree-holder not entitled until Court cancels attachment—Application by decree-holder—Does not save limitation—S. 273, Civ. Pro. Code, 1882.*—A instituted a suit against B for recovery of damages on the ground that B who attached,

**Execution of Decree—continued.****—1.—General—continued.**

in execution of his decree against A, a decree for money held by A against C, and who realised otherwise the amount due from A to himself, allowed the decree by negligence or in collusion with C to lapse by efflux of time. *Held* that A was entitled to a decree. The attaching judgment-creditor is the only person who could have executed the attached decree, and the original holder of the decree is absolutely precluded from executing his decree, unless the Court which issued the notice of attachment cancels the notice. (13 M.L.J. 265, 21 M. 417, 24 O. 778, R.) (S. 273, C.P.C., 1882). Any application for execution made by the holder would be infructuous and any such application by him would have been useless to save limitation. **THACHAKAVIL UNNI KOYA v. ARAPAYIL PATHUTTI UMMAH, 9 M.L.T. 312=21 M.L.J. 577=9 Ind. Cas. 786 (27 A. 619, 33 C. 867, 7 B. 459, R.)**

(54)—*Mortgage—Sale of mortgaged property in execution of simple money decree—Purchaser at auction sale, whether representative of judgment debtor—Subsequent sale in execution of decree for sale passed on mortgage—Auction-purchasers at the two sales, Respective rights of.*—One G mortgaged the property in suit to the respondent on 4th November, 1877. On 13th February, 1900, the appellant's father obtained a money decree against G. The respondent obtained a decree on his mortgage, which was made absolute on 14th November, 1903. On 30th November, 1904, the appellant's father purchased the property in execution of his own decree and obtained possession on 4th September, 1905. The respondent purchased the property in execution of his mortgage decree on 20th December, 1907, and obtained symbolical possession on 14th February, 1909. This was a suit for possession by respondent against appellant. *Held*, that, the appellant's title being based upon an auction sale in execution of a money decree, he represented the judgment-debtor in interest exactly in the same way as if he had purchased the property by a private sale, and he was as much bound by the respondent's decree as the mortgagor himself was. **CHANDI DAYAL v. RATAN LAL PANDIT, 14 O. C. 89. (8 O.C. 330, 25 B. 631, 31 A. 82, R.)**

(55)—*Execution of decree—Finality of order disallowing claim to be brought on record—Representative of party as against decree-holder seeking execution against person whose claim disallowed.*—Before judgment in appeal, two persons applied to be brought upon the record as representatives of deceased litigants. The claim of the one was disallowed, but the other was placed upon the record as an appellant and a decree was given against him. *Held*, that the decree-holders could not go behind the decree and execute it for costs against the person whose claim had been disallowed, on the ground that she was in fact the rightful representative of the appellant. **SONKALI v. BHAIRON BAKSH RAM, A.W.N. 1891, 158.**



**Execution of Decree—continued.****—1.—General—continued.**

(56)—*Execution of decree—Security by manager—Title of manager under purchase in execution, whether affected by delay in finding security—Act VIII of 1859, ss. 232, 235, 248, 272, 284, 287—Attachment without sale—Concurrent orders for attachment in different districts.*—Appellant, a lunatic's wife, as manager of his estate, obtained a decree in execution of which certain lands, belonging to the judgment-debtor, were sold and purchased by the manager; but before allowing actual possession to be given to her, she was required to give security for the proceeds of the sale. Sometime elapsed before she found the security, and meanwhile the lands were attached and sold in execution of the respondent's decree, and purchased by him and possession given to him. *Held* that the appellant's omission to give security (which was a proceeding not affecting the judgment-debtor, and entirely collateral to the suit between the creditor and him) could not, in any way, affect her title under the previous sale, and that the Judge was in error in granting the order for a second sale under the respondent's attachment, and confirming the purchase by him, when the sale of the same lands had already taken place under the appellant's attachment, and the purchase by her under that sale had been confirmed, and had not been set aside. Exposition of the principles and practice provided by the Civ. Pro. Code, Act VIII of 1859, in respect of the execution of decree by attachment and sale for property within, as well as without, the jurisdiction of the Court by which the decree is passed. Under the Civ. Pro. Code, property may be attached without view to immediate sale. The process of attachment and the order for sale may be distinct and separate and there may be complete execution of a decree under an attachment without any order for sale. Where the lands are situate in the other zillahs, the Civ. Pro. Code, contemplates the issuing of separate orders, subsequent to the attachment, for the sale or other disposition of them, and allows the transmission of a decree, with certificate to several Courts concurrently for execution. At the same time, the Privy Council considered that in any case, it would be a right exercise of the discretion of any Court not to act on the power, and to bind the decree-holder not to proceed to sale under all the attachments at once. To invalidate an attachment, on the ground that no copy of the decree was sent (assuming that it could be so invalidated) it would be necessary to prove non-transmission, the maxim, *omnia præsumentur rite esse acta* must prevail until the contrary is shown. SARODA PROSAUD MULLICK v. LUTCHMEEPUT SINGH DOOGUR, 10 B.L.R. 214, P.C. = 14 M.I.A. 529 = 17 W.R. 289.

(57)—*Execution of decree—Property lying within different districts.*—Where an estate which is entered on the *towjee* of the Collectorate of a district, consists of villages of which only the greater number are situated within that district, it may, for the purposes of attachment and sale in execution of a decree, be considered as wholly situated in that district, and

**Execution of Decree—continued.****—1.—General—continued.**

be so dealt with by the District Court. KALLY PRASANNO BOSE v. DINONATH MULLICK, 11 B.L.R. 56 = 19 W.R. 434. [Appl., 12 C. 307; R., 23 W.R. 154, 8 C. 703, 14 C. 661.]

(58)—*Act VIII of 1859, s. 224—Execution of decree—Joint Hindu family—Dwelling-house—Right to share.*—A person, who, at a sale in execution of a decree, has purchased the share of a member of a joint undivided Hindu family, and subsequently sued for and obtained a decree against other members of the family for possession of such share in property consisting of the joint family dwelling-house and land in execution of the decree is entitled to be put into actual possession of a portion of the dwelling-house (*dissentiente Kemp, J.*). KOWAR BIJOI KESAL ROY BAHADUR v. SAMASUNDARI, B.L.R. Sup. Vol. 172 = 2 W.R. Mis. 30. [F., 8 W.R. 239, 4 B.L.R. App. 55 = 13 W.R. 74; Commented on, 10 C. 244.]

(59)—*Execution of decree—Purchase of surplus proceeds of revenue sale—Sale set aside—Refund of purchase money.*—A decree-holder in execution of his decree, caused the right, title and interest of the judgment-debtor in the surplus proceeds of the sale of the *mehal*, sold for arrears of revenue to be attached and sold, and the plaintiff purchased the same. After confirmation of the sale, the money was drawn by the decree-holder and other decree-holders of the judgment-debtor. The judgment-debtor instituted a suit for, and obtained a decree setting aside the revenue-sale. The purchaser's application to the Collector for payment to him of the surplus proceeds of the revenue-sale was rejected on the ground that the revenue-sale had been set aside. Thereupon, the purchaser brought the present suit for the recovery of the amount paid by him for the purchase of the surplus proceeds of the revenue-sale with interest. *Held*, that the plaintiff was entitled to the refund prayed for from the judgment-debtor, as the loss to the plaintiff was caused, not by the judgment-debtor having no title to the property but by his asserting his title, and by virtue of his getting the sale set aside. BISSESSUR LALLSAHOV v. RAMTUHULSINGH, 11 B.L.R. 121 = 19 W.R. 351. (4 B.L.R., F.B., 11, D.) [Overruled, 15 B.L.R. 208 = 23 W.R. 305 = 2 I.A. 131.]

(60)—*Execution of decree—Insolvency—Decree right of purchaser under, to recover property deposited with creditors.*—A member of a firm of Native Bankers which had become insolvent, with a view to protect his property from the general body of his creditors, in March 1870, deposited property to the value of Rs. 30,000, with the appellants, another firm of Bankers to whom he owed Rs. 1,500. In April 1871, the appellants brought an action against him for Rs. 500, the balance of that debt, and obtained a decree, in execution of which the property was put up for sale and purchased by the respondent. *Held* (affirming the decision of the High Court, N.W. Provinces) that



**Execution of Decree—continued.****—1.—General—continued.**

the respondent was entitled to the property. **DWARKA DASS v. RAISITARAM**, 5 C.L.R. 430, P.C.

(61)—*Order of Her Majesty in Council—Allowance of interest on costs incurred in British India—Practice.*—In the execution of a decree of the Privy Council, the High Court allowed interest at 6 per cent. from the date of the order in Council on the costs incurred in British India by the successful appellant. **A.B. MILLER v. MADHO DAS**, A.W.N. 1897, 70. (21 W.R. 411, R.)

(62)—*Civ. Pro. Code (Act V of 1908)—Execution proceedings—Order of Court that no warrant of attachment should issue by a certain date not appealable.*—Where in execution proceedings, the judgment-debtors, after the rejection of their objections, stated before the Court that they would deposit the decretal amount in Court by a certain date, and thereupon the Court directed that no warrant for attachment should issue before that date. *Held*, that the Court took no step in execution of the decree against the judgment-debtors, and that no appeal, therefore, lay from that order. **HAZOO-RA SINGH v. MUSSAMMAT MAYA DEVI**, 101 P.L.R. 1911=9 Ind. Cas. 823.

(63)—*Small Cause Courts—Act IX of 1892, ss. 58, 88—Jurisdiction—Sale of moveable property in execution of decree—Huts, goods and chattels.*—Huts are not goods and chattels, and cannot be taken in execution of a decree of the Court of Small Causes under s. 58, Act IX of 1850. **KALLY PERSAUD SINGH v. HOOLAS CHUND**, 10 B.L.R. 448=20 W.R. 8. [R., 4 C. 946=4 C.L.R. 460; D., 14 B.L.R. 201.]

(64)—*Execution of decree—Decree payable by instalments—Default in payment of instalments.*—In this case, the suit was compromised by the parties, and the decree was passed to the effect that the claim was decreed in terms of the compromise. No provision was made in the compromise for default in paying the instalments, but the parties had stated before the Court that, in case of default in the payment of an instalment, the whole amount decreed would at once become payable. On the judgment-debtors making default, execution was twice sought for by the decree-holder for the whole amount, but no decision was arrived at as to whether the decree-holder was entitled to realize the whole amount. *Held*, that the decree-holder was entitled to realize by execution the unpaid instalments and the application was not barred by limitation; the decree-holder was not given the right by the decree to enforce payment of the whole amount on default being made to pay an instalment on the date fixed. **KANHAYA LAL v. FATTA**, P.L.R. 1900, p. 415=48 P.R. 1900. (19 M. 54, D.)

(65)—*Sale, what passes—Test—Civ. Pro. Code (Act XIV of 1882), s. 258—Taking out execution for larger sum, Affect of.*—The test to be applied in order to determine the exact interest

**Execution of Decree—continued.****—1.—General—continued.**

which passes at a sale in execution of a decree against a Hindu widow or a qualified proprietor is, whether the suit in which the sale was directed was one brought against the widow upon a cause of action personal to herself or one which affects the whole inheritance of the property in her hands. It might be an important element also to take into consideration the form of the suit and to determine whether the suit was framed so as to include only a claim for personal decree against a limited owner or to obtain a decree which would bind the entire inheritance. (6 C.L.J. 490, R.) Under s. 258, Civ. Pro. Code, 1882, any payment made out of Court and not certified in due course, could not be taken into account in execution proceedings. A sale at the instance of the decree-holder who took out an execution for a larger amount than what was due is not necessarily fraudulent and is not vitiated by that circumstance alone. **TRIOCHAN HAZRA v. BAKKESWAR TA**, 15 C.L.J. 423.

(66)—*Practice—Right of suit—Damages—Decree—Execution—Attachment—Interference by third party.*—Where a decree holder, in executing his decree by attachment of the house and property of his judgment-debtor, is prevented from doing so by a third person, he has a right of action against such third person to recover damages arising from his act. **HARI VENKATESH PAI v. HARI VENKAPPA SHETTI**, 14 Bom. L.R. 356.

(67)—*Execution of decree—Application for execution—Bar imposed by judgment-debtor—Removal of bar—Subsequent application to be treated as one in continuation of previous application—"Review of judgment"—Limitation Act (XV of 1877), sch. II, art. 179, cl. (3)—Bengal Tenancy Act (VIII of 1885), sch. III, art. 6, cl. (3).*—When a decree-holder is unable to proceed with an application for execution by reason of some bar imposed at the instance of the judgment-debtor or any other person, a subsequent application by the decree-holder of the same scope and character may be treated as in continuation of the previous application, provided the subsequent application is presented after removal of the bar which interrupted the previous proceeding. This principle is applicable to cases of applications for execution of rent-decree. A rent-decree was passed on May 23rd, 1904. The judgment-debtor made an application for amendment thereof, which was heard *ex parte* and on February 25th, 1905, the original decree was materially altered. The decree-holder applied for execution of the original decree on August 26th, 1905, upon which the judgment-debtor objected that the decree could not be executed. The application for execution was then dismissed and the decree-holder applied for a review of the order for amendment. On June 30th, 1906, the review was granted and the original decree was restored. The present application for execution was then made on January 20th, 1909. *Held*, that the application was not barred



**Execution of Decree—continued.****—1.—General—continued.**

first, because the application of January 20th, 1909, may be treated as one in continuation of the application of August 26th, 1905, and secondly, because under cl. (3) of art. 6 of sch. III of the Bengal Tenancy Act, time ought to run from June 30th, 1906, when the decree-holder's application for review was granted. **RAMESHWAR SINGH v. TIRPIT SINGH**, 13 Ind. Cas. 140. (1 C.L.J. 381, 27 A. 334, 15 M.L.J. 258, 7 Bom. L.R. 433, 9 C.W.N. 601, 2 A.L.J. 397, 7 Ind. Cas. 886, 11 Ind. Cas. 48, 14 C.L.J. 610, 14 C. 385, 21 C. 387, *Rel. on.*)

(68)—*Execution—Application for execution—Order directing attachment of immoveables and dismissing petition otherwise—Subsequent application after lapse of three years—Limitation.*—Appellant decree-holder applied in 1900, in execution, for attachment and sale of the judgment-debtor's property. The order passed on the application was, "immoveables attached; strike off petition, but the attachment will continue." On a subsequent date, he applied for sale of the attached property, but the application was dismissed for non-payment of *batta* in 1901. In 1909, the present application for execution was made. *Held*, that the application was not in continuance of the proceedings of 1900 and was barred. **PARRY & CO. v. VADIVELU PILLAY**, 13 Ind. Cas. 160. (31 M. 71, 3 M.L.T. 328, 18 M.L.J. 46, 37 C. 796, 6 Ind. Cas. 537, 27 A. 334, 1 C.L.J. 381, 15 M.L.J. 258, 9 C.W.N. 601, 2 A.L.J. 397, 7 Bom. L.R. 433, *D.*)

(69)—*Limitation Act (XV of 1877), art. 178, sch. II—Execution of decree—Execution stayed by injunction—Suit to establish right—Act IX of 1908, s. 15—Exclusion of period—Decree-holder not bound to follow either property.*—In execution of a decree, certain property was attached by the decree-holder by means of an application made on July 8, 1904. Objection was taken to the attachment which was disallowed on March 10, 1905. This was followed up on April 5, 1905, by a declaratory suit against the decree-holder. An injunction was also granted on April 6, 1905, whereby the sale of the property in suit was stayed. The suit terminated on June 29, 1907, but the injunction lasted until January 29, 1909. The next application for execution was made on April 14, 1910. *Held*, (i) if the Limitation Act, 1877, applied, the application for execution was within time, it being governed by art. 178. The flow of limitation was obstructed by the objection to the attachment followed up as that was by the declaratory suit and the injunction, which were not the acts of the decree-holder; (ii) if Act IX of 1908 applied, then, too, the application was within time, the period from April 6, 1905, to January 26, 1909, during which the injunction subsisted, being excluded under s. 15 of the Act. A decree-holder is not bound to search out and to proceed against all property of which his judgment-debtor may stand possessed. If he is executing his decree against property which he *bona fide*

**Execution of Decree—continued.****—1.—General—continued.**

believes to be the property of his judgment-debtor, he is executing the decree within the meaning of the law. **GHULAM NASIR-UD-DIN v. HARDEO PRASAD**, 9 A.L.J. 540. (28 A. 651, *F.*)

(70)—*Execution—Questions to be decided in—Suit for declaration—Maintainability.*—All questions arising between the judgment-creditor and the legal representative of the judgment-debtor must be decided in execution. A suit for a declaration that the suit properties belonged to his judgment-debtor is not therefore maintainable, where the execution petition had been dismissed on the ground that the defendant was not the legal representative of the deceased judgment-debtor. Such a suit can lie only if a declaration that the defendant was such legal representative has been prayed for. **CHATH KUTTY NAIR v. KALATH CHANDU KUTTI NAIR**, M.W.N. 1912, 401.

(71)—*Application for execution of a decree by sale—Sale stayed by High Court—Warrant fees not paid—Application 'struck off'—Effect of such order—Civ. Pro. Code, 1881, s. 295—Realisation of assets.*—Where the order passed on an execution petition ended with the words "Petition struck off," such an order is not known to the law, and its effect has to be determined by a consideration of the circumstances of the case and the terms of the order itself. Where, therefore, an application was made for the execution of a decree by sale of a debt, but the applicants had failed to pay certain warrant fees, as the sale had been stayed by an order of the High Court, and the petition was consequently 'struck off,' the order simply amounts to an adjournment *sine die*. Even if the warrant fees had been paid, the Court could not have proceeded with the application at that stage. Where moneys were realised on a personal decree and in execution, they are assets realised under s. 295, Civ. Pro. Code. **SEETHARAMA CHETTIAR v. KRISTNA ROW**, M.W.N. 1912, 407.

Sale of arms in execution of decree by Nazir of Court—Sale by public servant in the discharge of his duty—Indian Arms Act, XI of 1878, s. 1, cl. (b)—*See* ACT XI OF 1878, s. 1, cl. (b), 9 B. 518.

*See* BEN. ACT VI OF 1871, S. 22, A.W.N. 1886, 286.

*See* BEN. ACT VIII OF 1885, SS. 143, 144, 148, SCH. III, ART. 6, 21 C. 387.

*See* BEN. ACT VIII OF 1885, SCH. III, ART. 6, 22 C. 644.

"Suit" includes application for execution—*See* BOM. ACT XIV OF 1877, s. 19, 5 B. 448.

Reference to High Court by Recorder of Moulmein—Questions in execution of decree—*See* BUR. ACT XXI OF 1868, ss. 22, 23, 25, 4 B.L.R., A.C., 50.



**Execution of Decree—continued.****—1.—General—continued.**

Execution of decrees by Village Munsiff—Payment by defendant under protest—Power of District Munsiff to direct refund by Village Munsiff of money levied—See MAD. ACT I OF 1889, s. 73, 24 M. 335 = 11 M.L.J. 189.

'Res judicata'—See U.P. ACT XII OF 1881, s. 9, A.W.N. 1892, 5.

See U.P. ACT XXII OF 1886, s. 174, 4 O.C. 28.

Decree against manager of Court of Wards—Estate released from management of Court of Wards—Mode of—See U.P. ACT III OF 1899, s. 49, 14 O.C. 6 = 9 Ind. Cas. 335.

Sale of mahal—Effect on submerged contiguous mahal—See ALIENATION, 7 A. 38 = A.W.N. 1884, 257.

Appeal—Order refusing extension of time for payment of amount due under decree—See APPEAL—ORDERS, A.W.N. 1890, 68.

See APPEAL—ORDERS, A.W.N. 1894, 88.

See AUCTION-PURCHASER, 2 A. 698.

Objection by person claiming title to property sought to be sold in execution—Suit by decree-holder to establish title of his judgment-debtor—See BURDEN OF PROOF—MISCELLANEOUS, A.W.N. 1893, 60.

See CIV. PRO. CODE, 1882, ss. 210, 257-A, 6 A. 623.

See CIV. PRO. CODE, 1892, s. 257-A, 5 A. 492, F.B. = A.W.N. 1883, 68.

See CIV. PRO. CODE, 1908, s. 2 (12), O. XX, R. 12, 4 C. 649.

Order dismissing objections to the—for default—See CIV. PRO. CODE, 1908, ss. 2, 47, 96, 28 C. 81.

Civ. Pro. Code, s. 586—Applicability of, to orders in execution of decrees—See CIV. PRO. CODE, 1908, s. 102, 12 M. 116.

Reversal on appeal—Power of Court to award restitution—Jurisdiction of executing Court—See CIV. PRO. CODE, 1908, s. 144, 13 B. 485.

See CIV. PRO. CODE, 1908, O. XXIII, R. 1, s. 141, A.W.N. 1891, 92, A.W.N. 1891, 98.

See CIV. PRO. CODE, 1908, SCH. III, RR. 4, 6, s. 47, A.W.N. 1896, 69.

Powers of Collector to whose Court a decree had been transferred for execution—See COLLECTOR, A.W.N. 1893, 28.

Transfer to Collector—Appeal to High Court from Collector's orders in execution—See COLLECTOR, 5 A. 314, F.B. = A.W.N. 1883, 59.

Hindu law—Mirasi right in temple—Suit against office-holder—Compromise for sale of office and emoluments—Public policy—Execution of decree passed in terms of compromise

**Execution of Decree—continued.****—1.—General—continued.**

—Power of executing Court to refuse to execute decree—See COMPROMISE—GENERAL, 26 M. 31.

See COMPROMISE — GENERAL, A.W.N. 1883, 127, 11 A. 228 = A.W.N. 1889, 58.

Wrongful attachment—Payment of decretal amount under protest — Payment whether voluntary—Right of payer—See CONTRACT ACT, 1872, ss. 15, 69, 72, 78, 32 P.W.R. 1911.

Sale intended to defeat expected execution—Effect—See CONTRACT ACT, 1872, ss. 23, 24, 4 B. 70.

See COSTS—SPECIAL CASES, 2 C.L.R. 152.

Execution of legal process—Unintentional interference with person or property—Attachment of land—Nominal damages—See DAMAGES—DAMAGES, SUIT FOR, 14 C.L.J. 515.

Purchaser in—for money, possession obtained by—Decree for sale on mortgage, suit for declaration in respect of—Specific Relief Act I of 1877, s. 42—See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 18 A. 320 = A.W.N. 1896, 86.

See DECREE—GENERAL, A.W.N. 1888, 71, 9 A. 413 = A.W.N. 1887, 48.

See DECREE—ALTERATION OR AMENDMENT OF DECREE, 8 A. 377 = A.W.N. 1886, 127, 6 A. 30 = A.W.N. 1883, 215 = 8 A. 492 = A.W.N. 1886, 156, 13 A. 400 = A.W.N. 1891, 150, 5 C.L.R. 522, 11 C. 143.

Construction of decree—Declaratory decree—Execution — Limitation — See DECREE — DECREE, CONSTRUCTION OF, 14 O.C. 100.

See DECREE — DECREE, CONSTRUCTION OF, 5 O.C. 35, A.W.N. 1898, 44, 15 C. 751, P.C., A.W.N. 1896, 54, 17 M. 343 = 21 I.A. 71, P.C.

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See ESTOPPEL—ESTOPPEL BY CONDUCT, 9 A. 690 = A.W.N. 1887, 254, 10 C. 196 = 13 C. L.R. 385 = 10 I.A. 119.

Order in execution proceedings, construing decree, finality of—See ESTOPPEL—ESTOPPEL BY JUDGMENT, 7 A. 102, P.C. = 11 I.A. 181.

Execution against assets of deceased judgment-debtor — See HINDU LAW — JOINT FAMILY, A.W.N. 1897, 74.

For husband's debt—See HINDU LAW—WIDOW, 5 M. 5.

See HUSBAND AND WIFE, 1 A. 772.

Neglect to take steps to set aside decree—Laches—Injunction not to be granted—See INJUNCTION—SPECIAL CASES, 2 C.P.L.R. 75.

See INSOLVENCY — INSOLVENCY UNDER CIV. PRO. CODE, 16 C. 85, 14 A. 358 = A.W.N. 1892, 36, 15 C. 762.



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See **INSTALMENT DECREE**, 24 A. 85 = A.W.N. 1901, 168.

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Relief against forfeiture—Grant of relief in execution proceedings—See **LANDLORD AND TENANT—MISCELLANEOUS**, 13 Bom. L.R. 154.

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See **LIMITATION ACT**, 1908, SS. 4, 5, 14, A.W.N. 1891, 128.

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See **LIMITATION ACT**, 1908, SS. 6, 8, 7, 22 A. 199, F.B. = A.W.N. 1900, 8.

Majority attained by manager more than three years before applying for—Decree barred against manager of joint Hindu family—Barred against all members—See **LIMITATION ACT**, 1908, s. 7, 10 M.L.T. 370 = 2 M.W.N. 1911, 420.

Limitation for—Acknowledgment of judgment-debt in insolvency petition—Effect—See **LIMITATION ACT**, 1908, s. 19, 16 C.W.N. 346.

See **LIMITATION ACT**, 1908, s. 19, 18 A. 384 = A.W.N. 1896, 101, 7 A. 424 = A.W.N. 1885, 76, 3 A. 247, F.B.

See **LIMITATION ACT**, 1908, s. 19, ART. 182, 3 C.L.R. 572.

See **LIMITATION ACT**, 1908, s. 20, 27 M. 608.

Payment of judgment-debt—Failure to certify—Payment second time—Suit for recovery of money—Limitation—See **LIMITATION ACT**, 1908, arts. 11, 11-A, 20 M.L.J. 518.

Failure under the claim sections of the Civ. Pro. Code—Suit for return of sale proceeds realised by sale of plaintiff's property wrongly attached—Limitation—See **LIMITATION ACT**, 1908, arts. 11, 11-A, 29, 9 Ind. Cas. 773.

Property wrongfully seized—Person having interest in such property—Claim for compensation—Limitation—See **LIMITATION ACT**, 1908, art. 29, 10 M.L.T. 381.

Suit for recovery of value of moveable property wrongfully seized and sold in—Limitation—See **LIMITATION ACT**, 1908, arts. 29, 120, 9 Ind. Cas. 774.

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Application to Court to take step-in-aid of—Deposit of Nazir's travelling allowance, if saves time—Time runs from date of application and not from date of order—See **LIMITATION ACT**, 1908, art. 182, cl. 4, 13 Ind. Cas. 189.

Decree under award upon mortgage—Execution—Objections to award—Maintainability—See **MORTGAGE—GENERAL**, 5 S.L.R. 71.

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See **MORTGAGE—REDEMPTION**, 8 O.C. 361.

See **MORTGAGE—SALE OF MORTGAGED PROPERTY**, 1 N.W.P. 27, A.W.N. 1900, 14.

See **MORTGAGE—MISCELLANEOUS**, 7 O.C. 307.

See **PARDANASHIN WOMEN**, 1 B.L.R., F.B. 31 = 10 W.R., F.B., 21.

See **PAUPER SUITS**, 2 A. 196.

See **PAYMENT INTO COURT**, 15 B. 681.

In different Courts—Plea of limitation—Conflicting decisions—Appeal against one—Effect—See **PRACTICE AND PROCEDURE**, 11 C.L.R. 277.

Money brought into Court under process of execution—Party or wakil present—Duty of Court—See **PRACTICE AND PROCEDURE**, 5 M.H.C., App., 2.

Decree for pre-emption—Civ. Pro. Code, s. 214—Effect of default in payment within time—Appeal—See **PRE-EMPTION—MISCELLANEOUS**, A.W.N. 1888, 4.

Realisation of assets by sale before adjudication of judgment-debtor as insolvent—Right of execution creditor to the money—Priority—See **PROVINCIAL INSOLVENCY ACT**, 1907, s. 34, 11 Ind. Cas. 433.

See **PROVINCIAL SMALL CAUSE COURTS ACT**, 1850, 4 C. 946 = 4 C.L.R. 460.

Beneficial enjoyment of donee after discharge of trust—Attachment of property in—See **RELIGIOUS ENDOWMENT**, 13 Bom. L.R. 101 = 9 Ind. Cas. 768.

Objection to attachment—Suit to establish right of judgment-creditors—Subsequent suit by one of the judgment-debtors to recover possession as against the objector—See **RES-JUDICATA—PARTIES**, A.W.N. 1890, 177.

See **RESTITUTION OF CONJUGAL RIGHTS**, 2 Agra 111.

Execution of decree—Assignment of decree for costs—Costs realized by assignee—Decree reversed in appeal—Costs cannot be recovered by way of execution—See **RESTITUTION OF RIGHTS BY MOTION**, 20 A. 139 = A.W.N. 1897, 222.

Suit on decree where there is no means of enforcing it by execution—See **RIGHT OF SUIT—DECREES**, March 611.



**Execution of Decree—continued.****—1.—General—concluded.**

Compensation for damage done in execution of decree—See SET OFF, 2 Agra 377.

Cross-decrees — Cross-claims under same decree—Different rights of enforcing execution—See SET OFF, 5 A. 272.

Decree of a Small Cause Court—Execution of such decree against immoveable property—See SMALL CAUSE COURT, MOFUSSIL JURISDICTION OF—PRACTICE AND PROCEDURE OF, 1 A. 624.

See SMALL CAUSE COURT, MOFUSSIL JURISDICTION OF—PRACTICE AND PROCEDURE OF, 6 A. 243, F.B.

Dispossession in, obtained against third party, if in due course of law—See SPECIFIC RELIEF ACT, 1877, s. 9, 15 C.W.N. 956.

Injunction not to execute decree in foreign territory—See SPECIFIC RELIEF ACT, 1877, s. 42, 4 M.L.J. 254.

Application for execution by legal representative of decree-holder—Necessity for succession certificate—See SUCCESSION CERTIFICATE ACT, 1889, s. 4, 20 B. 76.

See SUCCESSION CERTIFICATE ACT, 1889, s. 4, 18 B. 315.

See SUPERINTENDENCE OF HIGH COURT, 2 B.L.R., A.C., 217=11 W.R. 54.

Execution of decree against surety—Payment by instalments—See SURETY—LIABILITY OF SURETY, 3 A. 809=A.W.N. 1881, 78.

Summary procedure against surety — See SURETY—LIABILITY OF SURETY, 3 C.L.R. 505.

Objection that decree is invalid, if can be taken in execution—See TRANSFER OF PROPERTY ACT, 1882, ss. 88, 89, 10 Ind. Cas. 536.

See TRANSFER OF PROPERTY ACT, 1882, s. 89, 3 O.C. 42.

Attachment and sale of trees on land used for agricultural purposes—Jurisdiction of Civil Courts—See TREES, 7 N.L.R. 63.

See WAIVER, 17 B. 555.

Arrest in—Privilege of witness—Scope of privilege—See WITNESS—GENERAL, 14 B.L.R., App., 13.

**—2.—Appeal, Review, etc., Execution of decree after.**

(1)—*Appellate decree, effect of, in respect of execution—Rent decree.*—There is direct authority, not only in reported cases, but in the Civ. Pro. Code itself, for holding that the appellate decree, even where the appeal is merely dismissed, supersedes the original decree, and is the only decree that can be executed, if execution has not already been had upon the original decree. Hence, where a rent decree, rendering a tenant liable to ejectment if the rent was not paid within 15 days from the date thereof, was confirmed on appeal, and no steps had been taken to execute it in the meantime,

**Execution of Decree—continued.****—2.—Appeal, Review, etc., Execution of decree after—continued.**

held, the tenant would be protected from ejectment, if he paid the decretal amount within 15 days of the appellate decree. NOOR ALI CHOWDHURI v. KONI MEAH, 13 C. 13. [F., 11 A. 346=A.W.N. 1889, 127, 22 C. 467, 11 B. 172; D., 25 C. 311=1 C.W.N. 671, 6 A.L.J. 493=31 A. 379; Cons., 15 M. 170, 48 P.R. 1906=104 P.L.R. 1906, F.B., 31 M. 28=3 M.L.T. 26=17 M.L.J. 495, 11 A. 267, F.B., 13 A. 189, 13 A. 376 F.B., 15 B. 370, 16 B. 243, 18 M. 214, F.B., 22 B. 500, 18 A. 223, 18 A. 455, 11 C.P.L.R. 115, L.B.R. 1893-1900, 420, 13 C.W.N. 1060.]

(2)—*Decree on review or appeal affirming decree under consideration — Final decree between parties—Execution.*—If, in a review or appeal, a decree is passed upholding the decree appealed against, the decree of the appellate or reviewing Court is the final decree between the parties, and therefore the decree to be executed. BISTOO PERSHAD CHUCKERBUTTY v. ISHAN CHUNDER ROY, 23 W.R. 57.

(3)—*Decree to be executed where appeal preferred—Reference to decrees of lower Courts, whether permissible.*—Where there has been an appeal, the decree of the Court of last instance is the only decree susceptible of execution; and the specifications of the decrees of the lower Court or Courts as such, may not be referred to and applied by the Court executing the decree. SHOHRAT SINGH v. BRIDGMAN, 4 A. 376, F.B. [F., 11 A. 267, F.B.; Appl., 11 A. 346; Cons., 7 A. 366, 10 A. 389; R., 6 A. 48, 8 A. 492, 10 A. 51, 8 A. 519, 13 A. 394, 22 B. 500, 20 A. 493=A.W.N. 1898, 121; D., 5 A. 589=A.W.N. 1883, 128.]

(4)—*Execution of decree—Decree to be executed where appeal preferred — Costs of lower Court.*—Where, in an appeal by the defendant in respect of the costs decreed against him by the Court of first instance, the order of the lower Court was upheld, but the amount of costs thus payable by him was not specified in the decree, such decree could be executed in respect of such costs which had become the substantive portion of the decree. HIMAYAT HUSAIN v. JAI DEVI, 5 A. 589=A.W.N. 1883, 128. (4 A. 376, D.)

(5)—*Execution of decree — Costs in lower Court, not specified in appellate decree affirming same.*—Where the Court of first instance dismissed a suit with costs, and the appellate Court affirmed the decree of the lower Court, specifying in its decree, the costs of the respondent in the appellate Court payable by the appellant, but not the costs of the lower Court, the Court executing the decree of the appellate Court could execute it for the costs of the lower Court, by ascertaining the amount of the same from the original decree. BEHARI LAL v. KHUB CHAND, 6 A. 48. (4 A. 376, R.) [R., 11 A. 267, F.B.]

(6)—*Execution of decree—Decree to be executed where appeal preferred—Omission to ask for*



**Execution of Decree—continued.****—2.—Appeal, Review etc., Execution of decree after—continued.**

*execution of final decree.*—Effect, of Full Bench decision in 4 A. 376 explained by *Oldfield, J.* See 4 A. 376, *supra*. Where the first Court of Appeal affirmed the decree of the Court of first instance, and the High Court affirmed that of the lower appellate Court and dismissed the appeal, an application by the decree-holder for the execution of the decree of the Court of first instance, cannot be rejected on the technical ground, that it did not ask for the execution of the final appellate decree, where the object of such application clearly was to take out execution under such appellate decree by carrying out the mandatory part of the original decree. **GOBAR DHAN DAS v. GOPAL RAM**, 7 A. 366 = A.W.N. 1885, 57. [Cons., 11 A. 267, F.B.; R., 10 A. 61; D., 13 A. 394.]

(7)—*Decree affirmed on appeal—Amendment of decree by first Court afterwards—Execution of amended decree, objection by judgment-debtor to, if maintainable.*—Where after a decree was affirmed by the High Court in appeal, the first Court (which passed it) with the intention of bringing it in accordance with the judgment of the High Court amended it, *held* that the amended decree could not be executed, as it was not the decree of the appellate Court, and that the first Court had no power to alter it. **MUHAMMAD SULIAMAN KHAN v. FATIMA**, 11 A. 314, F.B. = A.W.N. 1889, 107. (8 A. 377, R.) [R., 17 A. 478, 14 C.P.L.R. 92.]

(8)—*Decree—Appeal—Decree confirmed in appeal—Decree to be executed—Limitation.*—The plaintiff sued the defendants for recovering certain ornaments and damages. The Subordinate Judge in whose Court the suit was instituted decreed a portion of the claim and rejected the rest. On appeal by the plaintiff to the High Court in respect of the claim disallowed, the appellate Court confirmed the decree appealed against. The plaintiff thereupon took out execution of the decree in the Court of the Subordinate Judge, after the expiry of 3 years from the date of the original decree but within a period of 3 years from the date of the appellate Court's decree. The Sub-Judge rejected the application for execution as time-barred. On appeal by the plaintiff: *Held*, discharging the order of the lower Court, that when the appellate Court confirmed the decree of the Court below, the latter became incorporated in the decree of the appellate Court, which was thenceforth the only decree to be executed, and that the application for execution, being within 3 years from the date of the appellate Court's decree, was within time. The case was accordingly remanded to the lower Court for disposal on the merits. **SAKHALCHAND RIKHAWDAS v. VELCHAND GUJAR**, 18 B. 203 = P.J. 1893, 79. [F., 19 B. 258, 23 C. 876, 22 B. 500, 26 M. 91; Appl., 23 M. 60; R., 18 B. 542, 11 C.P.L.R. 115.]

**Execution of Decree—continued.****—2.—Appeal, Review, etc., Execution of decree after—continued.**

(9)—*Decree not in accordance with judgment—Amendment—Civ. Pro. Code, 1882, s. 206—Appeal.*—The judgment of an appellate Court directed the parties to bear each other's costs in proportion in both the Courts (including the Court of first instance). But in the decree which was drafted, there was a discrepancy in respect of the order as to costs, the decretal order being "parties to bear their own costs in proportion in both the Courts." Cross second appeals having been preferred by both parties, to the High Court, the latter Court confirmed the lower appellate Court's decree. But there was no point taken in either of the appeals with respect to the order as to costs. On the discrepancy between the judgment and the decree of the lower appellate Court having come to the notice of the plaintiff, he applied to the High Court under s. 206, Civ. Pro. Code, 1882, for amending it. On behalf of the defendant it was contended that the High Court having merely confirmed the lower appellate Court's decree, it was the decree of the latter Court that required amendment, and, therefore, the latter Court only had jurisdiction to entertain the application. *Held*, rejecting the contention of the defendant, that the application was properly made to the High Court, because the only decree which existed for the purpose of execution after the High Court had confirmed the decree of the lower appellate Court was the decree of the former Court into which that of the latter Court had become merged. **SHIVLAL KALIDAS v. JUMAKLAL NATHIJI DESAI**, 18 B. 542. [F., 11 C.L.J. 155 = 5 Ind. Cas. 723; R., P.L.R. 1900, p. 528, 134 P.L.R. 1904, 9 C.W.N. 605, 6 C.L.J. 542.]

(10)—*Transfer of Property Act, ss. 92, 93—Appeal against decree for redemption—Time fixed for redemption—Execution of decree—Decree to be executed when appeal preferred.*—When a mortgagor obtains a decree for redemption, the payment of the redemption money by him within the time allowed by the decree is a condition precedent to his being allowed to execute the decree, and though a decree passed on an appeal preferred by the defendant may give the plaintiff (the mortgagor) a fresh starting point of time within which he may execute, it does not necessarily, unless the appeal so declares, give him an extension of the time during which he must fulfil the condition precedent. The mere pendency of the appeal will not extend the time. Where, therefore, a decree for redemption of a mortgage "within six months of this decree" is merely confirmed on appeal, and the decree-holder seeks to execute it within six months after the appellate decree, the Court should, before passing orders on his application give him time to apply to the appellate Court to amend the decree under s. 92 of the Transfer of Property Act. [R., 19 M. 40, 11 C.P.L.R. 115, 48 P.R. 1906 = 104 P.L.R. 1906, F.B., 31 M. 28 = 17 M.L.J. 495 = 3 M.L.T. 26, 54 P.R. 1908 = 87 P.L.R. 1908 = 40 P.W.R. 1908.]



**Execution of Decree—continued.****—2.—Appeal, Review, etc., Execution of decree after—continued.**

When there has been an appeal, the decree of the appellate Court is the only decree that can be executed. *MANAVIKRAMAN v. UNNIAPPAN*, 15 M. 170=2 M.L.J. 23. [Appl., 20 C. 279, 18 M. 214, F.B.]

(11)—*Execution of decree—Application for execution dismissed—Decree confirmed on appeal—Decree to be executed—Dismissal of application to execute original decree no bar to executing appellate decree—Res judicata—Limitation.*—Where the High Court confirms on appeal the decree of a subordinate Court, such confirmation has the same effect as an order of reversal would have had, in so far as it leaves the decree of the High Court as the only decree which exists for the purpose of execution, and the decree of the lower Court becomes incorporated with it. On 23rd July, 1888, plaintiff obtained a decree for redemption of certain lands on payment to the mortgagee within three months of what might be due to him under his mortgage-bond. The decree directed that the amount due to the mortgagee should be ascertained at the time of execution. Against this decree, the defendant appealed to the High Court. Pending the appeal the plaintiff presented a *darkhast* for execution on the 4th October, 1888. This *darkhast* was dismissed as the plaintiff failed to produce a copy of the mortgage-bond within the time allowed by the Court. The three months allowed by the decree for payment expired on the 23rd October, 1888. The High Court confirmed the decree on 11th February, 1890, and on 11th April, 1890, plaintiff presented a fresh *darkhast* for execution. This *darkhast* was rejected by both the lower Courts on the ground that it was barred by the dismissal of the first *darkhast* on the principle of *res judicata*. Held, that the plaintiff was entitled to execute the decree, and that his second *darkhast* was not barred either by limitation or on the principle of *res judicata*. *NANCHAND v. VITHU*, 19 B. 255.

(12)—*Civ. Pro. Code, 1882, s. 214—Conditional decree in pre-emption suit—Affirmed in appeal—Computation of time allowed for payment.*—Where, in a pre-emption suit, a decree was passed in favour of the pre-emptor fixing one month from the date of the decree within which the purchase-money was to be deposited, and after the termination of this period without payment, an appeal was made against the decree, and the appellate Court affirmed the decree without fixing any fresh period for payment of the purchase-money, held that the decree which could be executed being only the appellate decree, payment of the purchase-money within one month from the appellate decree was within time. *RUP CHAND v. SHAMSH-UL-JEHAN*, 11 A. 346=A.W.N. 1889, 127. (4 A. 376, 7 A. 396, 11 B. 172, 8 C. 218, 13 C. 13, R.). [Not F., A.W.N. 1890, 92, 81 A. 455; Appl., 13 A. 376, F.B., 22 C. 467;

**Execution of Decree—continued.****—2.—Appeal, Review, etc., Execution of decree after—continued.**

R., 13 A. 189, 15 M. 170, 18 A. 223, 88 P.R. 1898, 48 P.R. 1906=104 P.L.R. 1906, 31 M. 28=17 M.L.J. 495=3 M.L.T. 26; D., 15 B. 370, 11 C.P.L.R. 115.]

(13)—S. 88, *Bengal Act I of 1879 (Chota Nagpur Landlord and Tenant Procedure Act—Appellate decree, effect of, in respect of execution—Rent-decree—Date of final decree.*—Where the decree of the original Court was not executed pending the appeal to the higher Court, the words "date of the decree" in the latter part of s. 88, Bengal Act I of 1879, ought to be read as the date of the final decree. The decree of the appellate Court is the final decree and the only decree capable of execution. *NAM NARAIN SINGH v. LALA ROGHUNATH SAHAI*, 22 C. 467. (13 C. 13, 11 A. 346, 11 B. 172, F.) [R., 48 P.R. 1906, F.B.=104 P.L.R. 1906.]

(14)—*Analogous cases—Judgment by consent.*—The Calcutta High Court reversed a decision of the Recorder of Rangoon in the first of a number of suits against the same defendant—the decision in which it was mutually agreed should determine all the others—and subsequently, without hearing argument, reversed the decision in such of the other suits as were appealable; held that the decree passed by the Recorder's Court in the four unappealed suits were good ones on which execution might be issued in the usual form, provided they be not altered on review. *NGA BIKE v. R. SNADDEN*, 9 W.R. 276.

(15)—*Execution of decree—Decree modified in appeal—Decree to be executed.*—Where a decree has been modified on appeal, the decree of the appellate Court entirely supersedes that of the lower Court, and is the only decree which can be executed. *NOUBANG RAI v. LATIF CHAUDHRI*, 13 A. 394=A.W.N. 1891, 148. (4 A. 376, 7 A. 366, 11 A. 267, R.) [R., 5 O.C. 373.]

(16)—*Application to execute Zillah Court's decree—Confirmation of decree by High Court—Appeal to Privy Council—Application to execute appellate decree—Certificate.*—Where a person applies for execution of a Zillah Courts' decree, affirmed in appeal by the High Court he must mention whether a further appeal to the Privy Council has been preferred. The Court to which an application to execute an appellate Court's decree should be made is that passing the first decree and it must be made after the receipt by that Court of the copy of the decree certified by the appellate Court; but *quære*, whether execution should be allowed to issue on a certified copy procured by parties and presented to the Judge by petition? *TOONDUN SINGH v. POKH NARAIN SINGH*, 14 W.R. 203.

(17)—*Landlord and tenant—Rent—Suit for enhancement of rent—Decree—Appeal—Execution of decree pending appeal—Possession given to landlord—Appeal to High Court—Time for complying with decree—Application by tenant*



**Execution of Decree—continued.****—2.—Appeal, Review, etc., Execution of decree after—continued.**

for restoration of possession on complying with the conditions of the decree—*Practice*.—Suit for enhancement of rent. The appellate Court awarded the claim, ordering the defendants to pay Rs. 34 to the plaintiff as rent for the year 1882-1883, and Rs. 50 per year as rent from 5-4-1883, the date on which the plaintiff gave notice of enhancement to the defendant. In default of payment, the plaintiff was to take possession of the land. The decree also directed the plaintiff to give the defendant credit for any sums which he had paid as rent since the year 1882-1883. On 13-2-1890, the plaintiff took out execution by an application to the subordinate Court (which passed the decree), praying for immediate possession of the land and for the rent due, which was given as Rs. 334. This amount was arrived at by adding the rent for 1882-1883 (Rs. 34) to the rent at Rs. 50 for six years, *viz.* 1883-1884 to 1888-1889 inclusive. The defendant had all along continued to pay the old rent only (Rs. 34) through the village officers, under s. 85, Bombay Land Revenue Code (Act V of 1879). Possession was thereupon ordered to be given by the Subordinate Judge, which was done on 19-2-1890. On 20-3-1890, the defendant applied to the Subordinate Judge objecting to being ousted from possession, alleging that he was liable to pay Rs. 83-4-0 only, that he had preferred a second appeal to the High Court against the decree of the District Court which fixed the rent at Rs. 50 and that credit should be given for the sums which he had paid to the village officers (*viz.* Rs. 34 rent and Rs. 2-2-0 local fund cess). He also demanded restoration of the land on the ground that the plaintiff had obtained possession with the crops on the strength of an illegal application. In the meanwhile, both parties had filed second appeals in the High Court against the District Court's decree, which, however, was confirmed on 17-7-1890. Thereupon, on 1-8-1890, the defendant made an application to the Subordinate Judge producing Rs. 98 (being the difference between the old rent which he had paid and the enhanced rent payable under the confirmed decree of the High Court) and praying for restoration of possession. On 6-2-1891, the Subordinate Judge heard the defendant's application of 20-3-1890 for restoration of possession and rejected it holding that he had defaulted in complying with the terms of the first appellate Court's decree. On appeal to the District Court, the Judge reversed the order of the Subordinate Judge, holding that the time fixed for payment of rent due must be reckoned from 17-7-1890, the date of the decree of the High Court (which confirmed the District Court's decree), and that the defendant was entitled to be put back into possession, he having obeyed the decree of the District Court by reason of his payments made to the village officers and his payment into Court of Rs. 98 on 1-8-1890. The High Court, on second appeal, held that the defendant was not entitled

**Execution of Decree—continued.****—2.—Appeal, Review, etc., Execution of decree after—concluded.**

to recover possession. The fact that he had preferred an appeal to the High Court could not prevent the decree of the District Court from being executed, or enlarge the time for payment of the rent as decreed by the District Court. Even if the Subordinate Judge had the power to enlarge the time for payment in the course of execution, the fact of an appeal having been lodged would afford no special ground for enlarging the time. No stay of execution was asked for. Therefore, all that the Subordinate Judge had to see in February, 1890 was, whether payment of rent had been made in accordance with the terms of the District Court's decree, dated 13th February, 1889. The defendant had not paid his rent when the plaintiff executed the decree on 19-2-1890, nor did he tender it or pay it to the village officers when he objected to being ousted from possession in March, 1890. The decree having been legally executed before the passing of the High Court's decree on 17-7-1890, that execution could not afterwards be cancelled. When the District Court's decree was passed, the defendant should at once have paid to the village officers the balance of the rent due according to that decree, or should, on second appeal being made, have applied for stay of execution. He followed neither course and the decree was, therefore legally executed before the decision of the High Court was passed. The claim in the plaintiff's application for execution may have been excessive, but the defendant had never made an attempt to pay anything beyond the old rent. The appellate Court's order was accordingly discharged and the order of the Subordinate Judge restored. *AMINABI v. SIDU*, 17 B. 547. [*R*, 16 A. 65, L.B.R. 1893-1900, 174, L.B.R. 1893-1900, 420.]

(18)—*Execution—High Court's orders in revisional jurisdiction—Procedure—Civ. Pro. Code*, ss. 583, 647.—The same procedure that applies to High Court decrees in appellate jurisdiction, must also be applied to the High Court's decrees or orders in revisional jurisdiction (see s. 647). Application to execute the latter must, therefore, be made to the Court which passed the decree against which the revision application was preferred; and that Court must proceed to execute the decree or order passed on revision, according to the rules which are prescribed for the execution of its own decrees (see s. 583). *MARY GOLD v. BERL GOLDENBERG*, 16 B. 550.

Award of costs in favour of both defendants—Successful appeal by plaintiff against one defendant only—Right of other defendant to realize entire costs—*See COSTS—MISCELLANEOUS*, 17 C.P.L.R. 53.

Decree affirmed on appeal—Jurisdiction of lower Court to amend decree—*See DECREE—ALTERATION OR AMENDMENT OF DECREE*, 11 A. 267, F.B.



**Execution of Decree—continued.****—3.—Application for execution and powers of Court.**

See CIV. PRO. CODE, 1908, O. XXI, RR. 3-23.

(1)—*Principal Civil Court of District—Assistant Judge—District Judge—Functions of Court executing decree are not ministerial only but judicial.*—If an Assistant Judge is invested with all the powers of a District Judge within any part of the District of such Judge, the Court of the Assistant Judge should be regarded, no less than the Court of the District Judge, to be the principal Civil Court of original jurisdiction. A decree, therefore, sent for execution in such part of the District is not improperly executed by or under the directions of such Assistant Judge. The functions of the Court executing a decree are not merely ministerial, but also judicial. *GOVIND HARI VALEKAR v. SHIDRAM BIN SHIDMURTI*, 7 B. H.C., A.C., 37.

(2)—*Act VIII of 1859, ss. 210, 212—Application for execution—Right to benefit of s. 210, to be explained by judgment-creditor.*—An application under Act VIII of 1859, s. 210, for execution must clearly state how the judgment-creditor claims the benefit of s. 210, quite independently of the particulars required by s. 212, Act VIII of 1859. *RAM RUNJUN CHUCKERBUTTY v. RAJAH JOWHIR JUMMAH KHAN*, 21 W.R. 420.

(3)—*Uncertain decree—Execution—Evidence.*—If what is contained in the decree is so uncertain that it is impossible to ascertain what is decreed, execution cannot be given. Evidence is not admissible, in the execution department, to make that clear which the decree has left uncertain, or to show that the decree intended to give the plaintiff something different from that for which he sued and which was awarded to him by the decree. *DWARKANATH HALDAR v. KAMALAKANTH HALDAR*, 3 B.L.R., App., 128.

(4)—*Terms of decree uncertain—Execution—Evidence to explain the terms.*—A decree, the terms of which are uncertain, cannot be executed; and it is not competent to the Court of execution to make any enquiries, by taking oral and documentary evidence, to ascertain the meaning of such terms. *NUDDYAR CHAND SHAHA v. GOBIND CHANDER GUHA*, 10 C. 1092.

(5)—*Execution of decree obtained through error in procedure.*—It is not competent to a Court to refuse execution, where no fraud is suggested, on the ground that the plaintiffs were allowed improperly to institute the suit. *SUBRAMANIAN v. PANJAMMA*, 4 M. 324.

(6)—*Decree of foreign Court based upon decree in British India—Execution of original decree.*—The existence of a decree in a foreign Court is no bar to the execution of a decree of a Court in British India, though the cause of action in both suits be the same; and as any payment made in satisfaction of the foreign decree can,

**Execution of Decree—continued.****—8.—Application for execution and powers of Court—continued.**

under s. 258, Civ. Pro. Code, be certified to the Court in British India and the amount placed to the credit of the judgment-debtor, no injustice can arise from the decrees being concurrent. *FAKURUDDEEN MAHOMED ASSAN v. THE OFFICIAL TRUSTEE OF BENGAL*, 7 C. 82. (14 M.I.A. 529=10 B.L.R. 214, R.)

(7)—*Ss. 373, 647, Civ. Pro. Code, 1882—Execution of decree.*—Proceedings spoken of in s. 647 of the Civ. Pro. Code include original matters in the nature of suits such as proceedings in probates, guardianships, and so forth, and do not include proceedings in execution. S. 647 of the Civ. Pro. Code cannot operate to extend the rule laid down in respect of a suit in s. 373 of the Code to an application for execution. *BUNKO BEHARY GANGOPADHYA v. NIL MADHUB CHUTTOPADHYA*, 18 C. 635. (12 A. 392, Not F.) [Appr., 17 A. 106; R., 26 B. 76=3 Bom. L.R. 431.]

(8)—*Invoking process of Court—Execution—Conduct of parties—Effect on decree.*—Parties cannot, either by special agreement, or by any conduct of their own, invoke the process of the Court in execution. Process in execution must be granted by the direct act of the Court itself. Precisely upon the same principle parties are prohibited from extending the relief which the Court has chosen to award. Therefore, all questions as to the conduct of the parties, where they are seeking to execute a decree of the Court, are immaterial in considering what is the effect of the decree. *EKOWRI SINGH v. BIJAYNATH CHATTAPADHYA*, 4 B.L.R., A.C., 111=13 W.R. 11. [R., 24 W.R. 193, P.C., 10 C.W.N. 830.]

(9)—*Court which passed the decree ceases to have jurisdiction to execute it—Application for execution to be made to what Court—Change of headquarters of Court or alteration of its local limits—Effect.*—Where the Court, which passed the decree, has ceased to have jurisdiction to execute it, the application for execution may be made either to that Court, although it had ceased to have jurisdiction to execute the decree or to the Court which, if the suit, wherein the decree was made, were instituted at the time of making application to execute it, would have jurisdiction to try the suit—*Per Garth, C. J.* [F., 35 C. 974=12 C.W.N. 859, 15 C. 667, 28 C. 233; R., 5 C.W.N. 150.] A Court did not cease to be "the Court which passed the decree," so as to be deprived of jurisdiction to entertain an application for execution, merely by reason of the headquarters having been moved to another place, or of the local limits of the jurisdiction of such Court having been altered—*Per Field, J.* *LUTCHMAN PUNDEH v. MADDAN MOHUN SHYE*, 6 C. 513=7 C.L.R. 521. [F., 35 C. 974=12 C.W.N. 859.]

(10)—*Decree for performance of a particular Act—Execution of decree—Civ. Pro. Code, 1859, s. 200.*—When a decree directs the



**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

performance of, or abstinence from, a certain act, there must be clear evidence of disobedience by the person so directed, before the decree can be executed against him. When, in a decree for restitution of conjugal rights, the plaintiff's mother-in-law, who had been impleaded as a defendant, was directed to refrain from preventing the plaintiff's wife from returning to him, *held*, in an execution petition for attaching the property of the mother-in-law, that her action in permitting her daughter, who was of age, to reside in her home after decree, did not constitute such interference, on her part, with the return of her daughter, as would justify execution against her. *AJNASI KUAR v. SURAJ PRASAD*, 1 A. 501.

(11)—*Discretion to issue warrants—Diligence.*—The discretion of a Judge to issue fresh warrants for the execution of decrees, where the parties have not been diligent to execute those which have expired, notwithstanding, the fact that the decree-holder had not used the utmost possible diligence in executing a former warrant would not justify the refusal of a new one, and, under the circumstances, a warrant running for a year was issued. *KALEE CHUNDER PAUL v. THAKOOR DOSS BISWAS*, 12 W.R., O.C., 7.

(12)—*Civ. Pro. Code, ss. 373, 647—Application for execution struck off the file for non-payment of batta—Subsequent application.*—When an application for execution is struck off for non-payment of batta, after notice issued to the judgment-debtor and attachment of his property, and the decree-holder does not obtain permission under s. 373, Code of Civil Procedure, to make a fresh application, the circumstance is no bar to a fresh application for execution when made. *LAKSHMI NARASIMHA v. ATCHANNA*, 15 M. 240 = 1 M.L.J. 750.

(13)—*Civ. Pro. Code, 1882, ss. 373 (= O. XXIII, r. 2), 647 (= s. 141, new Code)—Execution of decree—Application for arrest of judgment-debtor withdrawn by decree holder—Subsequent application for execution barred.*—Where an application for execution against the person of the judgment-debtor by his arrest, had been made, and an order for a warrant had been issued subject to the payment of fees which however, were not paid nor the diet money, and afterwards on the representation by the decree-holder that he did not want to prosecute the application further, it was struck off, *held* that a subsequent application for execution of the same decree was barred under s. 373 of the Code. *RADHA CHARAN v. MAN SINGH*, 12 A. 392, F.B. = A.W.N. 1890, 119. (10 A. 71, 12 A. 179, *Appr. & F.*; A.W.N. 1889, 163, D.) [*Appl.*, 15 A. 49; R., 15 A. 564.]

(14)—*Civ. Pro. Code, 1882, ss. 373, 374—Execution of decree—Practice—Lease taken up accidentally, to suit Court's convenience—Order passed without notice to decree-holder and in his absence—Effect.*—Ss. 373 and 374 of the Code of

**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

Civil Procedure do not apply to applications for execution of decrees. [*F.*, 18 C. 515, 18 C. 635.] Where a case is apparently taken up accidentally at some time convenient to the Court itself, *held*, that it is not in accordance with the regular procedure of the Courts established. The Civil Procedure Code contemplates that, on the adjournment of a suit or other proceeding, a day shall be fixed for its hearing. No order, therefore, passed on any other day, except in the presence of the parties and without objection raised, can be binding on them. Where an order was passed without any notice to the decree-holder, and in his absence, it should not be regarded as precluding him from further proceeding. *WAJIBAN alias ABIJAN v. BISHWANATH PERSHAD*, 18 C. 462. [*F.*, 15 M. 240; D., 137 P.L.R., 1901 = 13 P.R. 1901.]

(15)—*Agreement by plaintiff not to prosecute claim against a particular defendant and not to execute decree against that defendant—Admissibility in evidence of such agreement without registration—Effect of agreement on.*—Plaintiff, in a suit, wrote to one of the defendants therein that he would not press his claim against her and that, even if he got a decree, he would not execute it against her and asked her not to defend the suit. She did not defend the suit and a decree was also passed against her. The plaintiff's heir sought to execute the decree against her. The question for decision was whether the agreement was admissible in evidence, though unregistered, and whether it could be pleaded in bar of execution. *Held*, the letter was not intended to be a release of the interest of the deceased plaintiff in the property concerned. The real purpose of the communication was only to inform the particular defendant that the plaintiff agreed not to prosecute, any further, his claim against her and, if it should happen that the decree came to cover the property claimed by her, he would not execute the decree. Even if the portion of the letter relied on could be treated as a release and, therefore, not receivable in evidence as to such release, the document was clearly admissible in evidence for the collateral purpose of proving that the deceased plaintiff was not to prosecute the suit or execute the decree should the property be included in the decree. These promises were independent of the alleged release and they were merely covenants not affecting immoveable property of the value of more than one hundred rupees. Application to execute the decree refused. *KRISHNAMACHARIAR v. RUKMANI AMMAL*, 15 M.L.J. 370. [*R.*, 7 M. L.T. 278, 4 M.L.T. 229 = 31 M. 467 = 18 M.L.J. 542.]

(16)—*Civ. Pro. Code, 1882, ss. 278, 287, scope of—Rule of High Court under s. 287—Immoveable property in possession of third party, Power of Court to order sale of.*—Under s. 287 of the Civ. Pro. Code of 1882 and the rules made under it by the High Court, a Court cannot



**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

refuse to execute its own decree by ordering the sale of immoveable property, merely because a third party happens to be in legal possession. Rule 1 of the High Court Rules framed under s. 287, which permits enquiry as to the judgment-debtor's title, relates only to moveable property. Also a claim preferred in the course of an investigation held under s. 287 is not capable of being treated as a claim under s. 278, which latter section refers to claims to, and objections to attachment of, property attached. **BHIKU BAL PATIL v. KHEMCHAND KUBERSHET, 14 B. 369.**

(17)—*Execution of decree, Application for—Terms such as "dismissed," "struck off the file," "shelved," etc., Effect of.*—The "dismissing," "striking off," or "shelving" of an execution application is an order which may admit of different interpretations according to the circumstances under which it has been passed. (4 C. 877, R.) If such an order is passed on the merits of the application (e.g., by a finding that a decree has already been fully satisfied or that the execution is barred by limitation or by some previous order which would operate as (*res judicata*) then, so far as the Court executing the decree is concerned, the application must be held to have been finally disposed of in a manner adverse to the applicant's right to have the decree executed, and no further application for execution of the same decree can be entertained unless in pursuance of a successful appeal to a superior Court. But if such an order has been passed in consequence of some default of the applicant not going to the merits of his right to have satisfaction of his decree (e.g., default in appearance, failure to pay process fees or to put in copies of papers called for, etc., etc.), in such cases, though the order may put an end to the particular application in which it was passed, it does not bar a subsequent application for execution, if the latter be made within the time allowed by the Limitation Act. The matter to be enquired into respecting such an order is whether or not the Court which passed it intended to and did judicially decide that the decree-holder's right to have satisfaction of his decree was barred by some rule of law. If the Court did so decide, then, the decree-holder's only remedy is by appeal, a fresh application for execution being barred. But, in other cases, another application is for execution admissible, subject always to the Law of Limitation. **DHONKAL SINGH v. PHAKKER SINGH, 15 A. 84 = A.W.N. 1893, 36, F.B. [F., 15 A. 198, 18 M. 131, 76 P.R. 1903 = 170 P.L.R. 1903; Appl., 17 A. 243; Appr., 20 A. 428; R., 24 A. 282, 20 P.L.R. 1903 = 90 P.R. 1902, 13 P.L.R. 1905.]**

(18)—*Civ. Pro. Code, 1877, s. 230, cl. 3—Meaning of the words "the last preceding application."*—The words "the last preceding application" in the above clause mean an application under s. 230, Civ. Pro. Code, 1877, and not an application under Civ. Pro. Code, 1859,

**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

Where, therefore, an application for execution under the Civ. Pro. Code, 1877, was disallowed as barred owing to want of due diligence on the part of the decree-holder to procure complete satisfaction of the decree on the last preceding application under the Civ. Pro. Code, 1859, held, that such order was wrong. **RAM KISHEN v. SEDHU, 2 A. 275. [R., 6 C. 504.]**

(19)—*Execution of decree—Civ. Pro. Code, s. 230—Meaning of the word, "granted,"*—Under s. 230 of the Civ. Pro. Code, after a decree is twelve years old, there is a prohibition against its being executed more than once, that is, an application for execution should not be granted if a previous application had been allowed under the provisions of that section. The mere filing of a petition with the result, that the application contained in it is subsequently struck off, cannot be said to be a "granting" of the application within the meaning of s. 230 of the Civ. Pro. Code. And a consideration of the provisions of ss. 245, 248 and 249 will show that there is a broad distinction between admitting an application for the purpose of issuing notice to the other side, and of hearing the objections that may be urged, and a decision of the Court as provided in s. 249. In other words, it is one thing to ask for execution of a decree and another to have such application granted. **PARAGA KUAR v. BHAGWAN DIN, 8 A. 301 = A.W.N. 1886, 97. [Appr., 8 A. 536; R., 12 A. 571, 18 A. 482, F.B.; D., 15 A. 198.]**

(20)—*Decree for possession by Civil Court—Civil Court only to execute it.*—A Civil Court's decree for possession of land can only be executed by a Civil Court. **RAJAH SUTTO CHURN GHOSAL v. GOUREE PERSHAD ROY, 13 W.R. 117.**

(21)—*Application for execution of decree of appellate Court—Court to which application should be made.*—The Court which passed the first decree in the suit is the Court to which an application for execution of the decree of an appellate Court should be made irrespective of any previous order referring the case for execution. **RAM JADUB SIRCAR v. AMEEROONISSA BEEBEE, 13 W.R. 27.**

(22)—*Execution of decree—Decree confirmed by appellate Court.*—Where a decree of the lower Court is confirmed by the High Court, the decree to be executed is the decree of the High Court and not that of the lower Court. **MUHAMMAD ALTAF ALI v. BHOLANATH, A.W.N. 1882, 126. [R., 7 A. 366 = A.W.N. 1885, 57.]**

(23)—*Decree sent for execution to another Court—Decree in excess of its pecuniary jurisdiction—Procedure.*—A Court to which a decree has been sent for execution has not jurisdiction to execute such decree, when it is in excess of its pecuniary jurisdiction as an original Court. **MAUNG MYAING v. ANAMALI CHETTY, U.B. R. 1902-1903, Vol. II, Execution of decree, 5. (7 M. 397, 17 M. 309, Diss.; 12 B. 155, 16 C. 457, 465, 9 P.R. 1901 = 1 P.L.R. 1901, F.)**



**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

(24)—*Sending decree simultaneously to plural Courts—Ss. 230, 235 and 245, Civ. Pro. Code.*—A Civil Court may send a decree simultaneously to two other Courts for execution and issue process in execution itself without waiting for the reports of the other Courts. (14 M. I.A. 529, R.) S. 245 prohibits the Court absolutely from taking action on an application for execution, until the provisions of s. 235 are complied with. The language of s. 245 is quite clear. The last sentence of paragraph 1 makes it plain that the only discretion allowed by the preceding paragraph is to either reject the application or allow it to be amended. No other course is permissible. As a rule the decree-holder can proceed simultaneously against both the person and the property of the debtor, and the Code merely gives the Court a discretion to refuse for special cause. **MAUNG THA DUN v. MAUNG THIN, U.B.R. 1904, 1st Cr.,** *ec ree*, p. 1.

(25)—*Order of Court executing transmitted decree—Court passing decree not competent to interfere with order.*—Where the execution of a decree is made over to a Court other than that which passed the decree, the Court executing the decree has authority to hear all objections and pass such orders, as if it were executing its own decree, and an appeal will lie from any order so passed, in the usual course to the Judge, and the Court which passed the decree has no jurisdiction to interfere with or set aside any order passed by another Court executing that decree. **MUNGLE PERSHAD v. GUDOOREE SINGH, 2 W.R. Mis. 17.**

(26)—*Order relating to mesne profits, executing Court not competent to import into decree—Proper course by application for review.*—Courts cannot, in execution, import new directions into any decree, or do anything except to give effect to the explicit provisions which the decree contains. The decree in the present case contained no order for mesne profits, nor any words or directions which could be construed as giving mesne profits. The proper course for the appellant, therefore, did not lie in execution. He ought either to have procured the insertion into the decree of an order for mesne profits at the time of judgment, or he ought to have applied for a review. **JUGDEB NARAIN SINGH v. THE COURT OF WARDS, 3 W.R., Mis., 9.**

(27)—*Court executing decree, if can question jurisdiction of Court passing it.*—The Court charged with the execution of a decree can consider the question as to whether the Court which passed the decree had jurisdiction to pass it, unless the decree itself precludes that question. **IMDAD v. JAGAN LAL, 17 A. 478 = A.W.N. 1895, 109. (11 A. 314, 15 B. 219, R.) [R., 1 O.C. 49, 14 C.P.L.R. 92, 7 O.C. 199, 48 P.R. 1906 = 104 P.L.R. 1906; D., 21 B. 456.]**

(28)—*Execution of decree—Whether Court can refuse to execute decree on equitable grounds*

**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

—*Court executing a decree cannot go behind it.*—In execution of a decree, mesne profits were recovered from one of the defendants in a suit, who thereupon sued the other defendants for contribution, and obtained a decree. In further execution proceedings in connection with the first decree, it was decided that mesne profits were not recoverable under it. *Held*, in an application for execution of the decree in the contribution suit, that it was not competent to the Court to go behind the decree and refuse to execute it, on the ground that it would be inequitable to execute it, as it was passed on the wrong supposition that mesne profits were recoverable under the first decree. **RAMPHAL RAI v. RAM BARAN RAI, 5 A. 53 = A.W.N. 1882, 151.**

(29)—*Execution of decree—Court executing a decree not to go behind its terms.*—Where a decree is unambiguous, the Court executing it must execute it according to its terms and is not entitled to inquire whether the decree is right or wrong in law. **BADSHAH BEGAM v. MUSAMMAT HARDAI, A.W.N. 1898, 17. (19 A. 174, R.) [D., 20 A. 397.]**

(30)—*Executing Court, power of, to go behind decree—Contract in derogation of decree—Contract prior to decree, not to execute it, effect of—S. 244, Civ. Pro. Code, 1882 (s. 47, present Code).*—The Court executing a decree cannot go behind it or question its validity. (22 B. 475, 23 C. 639, 17 B. 23, *Relied on.*) [R., 7 O.C. 199.] A contract made between the parties to a suit in derogation of a decree which may be passed in future cannot form the subject of an enquiry under s. 244, Civ. Pro. Code, in a proceeding for the execution of the decree. An agreement not to execute a decree, if effect is sought to be given to it in execution proceedings, must be a transaction between the parties subsequent to the decree, and not one which would make the decree itself void as being in contravention of the agreement. (17 B. 23, R.; 22 W.R. 194, D.) Questions under s. 244, cl. (c), relating to the execution of a decree and arising between the parties to a suit in which the decree was passed, or their representatives, must be such as have reference to matters arising subsequent to the passing of the decree and not antecedent to it. **CHHOTI NARAIN SINGH v. MUSST. RAMESHWAR KOER, 6 C.W.N. 796. [F., 31 C. 179.]**

(31)—*Execution of decree—Competency of Court to go behind terms of decree—Civ. Pro. Code, s. 266.*—A Court executing a decree must accept and enforce the decree as it stands and is not competent to inquire whether it is or is not capable of execution in the sense of s. 266 of the Civ. Pro. Code, or to go behind its terms or modify it. **TOTARAM v. DWARKA PRASAD, A.W.N. 1888, 69.**

(32)—*Executing Court not to go behind decree.*—A Court executing a decree cannot go behind the decree presented to it for execution,



**Execution of Decree—continued.****—8.—Application for execution and powers of Court—continued.**

but must execute it, whether it is legal or illegal, provided that it is capable of execution and the application is duly made within time. **BALAJI VITHOBA v. BALKRISHNA RAOJI**, 9 C.P.L.R. 136. (17 C. 699, R.) [R., 16 C.P.L.R. 141; F., 14 C.P.L.R. 92.]

(33)—*Court executing decree, whether can question validity of decree.*—Unless the terms of a decree should be found to be ambiguous, the executing Court is bound to give effect to the terms of it as conclusive between the parties, whether there may or may not be objections in point of law. Also ambiguous terms in documents and decrees should be construed rather to make them accord with law than to make them conflict with it. **MAHARAJAH OF BHARTPUR v. RANI KANNO DEI**, 23 A. 181=3 Bom. L.R. 51=5 C.W.N. 137=28 I.A. 35, P.C.=7 Sar. 792. [F., 31 C. 922=8 C.W.N. 264; R., 1 S.L.R. 98, 9 O.L.J. 288.]

(34)—*Power of executing Court to question validity of decree.*—Whether it be a good or a bad decree, the Court executing the decree cannot call it in question, but must execute it. **KASHI PERSHAD SINGH v. JAMUNA PERSHAD SAHU**, 31 C. 922. (23 A. 181, R.)

(35)—*Execution of decree—Duty of executing Court.*—The Court executing a decree as such cannot enter into the question whether the decree is right or wrong. It is bound to execute it according to its terms, where there is no ambiguity about it. **PIRBHU NARAIN SINGH v. RUP SINGH**, 20 A. 397=A.W.N. 1898, 93.

(36)—*Questions within the jurisdiction of the Court of execution.*—A Court executing a decree for possession against R could not decide whether he was entitled to resist the execution on the ground that he had a title independent of that decree. If it did decide it, it was beyond its jurisdiction. **KAILASH CHANDRA MANDAL v. RAM NARAIN GIRI**, 4 C.L.J. 211. [R., 12 C.W.N. 292=7 C.L.J. 504.]

(37)—*Decree against joint judgment-debtors—Power of executing Court to order execution in certain order.*—Where a decree was passed jointly against several persons, it is not within the power of the executing Court to make any direction to the decree-holder to proceed to execute his decree first against one debtor, and if that does not satisfy the decree, to proceed against the other debtors. **RAM COOMAR CHOWDHRY v. RAM MOHUN CHOWDHRY**, 5 W.R., Mis., 44.

(38)—*Execution of decree—Variation by executing Court.*—It is beyond the power of the Recorder of Rangoon to substitute for the decree of the High Court a new decree altogether, even by consent of parties. **AZIM NULLAH MOODEEN v. CRUIKSHANK**, 11 B.L.R. 67.

(39)—*Court executing decree, power of, to alter decree.*—A Court which executes a decree has no power to modify or alter it. **TEJA SINGH v. RAJNARAYAN SINGH**, 1 B.L.R.A.C., 62=10 W.R. 95.

**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

(40)—*Execution of decree—Decree, addition to, or alteration of—Appellate Court.*—It is not competent to the appellate Court, in a matter arising in execution, to add to or alter the decree? **BECHARAM PAUL v. BHUGWAN CHUNDER GHOSE**, 5 C.L.R. 822.

(41)—*Execution—Appeal.*—An order by a Judge refusing to execute the decree of a Small Cause Court is appealable. **DELAWAR ALI v. DABEE PERSHAD**, 11 W.R. 203.

(42)—*Act XXIII of 1861, s. 36—High Court when competent to direct lower Courts to take security in executing decree.*—Under s. 36 of Act XXIII of 1861, power is given to the appellate Court (i.e., in a case in which an appeal has been actually preferred) to direct the lower Court which pronounced the decree to take security for the execution of the decree. But this cannot be taken to enable the High Court to give any such direction to the lower Courts, when no appeal has been preferred to it. *In re BHUGWAN CHUNDER GHOSE*, 6 W.R. Mis. 15. [D., 6 W.R. Mis. 48.]

(43)—*Execution of decree—Decree allowing claim in general terms—Contents of application for execution—Mode in which assistance of Court is required—Separation of share—Civ. Pro. Code, ss. 235, 265—Costs.*—A decree provided that "the whole of the claim is decreed in favour of the plaintiff appellant," but contained no specification of the relief granted. The plaintiff prayed for the separate possession of a share of undivided property. *Held* that, though the decree should have contained in itself a specification of the relief granted, the absence of such specification was merely an irregularity, and the decree was not incapable of execution, but the relief asked for in the plaint should be read into it. A decree-holder, whose decree entitled him to separate possession of a share of an undivided estate, applied under s. 235 of the Civ. Pro. Code to the Court executing the decree for "possession according to procedure" and did not otherwise specify the mode in which the assistance of the Court was requested. *Held*, that the application was rightly made, not to the Collector but to the Civil Court, which alone could order execution of the decree; but that in execution the Civil Court should order the Collector to act under s. 265 of the Code. *Held*, also, that as it appeared that there would have been no appeal to the lower appellate Court, or the High Court if the decree-holder had been more precise in framing his application for execution, his appeal should be allowed without costs. **KALP KUAR v. BISHESHAR KUAR**, A.W.N. 1890, 75. [R., 5 A.L.J. 742, A.W.N. 1908, 257.]

(44)—*Act XXIII of 1861, s. 11—Parties to suits—Execution of decree.*—Under s. 11, Act XXIII of 1861, only orders which determine questions arising between parties to the suit in which the decree was passed and relating to the



**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

execution of the decree are appealable. **HAJEE KALUB HOSSEIN v. SHEIKH DEEN ALI**, 4 N. W.P. 2.

(45)—*Civ. Pro. Code, s. 43—Decree granting several reliefs of different nature, execution of, by different applications.*—On the contention, in this case, that s. 43 of the Civ. Pro. Code, applies to proceedings in execution of decrees, and that, therefore, the present application in execution of a decree, for possession of the property decreed thereby, cannot be entertained by reason of the plaintiff, in a prior application, having applied for execution of the decree in respect only of the damages and costs decreed, *held* that s. 43 of the Code provides the rule to be followed in the inception and framing of a suit by a person having claims against another in respect of one cause of action. The section cannot therefore apply to proceedings in execution of a decree, in which the cause of action, in respect of which the suit was brought, has merged. Consequently where a decree gives reliefs of different kinds, such as a decree for possession and a decree for costs, there is nothing in s. 43 or any other section of the Civ. Pro. Code, to prevent separate and successive application for execution as regards each of them. **SADHO SARAN v. HAWAL PANDE**, 19 A. 98, F.B. = A.W.N. 1893, 57. (N.W.P. 1875, 95, 18 C. 515, cited.)

(46)—*Separate and successive applications for execution of decree—Reliefs of different characters.*—When a decree gives reliefs of different characters, such as a decree for possession and a decree for costs, there is nothing in the Code of Civil Procedure which prevents separate and successive applications for execution, as regards each of such reliefs. **RADA KISHEN LALL v. RADHA PERSHAD SINGH**, 18 C. 515. [F., 19 A. 98, F.B. = 13 A.W.N. 1893, 57.]

(47)—*Uncertified adjustment of decree—Court's jurisdiction to execute it—Execution of decree by wrong person in the name of decree-holder—Effect—Duty of Court.*—Where the compromise has not been certified to the Court the decree remains, so far as the Court is concerned, an unsatisfied decree, capable of being executed, and the Court has jurisdiction to execute it. [F., 21 B. 463; R., 17 M. 58 = 3 M. L.J. 211, 13 C.W.N. 710, 19 M. 219.] Where the execution proceedings are instituted in the name of the decree-holder, they cannot be held to be void, because they were instituted by a person who had no authority to institute them. And neither the Court nor the auction-purchaser is bound to enquire whether the application was made by the real judgment-creditor. **MOTHURA MOHUN GHOSE MONDUL v. AKKOY KUMAR MITTER**, 15 C. 557. [F., 21 B. 463; R., 17 M. 58 = 3 M.L.J. 211, 19 M. 219.]

(48)—*Jurisdiction to execute, Finding as to—Necessity of finding—Evidence.*—There must be a clear finding, on the evidence, as to whether

**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

the subject-matter of a suit was within the jurisdiction of a Court at the time when the application for execution was made to determine whether the Court has jurisdiction in the matter. **ISHAN CHUNDER ROY v. TARRUCK CHUNDER BHATTACHARJEE**, 18 W.R. 278.

(49)—*Practice—Decree of District Court—Execution by High Court.*—On the application of the plaintiff for execution of a decree obtained in the Court at Patna against the defendant who was resident in Calcutta, a copy of the decree was forwarded to the High Court of Calcutta, in order that execution might be taken out there. The decree being more than a year old, the plaintiff applied to the High Court for a rule calling on the defendant to show cause why execution should not issue. *Held*, that the application should be made to the Court at Patna, and on such application being made and leave being granted, the High Court would issue execution. The functions of the High Court, in respect of the execution of a decree of another Court, were limited to effecting execution, and to the matters arising out of the proceedings in execution. Whether or not the applicant had a right to obtain execution must be judged of by the Court in which the record was. **JADU ROY v. FARRELL**, 6 B.L.R. App., 66.

(50)—*Jurisdiction of Court of district other than that in which decree passed—Civ. Pro. Code, 1859, s. 287.*—Where a Court which had to execute a decree was not the Court which passed it would not have jurisdiction in the matter of executing the decree, excepting such as it may obtain in pursuance of the provision of s. 287, Civ. Pro. Code, 1859, which did not give it any jurisdiction to entertain or to determine any question as to the right of the person asking for execution to have that execution. **MUSSAMUT DHUNESH KOEREE v. OOLFUT HOSSEIN**, 21 W.R. 219.

(51)—*Competency of Court to execute decree outside jurisdiction.*—Under the Code of Civ. Pro., 1882, a decree could not be executed outside the jurisdiction of the Court executing the same. **BISSESSARNATH TAHUTDAR v. LOK-NATH BANI**, 11 C.P.L.R. 148. (6 A. 243, F.; 12 B. 44, R.)

(52)—*Compromise, Decree passed on—Sale of immoveable property, decree for, in simple money suit—Immoveable property, outside local jurisdiction of Court passing decree, Execution against—Jurisdiction—Transfer of simple money-decree—Decree passed on compromise, objection as to validity of—Civ. Pro. Code, s. 248.*—In decree for money, it was added that, in case of default, the judgment-debtors' share in a certain village might be sold according to law. The decree-holder applied for execution of his decree, and, as the share was outside the local jurisdiction of the Court, he applied for a transfer certificate. On certain objections taken by the judgment-debtors, one



**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

of whom was a minor, it was *held* that the Court had no jurisdiction to pass a decree for the sale of the property, to which the application for execution related; as the suit was not one for the sale of it; but that the decree could be transferred for execution as a simple money-decree. *Held*, further, that a decree passed in a compromise is valid, until set aside in a regular suit instituted for that purpose. Whether it was passed in a suit, in which no guardian *ad litem* for the minor was appointed, or on a compromise without the consent of the Court, are questions which cannot be considered on an application for execution or by a Court executing the decree. **CHEDU v. PARAGI, 5 O.C. 9.**

(53)—*Order of the Revenue Court not capable of execution by a Civil Court.*—A Revenue Court's order awarding to a person a specified share of the village common land on partition cannot be executed in a Civil Court. **NIDHAN SINGH v. ATTUR SINGH, 84 P.R. 1869.**

(54)—*Execution of decree—Sale, objections to—Investigation of claims.*—A decree-holder got a money decree with a declaration of the liability to sale of certain properties mortgaged to him for the satisfaction thereof. In regard to one of these properties, called Belsool, the decree-holder on 6-2-1867, petitioned the Court that as it had been sold by the judgment-debtor to one Heera Lall, it might be exempted from sale. The judgment-debtor admitted the sale of Belsool to Heera Lall, but subsequently petitioned that Belsool might be sold first and the rest of the properties in succession. The Judge accordingly on the 10th December, 1867, passed an order that Belsool should be first sold and the rest of the properties afterwards, but Heera Lall was no party to that order. Subsequently Heera Lall petitioned that Belsool might not be sold as the decree-holder had himself prayed for its exemption from sale and as the judgment-debtor admitted that he had conveyed it to Heera Lall by a deed of sale. The Principal Sudder Ameen however, considered that the Judge's order of the 10th December, 1867, precluded him from sanctioning the prayer as he had no jurisdiction. *Held*, that the Principal Sudder Ameen had erred in law in not exercising a jurisdiction which it was in his province and power to exercise; that the order of the Judge, dated 10-12-1867, in no way affected the petitioner, Heera Lall because he was no party to it; and that it was, therefore, open to the Principal Sudder Ameen, as far as Heera Lall was concerned, to investigate his objections in the execution department and pass suitable orders. **LALLA HEERA LALL v. MONEE ROY, 11 W.R. 202.**

(55)—*Execution of decree—Objection to execution by person not party to suit—Jurisdiction, failure to exercise—Extraordinary jurisdiction—Civ. Pro. Code, 1882, s. 622 (=s. 115, new Code).*—A person, not a party to a suit, is not

**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

entitled to object to the issue of an order for execution of the decree therein. A Court having, at the instance of a person not a party to a suit, refused to pass an order for the execution of the decree on the judgment-creditor's application, *held*, that in omitting to make such an order the Court failed to exercise a jurisdiction vested in it by law and that s. 622, Civ. Pro. Code, was therefore, applicable. **NATHUBHAI MULCHAND v. NANA BABU, 19 B. 544.**

(56)—*Execution of decree—Mesne profits, pro forma defendant, not liable for.*—Where in a suit for possession and mesne profits, no specific mention as to mesne profits is made in the decree (the decree merely declaring that the plaintiff's suit be decreed) the Court executing the decree must look to the plaint to see from whom the relief granted is to be obtained, and ought not to allow execution to issue against a *pro forma* defendant against whom no relief was claimed. **MONOJAN v. KASHI NATH PANDAY, 5 C L.R. 303.**

(57)—*Mesne profits—Larger amount than that claimed in plaint found due in execution.*—Where, in a suit for possession and for mesne profits which were approximately estimated and claimed, the decree leaves the mesne profits to be ascertained in execution, the plaintiff is entitled to a larger amount of mesne profits than that claimed in the plaint, on payment of further Court-fees, if such is found due to him. A Court, in execution of a decree, cannot look behind the decree, when it does not limit the amount of mesne profits to be awarded. **JADOO-MANY DABEE v. HAFEZ MAHOMED ALI KHAN, 8 C. 293. (6 C. 474, D.)**

(58)—*Civ. Pro. Code, s. 583—Claim for mesne profits on restoration.*—A decree for possession of immovable property was executed pending an appeal from it. The appellate Court however reversed the lower Court's decree. The appellant sought to recover mesne profits also in execution, which the lower Court did not allow. *Held*, s. 583 was wide enough to give him the relief without directing him to a separate suit. **KALIANASUNDARAM v. EGNA-VEDESWARA, 11 M. 261, [Appr., 21 C. 989; R., 4 O.P.L.R. 167; D., 24 M. 341.]**

(59)—*Subject-matter affected by decree—Question for executing Court—Evidence—Separate suit—Judgment-debtor—Burden of proof.*—With regard to the subject-matter which a decree affects, the Court executing such decree is at liberty to take evidence to ascertain what it is and it should not refer the judgment-creditor for that purpose to a regular suit. Where a judgment-debtor contends that the property specified by the judgment-creditor is not what the decree deals with, it is incumbent on him to point out the actual property concerned. **BHUGOBAT SINGH v. RAM ADHIN SINGH, 22 W.R. 430.**



**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

(60)—*Execution of decree—Questions to be decided in—Not by separate suit.*—When one of three persons who were parties to a suit, makes an application alleging that the other two persons, who were the only parties in the execution proceedings, are colluding to defraud him, that is, a matter between parties to a suit and should, therefore, be decided in the execution department. *RAHIMAN v. PACHA*, 4 M. 285. [R., 7 M. 255, 15 C. 437; D., 5 P.R. 1907=40 P.W.R. 1907=23 P.L.R. 1908.]

(61)—*Execution in excess of decree—Power of Court to order restitution in execution proceedings—Regular suit, Necessity for—Inherent powers of Court.*—A suit for confirmation of possession was brought and the plaintiff got a decree. Though his decree was only for confirmation of possession, he applied for delivery of possession in execution, which was granted him. In the execution proceedings, he admitted receipt of possession. The defendant appealed and the decree was reversed. The defendant then applied for restitution of possession alleging that he had been dispossessed. The plaintiff urged that, if the Court had put him into possession, it had done wrong and gone beyond the terms of the decree and, therefore, the defendant should be relegated to a regular suit. This objection was overruled and, on appeal, the Judicial Commissioner confirmed it. The plaintiff, thereupon, appealed to the High Court. *Held*, the Court has inherent power to order restitution of property, which has been improperly taken and there is no reason why the defendant should be relegated to a separate suit. *MUNSHI DINESH PROSHAD v. SHANKAR CHOWDHRY*, 9 C.W.N. 381=2 C.L.J. 537. (21 C. 989, 14 C. 484, *Rel. on.*)

(62)—*Civ. Pro. Code, 1882, s. 583—Execution of decree—Reversal on appeal—Power of Court to award restitution—Jurisdiction of executing Court.*—The procedure which s. 583 of the Civ. Pro. Code, 1882, provides for obtaining any benefit (including restitution or otherwise), to which the successful party may be entitled under the appellate decree, is not confined to cases in which restitution is provided for by the decree itself. A brought a suit against B to recover certain timber or damages, and obtained a decree, which was upset on appeal by B. Meanwhile in execution of his decree, A had the timber sold. Thereupon, B made an application to the Court of first instance in execution of the decree of the appellate Court to have the timber restored to him or to recover Rs. 13,325 damages. On objection taken by the plaintiff that the defendant cannot make this claim in execution, but must bring a suit for the purpose, the Court of first instance awarded, overruling the objection, Rs. 5,000 damages to the defendant (the pecuniary limit of its jurisdiction being only Rs. 5,000). On appeal, it was *held* that the matter can be dealt with in execution, and that the jurisdiction of the original Court

**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

in execution continues in all matters, and is not ousted by the circumstance that the value of the question in execution exceeds the limit of suits within the Court's original cognizance. *Held*, further, that such Court (in this particular case) was not limited in its award to the sum of Rs. 5,000. *BALVANTRAY OZA v. SADRUDIN*, 18 B. 485. [R., 21 C. 989, 4 M.L.J. 1=17 M. 82.]

(63)—*Suit for possession and declaration of title under wusseutnamah—Property sold in execution of decree—Fraudulent execution during disability of barred decree—Question for executing Court.*—In a suit for declaration of title and possession and under a *wusseutnamah* of property sold in execution of a decree, the plaintiff stated that execution had been fraudulently taken out during his minority, of a barred decree *held* that the question was one for the Court executing the decree and not for a separate suit. *NAJABUT ALI CHOWDHRY v. BUSSEEROLLAH CHOWDHRY*, 20 W.R. 5=11 B.L.R. 42.

(64)—*Decree against minor—Objection during execution invalid—Remedy.*—In the execution of a decree against a minor, the Court cannot inquire whether or not he was properly represented by his guardian. It is bound to presume that the decree has been rightly passed, and to execute it according to its terms. If the minor complains that he was not a party to the suit because not properly represented, he should either apply for review of judgment or file a regular suit to procure an injunction to restrain the execution of the decree. *NAWAB MAHOMED NOOROOLLAH KHAN v. HAR CHARAN RAI*, 6 N.W.P. 98. [R., 23 A. 459.]

(65)—*Decree—Execution—Compromise of claim—Stay of execution—Power of Court.*—A Court executing a decree is bound to have regard to the decree and to any adjustment of the decree which the parties may agree to bring to its notice. Where, after a decree was passed, both parties in ignorance of the decree, compromised the claim, a Court executing the decree cannot take notice of this compromise, except by consent of the parties. Where one of the parties to the compromise disavows it, then, the remedy of the other party is to file a new suit to establish his rights under the compromise. He cannot, by an application in the execution department, rely on the compromise to arrest the execution of the decree. *JHUNDOO v. HIMMUT*, 3 N.W.P. 81.

(66)—*Decree—Declaration or injunction—Constructions by decree-holder—Executing Court not entitled to order demolition.*—Where the effect of a decree is to declare the plaintiff's right to build over a certain area and prohibit the defendant from interfering with such right, if the decree-holder makes any constructions contrary to the right which the decree has declared, that is a matter which does not relate to the execution, discharge or satisfaction of the



**Execution of Decree—continued.****—8.—Application for execution and powers of Court—continued.**

decree, and the Court has no power to enter into it in execution-proceedings. If the decree-holder has exceeded his rights, the judgment-debtor should seek remedy by suit. *SAUDAGAR MAL v. GOPI*, 2 A.L.J. 573.

(67)—*Decree-holder, whether benamidar or not—Question cannot be gone into execution proceedings.*—The question whether a decree-holder is only a nominal decree-holder for the benefit of some body else cannot be investigated in execution. *VEERABHADRA RAZU v. JAGAN-NADHA RAZU*, 3 M.L.J. 220.

(68)—*Application for execution by benamidar of purchaser of rights of decree-holder—Right of judgment-debtor.*—The appellant claiming to have purchased the rights of the original decree-holder applied to the Court for recognition of the assignment of the decree and stated that he would present a separate application for execution. The judgment-debtors objected that the appellant was the *benamidar* of the purchaser of the decree and was, therefore, not entitled to take out execution. The lower Courts decided this question against the appellant. *Held*, that there was evidence to support the finding of fact and that the judgment-debtors were entitled to insist upon the name of the real purchaser being entered on the record. *MOHAMMAED AKBAR KHAN v. NAWAB SHAH ARA BEGAM*, 7 O.C. 229.

(69)—*Hindu Law—Mitakshara—Execution of decree—Infant member of joint family, born after mortgage-decree, if a proper party—Infant born more than three years before application for execution—Joint family—Representative of judgment-debtor—Mortgage-decree, if binding on the infant.*—The term, "representative" as used in s. 244, Civ. Pro. Code, 1882, means not merely the legal representative in the sense of the heirs, executors or administrators, but includes any representative in interest, that is, any transferee of the interest or the decree-holder or judgment-debtor, who, so far as such interest is concerned, is bound by the decree. (24 C. 62, 26 A. 447, R.) To determine whether a particular person is a representative of a party to the suit, the two tests to be applied are, *first*, whether any portion of the interest of the decree-holder or of the judgment-debtor, which was originally vested in one of the parties to the suit, has, by act of parties or by operation of law, vested in the person who is sought to be treated as representative, and, *secondly*, if there has been a devolution of interest, whether, so far as such interest is concerned, that person is bound by the decree. Where the entire interest in the properties mortgaged is vested in the original judgment-debtors, who are parties to the mortgage suit, and a son of one of the judgment-debtors, a member of the joint *Mitakshara* family, is, born after the mortgage-decree, the immediate effect of his birth is, that the aggregate of rights then vested in his grand-father, his father and

**Execution of decree—continued.****—3.—Application for execution and powers of Court—continued.**

his two uncles, becomes vested in him conjointly with them. By reason of the birth of the son, there is a transference of interest in the eye of the law. To the extent of this interest, the son is a representative of one of the parties to the suit, namely, his father. It is, on principle, strictly analogous to that of the transfer of the equity of redemption of the judgment-debtor, in whole or in part, after the mortgage-decree has been made. The purchaser of a fragment of the equity of redemption after the decree is a representative of the judgment-debtor, whether he acquires his interest under a private alienation or by a judicial sale. (16 A. 286, 26 A. 447, 11 C.W.N. 495, R.) The son is also, to the extent of the interest acquired by him by birth, bound by the mortgage-decree made before his birth. A son cannot object to alienations validly made by his father before he was born or begotten, because he could only by birth obtain an interest in property which was then existing in his ancestors. (8 W.R. 15, 1 I.A. 321=14 B.L.R. 187, 3 Agra 432, R.) As, in the case of a mortgage suit, the *lis* continues after the decree *nisi*, and the doctrine of the *lis pendens* is applicable to proceedings to realise the mortgage after the decree for sale, the son, who, by reason of his birth subsequent to the mortgage-decree, acquired an interest in the mortgaged properties, would be bound by the proceedings in execution, though not brought before the Court. (2 C.L.J. 288, R.) But even though he may be so bound, the mortgagee-decree-holder is entitled to treat him as a representative of one of the parties to the suit and to bring him before the Court, with a view to avoid possible disputes and complications in future. *AJODHYA v. HARDWAR ROY*, 9 C.L.J. 483=1 Ind. Cas. 213.

(70)—*Civ. Pro. Code, 1859, ss. 17 (1), 115—Representative of deceased judgment-debtor applying for execution of decree—Powers of attorney unnecessary—Duty and limitation of executing Court.*—Where one of several representatives of a deceased judgment-creditor applied for the execution of a decree, the general powers of attorney contemplated by s. 17, cl. 1, of Act VIII of 1859 are not necessary; but it is sufficient, if the applicant is empowered under s. 115 to Act for the other representatives. *Held*, also, that in executing the decree of a Court of competent jurisdiction, the executing Court is incompetent to question the validity of any portion of it. Its duties are only of a ministerial character. *AMBARAM HARIVALLABHDAS v. HIMATSING KALIANJI*, 2 B.H.C. 103.

(71)—*Failure to take out certificate under Act XXVII of 1860—Application for execution by heirs of judgment-creditor—Evidence as to bona fides.*—There is nothing in the law which lays down that the failure of the heirs of a judgment-creditor to take out a certificate under Act XXVII of 1860 must prevent a Judge from taking evidence as to the *bona fides* of their



**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

application for execution. **KALEE CHURN SINGH v. RAM SURUN SINGH**, 11 W.R. 204.

(72) — *Construction of decree—Execution — Joint decree-holders—Application by one, when maintainable.*—Where one of several joint decree-holders made an application for the execution of the whole decree and he alleged that the other decree-holders had assigned to him the interest of them all, and the latter also made an application intimating that they had no objection to the execution of the decree at the instance of their assignee, the applicant. *Held*, that the application was maintainable. **KRISHNA KISSORE CHAKRAVARTI v. SUKHA SINDHU SANYAL**, 10 C.W.N. 1000.

(73) — *Partition-decree—Application by defendant co-sharer to be put in possession of share allotted to him, maintainability of.*—In execution of a partition-decree, one of the defendants to the suit made an application to be put in possession of the share allotted to him and the Court passed an order as prayed for. Against this order, an appeal was preferred by the other defendants on the ground that the applicant did not pay the Court-fees as he should have done. *Held*, a decree in a suit for partition is not, like a decree for money or for the delivery of specific property, a decree in favour of the plaintiff only. It is a joint declaration of the rights of the persons interested in the property of which partition is sought and is a decree in favour of each sharer. The partition is dealt with as a whole and cannot be split up by regarding only the share allotted to plaintiff without reference to what is allotted to the various defendants. The order of the lower Court was correctly made. **WASDEO v. RUP CHAND**, 23 P.R. 1905 = 13 P.L.R. 1905.

(74) — *Decree against manager — Execution proceedings — Right of decree-holder to show that debtor was sued in representative capacity.*—Where a decree has been obtained against the manager of a joint Hindu family, the decree-holder can show in execution proceedings that the decree has been obtained against him in his representative capacity. **KESHEO RAMACHANDRA v. JAWAHIR KUWAR**, 16 C.P.L.R. 19. (12 A. 313, 20 B. 285, 17 C. 711, F.; 11 M. 413, Not F.)

(75) — *Execution of decree—Absence of proof of assignment.*—An application for execution of a decree was made by the son of the decree-holder. The decree-holder being alive and the applicant not holding any authority from his father to act on his behalf, *held* that the application should be refused. **ANTAJI v. DURGA PRASAD**, A.W.N. 1884, 39.

(76) — *Application for—by minor representatives of deceased decree-holder, more than three years from last application by latter but within three years from latter's death—Limitation Act, s. 9*—The minor grandsons of the decree-holder, in this case, took out execution of the

**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

decree, through their next friend beyond three years of the last application but in by their grandfather, though within three years of his death. The executing Court dismissed their application as barred by time. *Held*, on revision, time having once commenced to run from the date of the last application by the grandfather, the fact that the present applicants were minors, when they became entitled to apply, could not stop the running of time, because s. 9 of the Limitation Act provides that, when once time has begun to run, no subsequent disability or inability to sue stops it. The disability in the present case is a subsequent, not an initial, disability and the applicants can derive no benefit from the provisions of s. 7 and their application is, therefore, time barred. **SITARAM v. TUKARAM**, 1 N.L.R. 180. (20 C. 714, 22 A. 199, 25 M. 431, 29 B. 68, R.)

(77) — *Suit to recover possession of land—Appeal by some of the defendants—Reversal of decree on a common ground, effect of—Second appeal—Omission to bring in and substitute the heirs of deceased defendants, effect of.*—In a suit to recover possession of certain land, the plaintiff obtained a decree in his favour. On appeal by some of the defendants, the decree of the lower Court was reversed on a ground common to all the defendants, though all the defendants were not made parties to the appeal. In second appeal, the heirs of a certain defendant, who was not one of the appellants in the lower appellate Court and who died during the pendency of the appeal, were not brought in as respondents to the second appeal; and also the heirs of certain other defendant, who was made a respondent in the second appeal, but who died during its pendency, were not substituted on the record. In execution of the decree obtained by the plaintiff-appellant in second appeal, he proceeded against the said heirs also. *Held*, that the decree on second appeal was not binding against the said heirs and, therefore, could not be proceeded against them. *Held*, also, that where an appeal was preferred by some of the defendants only and the decree of the lower Court was reversed on the ground common to all the defendants, the appellate decree inured to the benefit of all the defendants including those that had not preferred the appeal. **ASIBUNNESSA BIBI v. WALI AHAMED CHOWDHURY**, 1 C.L.J. 144.

(78) — *S. 232, Act XIV of 1882 (Civ. Pro. Code) — Recorded decree-holder executing decree.*—A recorded decree-holder, who appears upon the face of the decree, is entitled to execute, unless it be shown by some other person under s. 232 of the Code of Civil Procedure that he has taken the decree-holder's place. **JASODA DEYE v. KIRTIBASH DAS**, 18 C. 639. [R., 10 C.L.J. 396.]

(79) — *Application for execution—Original decree or copy, Filing of.*—It is not essential that application for the execution of a decree



**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

need not be accompanied with either the original decree or a copy. **GUNGA GOBIND GOOPTOO v. MAKHUN LALL HATTEE**, 9 W.R. 362.

(80)—*Execution — Procedure—Condonation.*—It is not necessary that an application for execution of a decree should be accompanied by a copy of the decision of the first Court. Where an irregularity in such an application (e.g., presenting it through a mooktear) is condoned by a Judge issuing notice on the judgment-debtor, his successor cannot interfere to set aside the order. **DHANPAT SINGH v. LILANAND SINGH**, 2 B.L.R., App., 8=11 W.R. 28.

(81)—*Execution, Application for—Copy of decree—Civ. Pro. Code, 1859, s. 212—Act XXIII of 1861, s. 15.*—A decree-holder need not file a copy of the decree of which execution is sought. **MODHOO DOSSIA v. NOBIN CHUNDER ROY**, 16 W.R. 23.

(82)—*Execution of decree—Application for execution—Dismissal for default—Subsequent application for restoring it to file—Power of Court to grant—Civ. Pro. Code, 1882, ss. 647, 103—Amendment Act VI of 1892, s. 4.*—There is nothing in the Civ. Pro. Code, 1882, as amended by the Amendment Act VI of 1892, which authorizes a Court to apply to applications for execution any of the procedure enacted in Chapter VII of the Code. So a Court has no jurisdiction to restore to the file under s. 103 of the Civ. Pro. Code, an application for execution which had been dismissed for the applicant's default. **HAJRAT AKRAMNISSA BEGAM v. VALIULNISSA BEGAM**, 18 B. 429. [F., 18 M. 131, 139 P.L.R. 1905; R., 2 C.W. N. 606.]

(83)—*Civ. Pro. Code (Act X of 1877), s. 245—Order of amendment of execution application before fixed date disobeyed—Jurisdiction to grant leave to amend subsequently.*—Where an order for the amendment of an execution application within a fixed period was disobeyed, and the application was not rejected, leave to make the amendment granted upon a subsequent petition is not *ultra vires*. **KAMINY MOHUN SOMODDOR v. GOPAL**, 8 C. 479=10 C.L.R. 519.

(84)—*Civ. Pro. Code, 1882, ss. 53, 245, 647.*—A person was entitled, under a decree of the year 1809, to a share in the income of a zemindari. Certain recent purchasers of the estate having denied such right, he sued and obtained against them a decree in 1887, declaring that he had a valid charge on the estate, and awarding to him the costs of the suit and the amount due in respect of one year. He tried to execute the latter decree in respect of the amount due for five years. As that decree could not be executed in respect of the years not covered by it, he applied to amend the petition for execution by adding a reference to the decree of 1809. This application was made, after execution in respect of some of the

**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

years in question had become barred by limitation. *Held*, that the amendment ought to be allowed, as the object of the application for execution was clear, though there was an error in the reference to the decree—an error not unnatural, considering the complicated nature of the previous proceedings in the case. **SATTAPPA CHETTI v. JOGI SOORAPPA**, 17 M. 67.

(85)—*Ss. 230, 235, 237, 245, Civ. Pro. Code, 1882—Decree, Execution of—Application in terms of s. 235 not containing specification of property, Nature of—Application defective, not amended within time—Effect.*—*Held* by the Full Bench:—An application in terms of s. 235, Civ. Pro. Code, for execution, but not containing at foot a description of the property such as is prescribed by s. 237, is an application within the meaning of s. 230 of the Code. Such an application, not amended within the time allowed by Court therefor, is not one in accordance with law so as to give a fresh start of limitation. *Per Prinsep, Pigot and Ghose, JJ.*—The application was defective as not complying with s. 237; and it not having been amended within due time, or under the provisions of s. 245, the decree-holder was barred. *Per Prinsep and Pigot, JJ.*—14 C. 124 should be overruled, for it was wrongly decided. *Per Petheram, C. J.*—The application was one which could not be carried out without amendment and no amendment could be made after the application had been admitted and registered under s. 245. So much of the decision in 14 C. 124 as decides that an application may be amended after admission and registration must be overruled. *Per O'Kinealy, J.*—In the present case, the original application was so defective that no relief could be obtained under it. The second and further application was barred and should have been rejected. An application to execute a decree, after it had been admitted and order for execution made in the manner prescribed by s. 245, should be dealt with on the merits. **ASGAR ALI v. TROILOKYA NATH GHOSE**, 17 C. 631, F.B. [Appl., 4 C.L.J. 421=11 C.W. N. 38=1 M.L.T. 355=34 C. 20; R., 18 C. 462, 23 C. 217, 112 P.L.R. 1902, 116 P.R. 1907; D., 16 M. 142, 25 C. 594.]

(86)—*Petition to restore execution—Proceedings—S. 207, Act VIII of 1859.*—A petition to restore execution-proceedings struck off the file, which contains not one of the particulars set forth in s. 207, Civ. Pro. Code, 1859, cannot be regarded as an application to execute the decree within the meaning of the Code. **RAM DHUN ROY v. KHAJAH ABDOL GUNNEE**, 9 W.R. 390.

(87)—*S. 89—Act IV of 1882 (Transfer of Property)—S. 235, Civ. Pro. Code, 1882—Application by mortgagee for order absolute or decree absolute, Nature of—Non-verification of application—Limitation.*—When, after a preliminary decree made by the Court, the mortgagee makes



**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

an application for an order absolute or decree absolute, the application is not an application for the execution of the decree, because, until the decree absolute is made under s. 39, Transfer of Property Act, there is in fact no decree capable of execution. It is not necessary that such an application by mortgagee for sale under s. 89, must be in the form prescribed in s. 235, Civ. Pro. Code. Such an application is not affected, if it is not verified. *AJUDHIA PERSHAD v. BALDEO SINGH*, 21 C. 818. (13 A. 278, R.; 16 C. 246, Appr.) [*F.*, 33 B. 273=10 Bom. L.R. 1057, 25 C. 133; *Rel. on.*, 8 C.W.N. 102; R., 19 M. 40, F.B., 5 O.C. 251, 22 B. 771, 12 C.P.L.R. 82, 23 B. 644, 24 A. 179 =A.W.N. 1902, 183, 25 M. 244, F.B., 1 A.L.J. 300, 6 Bom. L.R. 1043, 33 C. 867=4 C.L.J. 141, 11 C.W.N. 156, 2 N.L.R. 137, *Disc.*, 25 M. 244; *Expl.*, 10 C.L.J. 91.]

(88)—*Civ. Pro. Code*, 1882, ss. 235, 295, 400—*Attachment before judgment—Subsequent application for execution under s. 235, if necessary for sharing in distribution of assets of debtor under s. 295—Effect of attachment before judgment.*—The holder of an attachment before judgment can rank under s. 295 of the Civ. Pro. Code as an applicant in execution against the property attached after a decree is given in his favour and obtain a rateable share of the property attached, only if he, subsequent to the decree, applied for execution under s. 235 and the sections following it. All holders of decrees, if they desire to have them executed, must apply to the Court for execution under s. 230 of the Civ. Pro. Code. This section does not reserve or except a case arising under s. 490. S. 490 of the Civ. Pro. Code does not, either expressly or impliedly confer on the holder of a decree who had attached before judgment, the right to rank under s. 295 as an applicant in execution against the property attached and to share in the distribution of the assets. The effect of the section is to render a re-attachment of the property after decree unnecessary, the attachment before judgment enuring and becoming an attachment in execution. *PALLONJI SHAPURJI MISTRY v. EDWARD VAUGHAN JORDAN*, 12 B. 400. [*F.*, 8 M.L.T. 226; R., 19 M. 72, 10 C.W.N. 634=33 C. 639.]

(89)—*Application for execution—Dismissal for default, Effect of—Whether takes away effect of previous order—Order for attachment.*—The mere circumstance that an application for execution has been dismissed for default does not take away the effect of any previous order which might have been made. (4 Ind. Cas. 402, 11 C.L.J. 91, 14 C.W.N. 357. *Rel. on.*) An application for execution of a decree was made on August 5th, 1904. Then another application was made on October 5th, 1907. Notice of that application was duly served under s. 248 of the Code of 1882 on the judgment-debtor who asked for time to prefer his objections. Time was granted, but he failed to

**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

appear on the date fixed. On that date the Court passed this order; "Decree-holder is to take further steps on or before January 7th, 1908." On this day the application for execution was dismissed for default. The present application was presented on August 6th, 1908; *Held*, that the order necessarily implied an adjudication that the decree at the time was capable of execution and that consequently no question could be raised in the present proceeding that the application of October 5th, 1907, was barred by limitation. (8 C. 51, 11 C.L.R. 13, 8 I.A. 23, *Rel. on.*) The principle of the decision in *Mungal Pershad Dichit's case* is applicable whenever there is an adjudication by the Court upon the rights of the parties to an execution proceeding; it is not essential that there should be an order for attachment. *MURLIDHAR SUPAL v. NARSINGH DAS*, 10 Ind. Cas. 359. (5 Ind. Cas. 89, 14 C.W.N. 433, 11 C.L.J. 357, R.)

(90)—*Attachment of property in respect of decree-holder not applying, whether proper.*—A Court cannot order property belonging to the judgment-debtor to be attached and placed under management in respect of a decree the holder of which never made any application to the Court to have his claim included amongst those for the repayment of which it was attached. *KISHEN COOMAR CHOWDHRY v. MEER NUZUF ALI*, 5 W.R. Mis., 21.

(91)—*Attachment, Removal of—Application for execution, effect of striking off—Sale after attachment, void—Civ. Pro. Code, s. 276.*—*Held*, that the mere fact of an application for execution having been struck off the file does not necessarily imply that the attachment has been removed, nor can such removal be inferred from the mere fact that the decree-holder erroneously applies for a fresh attachment. It is only where the execution-case is struck off after a complete termination of the case and the execution-proceedings are put an end to, that such an inference can be drawn. *Held*, further, that this is a matter, which must be determined according to the circumstances of each case and that, under the circumstances of the present case, the attachment had not been withdrawn. *RAM DAS v. RAM TAHAL DAS*, 8 O.C. 152. (1 A. 616, 20 W.R. 133, 12 W.R. 260, 21 W.R. 66, R.)

(92)—*Husband and wife—Attachment by actual seizure.*—When a decree is passed against a wife alone, the husband and wife being Buddhists, attachment by actual seizure of joint property to the extent of the wife's interest is lawful. When a decree-holder exercises his right to attach the property of the judgment-debtor, malice cannot be inferred from surrounding circumstances, unless it is shown that the attachment was made in an unreasonable and improper manner. *MA THAING v. MAUNG THA GYWE*, U.B.R. 1902-1903, Vol. II, Execution of Decree p. 1



**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

(U.B.R. 1892-1896, Vol. II, 209, R.) [*Rel. on*, U.B.R. 1907, 4th Qr., Buddhist Law-Marriage, Joint Property, 1 ; R., 3 L.B.R. 66.]

(93)—*Costs—Damages—Costs incurred by decree-holder in contesting the removal of attachment cannot be added to amount of decree against the judgment-debtor.*—Where a Court has jurisdiction and orders or refuses costs, the parties cannot bring a separate action for such costs. (9 A. 474, F.) *Held*, that though the intervention in this case was fraudulent, a suit for damages occasioned by the intervention (as distinct from a suit expressly allowed by s. 283 of Civ. Pro. Code) could not be maintained. GAYUDDIN v. GAURI, U.B.R. 1897-1901, Vol. II, 426. (1 B. 467, F.)

(94)—*Money-decree—Payment by instalments.*—In general, Courts cannot, after a decree is passed, and if the judgment-creditor be unwilling, direct that the amount of a money-decree be paid by instalments. An exception may be made under peculiar circumstances. SREEMUTTY JUDOO BUNSEE BHUGTAHE v. RANEE SREEMUTTY MUKHUN KOWAREE, 1 W.R., *Min.* 5.

(95)—*Execution of decree—Matter referred to arbitration—New instalment decree—New decree capable of execution though old decree barred—Civ. Pro. Code (Act XIV of 1882), ss. 525, 526.*—The decree-holder obtained a decree against the judgment-debtor in the Calcutta Small Cause Court in 1895. This decree was transferred for execution to the Sub-Judge of Nadia. The decree-holder endeavoured in vain to execute it—his last application for execution being presented in 1906. This was objected to by the judgment-debtor. The parties ultimately agreed to refer the matter to arbitration. The arbitrator gave his award on March 18, 1907, as follows: "The judgment-debtor withdraws his objections, and the decree-holder agrees to take the decretal amount by instalments as follows. The remainder will have to be paid in two years more in half shares. In the event of non-payment, the decree-holder will be at liberty to execute..... and to realise the money by attachment and sale of the judgment-debtor's property." On receiving this award, the Court ordered "that the award is approved and accepted by the Court, and in terms thereof the original decree is modified and a decree is to be substituted as set forth in the award and agreed upon by both parties. This execution case is dismissed in terms of said award." On August 25, 1908, a formal decree was drawn up in terms of the award. The judgment-debtor paid the first instalment and on March 31, 1909, the decree-holder applied for execution of the decree of 1908 with respect to the second instalment. The judgment-debtor contended that the execution of the old decree was time-barred and that the new decree was not capable of execution; *Held* by D. Chatterjee and Teunnon, JJ. (Coze, J. dissenting) that the award and the order of March

**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

18, 1907, should be regarded and treated as an award and order under ss. 525, 526, Civ. Pro. Code, 1882, and the decree of August 25, 1908, should be executed as a decree made in accordance with the award made under the said sections, and the propriety of such a decree could not be called in question by the judgment-debtor in execution. NAGENDRA CHANDRA BANERJEE v. HARENDRA NATH MUKHERJEE, 11 Ind. Cas. 457.

(96)—*Application for execution and powers of Court—Decree—Instalment—Amount fixed at time of execution—Validity of proceedings.*—A decree provided for payment by instalments, but it did not fix the amount at the time of the passing of the decree and the executing Court fixed the amount of instalment; *held* that the above proceedings though irregular were not illegal. KIDARNATH v. BHOLE KHAN, 48 P.R. 1881.

(97)—*Decree awarding no interest—Judgment varying from decree—Right to claim interest.*—A case purported to be decided in accordance with a confession of judgment, making the judgment-debtor liable for interest, but the decree was silent as to interest; *held* that the decree-holder could not claim interest in execution of such decree, so long as the decree was intelligible in itself and was capable of execution without reference to the judgment. CHANDA MAL v. BAKSHA, 13 P.R. 1886.

(98)—*Decree of appellate Court not providing interest—Interest not awardable by executing Court in spite of judgment-debtor.*—The Court executing a decree or an appellate Court is incompetent to award interest when the decree is silent as to it in spite of the judgment-debtor's promise to pay it, while execution of the decree was proceeding. The promise would amount only to a new cause of action. JUSSO MULL v. AZIM JOO, 33 P.R. 1869. *See, also*, THAKOOR DASS v. MAHOMED BUKSH, 15 P.R. 1866.

(99)—*Conditional decree for possession of immoveable property—Interest not paid within fixed time—Mistake.*—Where a conditional decree was passed in favour of the plaintiff a minor suing through his mother, for possession and partition of certain property on the plaintiff paying within a certain fixed time the sum of Rs. 109-4-9 with interest at 1 per cent. per mensem from 2nd December, 1882 up to the date of payment; and the plaintiff paid in the principal sum within the time fixed but did not pay the interest; *held* that as the decree-holder paid in the considerable amount of Rs. 109-4-9 in time, the failure to deposit the very small sum of interest along with it was a pure and bona fide mistake, which could not render the deposit other than a substantial compliance with the decree; and that the application for execution of that decree should not be disallowed on this ground. SUNDAR LAL v. RAM CHABAN, A.W.N. 1884, 180.



**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

(100)—*Suit on mortgage—Lands situated outside jurisdiction—Court otherwise competent to try suit—Decree passed without objection.*—Where a suit on a mortgage is instituted in a Court within whose jurisdiction the mortgaged lands are not situated, but which is otherwise competent to try the suit, and no objection is raised by the Court to the entertainment of the suit and a decree passed, the judgment-debtor cannot be allowed to object to the validity of the decree in the course of its execution. *GOMATHAM ALAMELU v. KOMANDUR KRISHNAMACHARLU*, 27 M 118. (11 B. 116, R.) [Appr., 28 M. 26=14 M.L.J. 413; R., 28 M. 437=15 M.L.J. 236, 17 M.L.J. 300.]

(101)—*Foreclosure decree—No direction for delivery of possession—Right of decree-holder to be placed in possession in execution.*—Where a decree for foreclosure absolute contains no direction for delivery of possession of the mortgaged property, the decree-holder cannot apply for possession by way of execution of the decree. *RAMCHANDRA BANIA, v. BALKRISHNA GANPAT RAO DESHPANDE*, 17 C.P.L.R. 62.

(102)—*Attachment by subordinate Court—Objections based on mortgage lien of value over Rs. 5,000, whether entertainable by executing Court.*—On an attachment of immoveable property ordered by a subordinate Court, an application was presented objecting to the attachment, on the ground that the applicant had a mortgage-lien of over Rs. 5,000 in value on the attached property and praying that the property might be disposed of subject to his mortgage-lien and possession as mortgagee during the continuance of his lien. *Held*, agreeing with the Subordinate Judge, that he could entertain the application, as the subject-matter of it was the attachment placed upon, the lands of the judgment-debtor, and not the mortgage-lien, and that the subject-matter must be valued according to the judgment-debt, sought to be recovered by the attachment, which was below Rs. 5,000. *PURSHOTAM SIDHESWAR v. DHONDU AMRIT DANWATE*, B. 582. [R., 3 L.B.R. 275.]

(103)—*Court attaching property, competency of, to inquire into mortgage-lien of value beyond its jurisdiction—Pendency of insolvency proceedings against judgment-debtor, effect of, on execution.*—The Subordinate Judge who had ordered attachment and the sale of a village within his jurisdiction was held to be competent to inquire into the validity of a mortgage-lien of over Rs. 5,000 in value set up by the claimant, such inquiry being only collateral to the main question before the Court, viz., the right and manner of attachment and sale of the village, and such attachment and sale having been ordered in connection with a decree of an amount less than Rs. 5,000. Also, pending an inquiry, in another Court, into the right of one of the judgment-debtors to be dealt with as an insolvent, the executing Court ought to

**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

stay the execution of the decree so far as regards such judgment-debtor alone and none other. *VISHNU DIKSHIT v. NARSINGRAV*, 6 B. 584.

(104)—*Execution of decree for enforcement of hypothecation—Property specifically ordered to be sold—Objection that property is non transferable under N.W.P. Rent Act, s. 9—Not entertainable in execution.*—Where a decree specifically directs the sale of a tenure which may or may not be transferable, the Court executing the decree is bound to give effect to it, and not to question its validity. Accordingly, it was held that, in execution of a decree for enforcement of hypothecation by sale of specific property, the objection by the judgment-debtor, that the property was non-transferable under s. 9 of the N.W.P. Rent Act, could not be entertained. *MADHO LAL v. KATWARI*, 10 A. 130. (4 A. 371, D.)

(105)—*Mortgage—Decree for redemption within fixed time—Appeal against decree—Extension of time for redemption—Powers of executing Court.*—The plaintiffs obtained a decree on 1st March, 1886 for redemption of certain mortgaged property on payment by them of Rs. 649-11-0 to the defendants within 3 months from the date of the decree. The defendants appealed on the ground that a much larger sum than Rs. 649-11-0 was due to them on the mortgage. The plaintiffs also filed objections to the decree under s. 561 of the Civ. Pro Code, on the ground that the mortgage-debt had been long since paid off, and that a large sum was now due by the mortgagees who had been in possession of the property and enjoyed the profits arising therefrom. In view of the pending appeal, the plaintiffs did not pay the amount within the three months as ordered by the decree. On the 12th October, 1886, they applied for execution of the decree having paid the amount into Court, and prayed for possession of the mortgaged property. The defendants contended that the plaintiffs were foreclosed, inasmuch as they had failed to pay within the time ordered by the decree, and that the Court had no power to extend the time for payment allowed by the decree and to grant execution. *Held*, that the Court had no power in executing the decree, to alter the language of the decree which it would virtually do if it enlarged the time mentioned in it by accepting the amount paid into Court on the 12th October, 1886. Even if the Court had the power to extend the time in the course of execution, the mere fact that the plaintiffs had lodged an appeal would afford no special ground for enlarging the time. *MAHANT ISHWARGAR v. CHUDASAMA MANABHAI*, 13 B. 106. [F., 15 B. 370, 17 B. 547, L.B.R. 1893-1900, 174, 19 M. 40; R., 15 B. 644, 16 B. 249, L.B.R. 1893-1900, 420, 22 B. 221, 22 B. 500; D., 16 B. 263.]

(106)—*Transfer of Property Act (IV of 1882); s. 93—Decree for redemption—Application for*



**Execution of Decree—continued.****—8.—Application for execution and powers of Court—continued.**

*sale on failure to redeem, to be made to Court of first instance.*—Even in cases where the decree for redemption passed by the Court of first instance has been modified by the appellate Court, an application for an order for sale under paragraph 4 of s. 93 of the Transfer of Property Act should be made to the first Court and not to the appellate Court. The proceedings of the appellate Court having terminated with the passing of its decree under s. 92, any further order which the parties require in order to give effect to the rights of the parties, as settled by the decree, should be obtained from the Court of first instance on which would have devolved the duty of making such order if a correct decree had been passed in the first instance. **VENKATA KRISHNA AYYAR v. THIAGARAYA CHETTI**, 23 M. 521=10 M.L.J. 143. (13 A. 278, R.) [F., 23 A. 88; R., 25 M. 244, F.B.]

(107)—*Limitation—Suit on mortgage—Decree for redemption within time fixed—Appeal against decree, but subsequently withdrawn—Computation of period of limitation—Practice—Review—Equitable relief.*—Where an appeal is withdrawn, without permission to bring a fresh appeal for the same matter, the decree appealed from becomes again the final decree in the case, and the only decree which can be executed. Limitation for execution must be computed from the date of that decree, and not from the date of the order of the appellate Court permitting the withdrawal of the appeal. For, the mere fact that an appeal has been preferred does not stay execution of the decree appealed against, or prevent its being executed or enlarge the time for its performance. When the appeal is withdrawn whether with or without the permission of the Court, under s. 373, Civ. Pro. Code, 1882, no decree is made, and the order of the Court does not come within the definition of the word "decree" in s. 2 of the Civ. Pro. Code. **N.B.**—Case-law on the subject discussed. In this case, plaintiff obtained a redemption decree on 12th November, 1886, allowing him to redeem the property on payment, within six months from the date of a certain sum. It further stated that in default of payment, he was to stand for ever foreclosed. The defendant preferred an appeal against this decree on 30th November, 1886, and on the 10th September, 1888, the appellate Court allowed the appeal to be withdrawn, but without permission to the defendant to bring another appeal. The plaintiff, thereupon, applied on the 17th December, 1888 for the execution of his redemption decree. *Held* that, as the redemption money was not paid within six months from the date of the decree of 12th November, 1886, the application was time-barred, and that it was not competent to the lower Court to enlarge the time in the execution proceedings. [Diss., 30 M. 1. F.B.=16 M.L.J. 393=1 M.L.T. 233; F., 1 M.L.J. 745; Expl., 17 B. 547, 3 O.C. 50, 6 O.C. 48; R., 16

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B. 243, 16 B. 249, 19 M. 40, F.B.=5 M.L.J. 282, 22 B. 500, 31 M. 28=17 M.L.J. 495=3 M.L.T. 26, 54 P.R. 1908=87 P.L.R. 1908=40 P.W.R. 1908, 5 N.L.R. 88=3 Ind. Cas. 61; 15 M. 170=2 M.L.J. 23; D., 16 M. 214=3 M.L.J. 89.] But, however, under the circumstances of the case, it was pointed out by *Birdwood, J.*, that it was open to the plaintiff to apply, if so advised, to the appellate Court for a review of the order of withdrawal of the 10th September, 1888, with a view to the enlargement of the time of redemption as a condition which might equitably have been permitted when the defendant was allowed to withdraw the appeal. **PATOLJI v. GANU**, 15 B. 370=P. J. 1890, 336. [R., 15 M. 170=2 M.L.J. 23.]

(108)—*Execution of decree—Omission of Court to decide question of limitation—Right of judgment-debtor to appeal or apply for review—Civ. Pro. Code, s. 623.*—It is obligatory on the Court to which an application for execution of a decree is presented to consider and decide, so far as it can do so from the record, whether the application is within time or is barred by limitation. Where the Court has not got before it the information necessary to decide the question, it should compel the applicant to furnish such information. Two courses are open to a judgment-debtor who desires, after an order for execution has been made on notice to him, but in his absence, or without notice to him, to raise a question of limitation. He might either appeal or take the course of applying under s. 624 of the Civ. Pro. Code for a review of the order for execution. **RAMU RAI v. DAYAL SINGH**, 16 A. 390=A.W.N. 1894, 131. [Diss., 23 C. 39; F., 2 C.W.N. 606; R., A.W.N. 1898, 33.]

(109)—*Power of Court executing decree—Execution—Limitation.*—A Court when called upon to execute a decree may inquire whether at any time three years of inaction on the part of the decree-holder had elapsed so that the execution has become barred. **KHODA BUKSH v. HURREE RAM**, 2 N.W.P. 399.

(110)—S. 228, Civ. Pro. Code, 1882—*Executing Court's power to decide question of limitation.*—Where a decree has been transferred for execution from one Court to another, the latter Court has jurisdiction to decide whether the execution of the decree has become barred. **CHHOTAY LAL v. PURAN MULL**, 23 C. 39. (10 W.R., F.B., 10, 5 C. 897, 8 C. 916, 13 C. 257, R.; 21 W.R. 292, 21 W.R. 330, 16 A. 390, Diss.)

(111)—*Limitation—Res judicata.*—Where a Court executing a decree and competent to determine whether execution is or is not barred by limitation decides that execution is not time-barred, such decision can only be questioned by means of an appeal against the executing Court's order. If that order is not appealed against, and becomes final, the determination



**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

that execution of the decree was not time barred must, in subsequent proceedings relating to the execution of the same decree, be treated as valid, even although it may have been in fact erroneous. *MUHAMMAD HUSAIN v. MUZAF-FAR HUSAIN KHAN*, A.W.N. 1905, 237. (24 A. 283, 24 M. 669, F.)

(112)—*Recording opinion on decree on matter to be determined in course of execution.*—The last order passed in a case is held to be the final award from which limitation is to be reckoned under the special law. When a question was expressly reserved for future determination in the course of the execution of a decree, the Judge was held to be wrong in recording any opinion thereon in the decree. Entries in the *jummabundees*, and in similar records should be supported by independent evidence. *HEERA NATH v. BABOO SHUM-SHERE SUHEE*, 1 N.W.P. 14.

(113)—*Application for—Benamidar. Application for execution made by—Application made in accordance with law—Limitation Act, 1877, sch. II, art. 179.*—Held, that an application for execution made by a *benamidar* is a good application made in accordance with law and saves limitation. *ABDUL WAHID KHAN v. NAWAB BAQAR ALI KHAN*, 10 O.C. 263 (B). (4 B.L.R., App. 40, 5 C.L.R. 253, 9 C. 633, 16 C. 355, 19 W.R. 255, 20 C. 398, 16 A. 483, 2 M.L.T. 93, 21 A. 380, 30 C. 265, 18 A. 69, 28 A. 44, 22 B. 672, 22 B. 820, 21 M. 30, 15 M. 267, 21 M. 368, R.)

(114)—*Deceased decree-holder's heir—Application for execution—Non-production of succession certificate—Limitation Act, 1877, sch. II, art. 179, cl. 4—Succession Certificate Act, 1889, s. 4.*—When applying for the execution of a decree, a deceased decree-holder's heir need not have obtained a succession certificate under s. 4 of the Succession Certificate Act, 1889; his application would yet be legal under cl. 4, art. 179, sch. II, Limitation Act, 1877; because s. 4, Succession Certificate Act, only prohibits the Court from proceeding with as execution without a certificate but not from entertaining it, under the circumstances. *SOBHA SINGH v. FATTA*, 54 P.R. 1893.

(115)—*Power of executing Court—Court's power to execute decree exceeding pecuniary limit—Construction of decree—Decree directing payment on certain date—Limitation.*—There is nothing in the Civ. Pro. Code to prevent the execution of a decree of a competent Court, transferred to the executing Court for execution, even though the decree amount may exceed the pecuniary limit of the executing Court. Though, as a general rule, the decree must be construed by its own terms and nothing should be incorporated therein, which is not clearly and properly expressed in the decretal order, still, if the decree is most carelessly drawn and the words therein standing by themselves are unmeaning, a reference to the judgment may

**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

be made and a meaning which such reference showed that they were intended to bear may be given. Where a decree directed that the amount should be paid at the end of 5 years, and the application for execution is made within 8 years from the decree date, the application is not barred by limitation. The fact that a provision is made in the decree, enabling the decree-holder to realise portions of the decree amount, on failure by the judgment-debtor to pay interest on that portion, by a certain date, will not affect the case, as it will not amount to a direction in the decree that the said portion was to be paid on failure of the judgment-debtor to pay interest so as to make limitation run from the date of such failure. *RAM LAL v. NATHA SINGH*, 43 P.R. 1882. [R., 31 P.R. 1887, 9 P. R. 1901=1 P.L.R. 1901.]

(116)—*Absolute and conditional decrees—Notice—Ex parte orders, inherent power of Court to set aside—Application to set aside ex parte order for execution of conditional decree—Limitation.*—The Court has an inherent power to deal with an application to set aside an order made *ex parte* on a proper case being substantiated. (9 C.W.N. 81, R.). When a conditional decree is made, the plaintiff on the default of the defendant should apply to the Court, which passed the decree on notice to the defendant by motion on notice or by rule for an order absolute. Then, if and when such an order is obtained, application may be made in the usual way for execution of the order according to the provisions of the Civ. Pro. Code. On the plaintiff applying on notice for such order, the Court will determine the question, if necessary, directing the issue to be tried in evidence, whether there has been default of the condition or not. If the Court finds that there has been such default, then the plaintiff will be entitled to an order absolute and should thereafter apply to execute that order. The plaintiff obtained a conditional decree on the 21st of June, 1905, which provided that she would be entitled to eject the defendant from her premises unless the latter performed certain conditions. Disputes arise between the plaintiff and the defendant re the performance of the conditions and the plaintiff on the 31st of August, 1905, without notice to the defendant, applied for and obtained an order for ejectment of the defendant. The defendant was ejected on the 25th of September, 1905. The defendant applied and obtained a rule on the 1st of December, 1905, for setting aside, modifying so reviewing the order of 31st of August. Held, that the defendant's application was not barred by limitation. *S. M. SUDEVI DEVI v. SOVARAM AGARWALLAH*, 10 C.W.N. 306, [R., 10 C.L.J. 91.]

(117)—*Execution, Application for—Limitation—Execution sale set aside for fraud of decree-holder—Fresh application for execution if a continuation of previous proceeding.*—Where, on a sale in execution of a decree being set aside



**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

on the ground of fraud on the part of the decree-holder, he again applies for execution, such application ought to be treated as a continuation of the previous execution proceeding. **ABDUL KHAYAR ABDUL HUQ CHOWDHURY v. REAJUDDIN AHMED CHOWDHURY**, 13 C.W.N. 521 = 1 Ind. Cas. 341. [R., 2 Ind. Cas. 265.]

(118)—*Application for execution, not pending—Judgment-debtor not entitled to ask for declaration that execution is barred by limitation.*—When an application for execution of a decree has been struck off and is in fact not pending, the judgment-debtor is not entitled to ask for a declaration that execution is barred by limitation. Where the judgment-creditor has not applied for execution or put the Court in motion, under s. 42 of the Specific Relief Act, a declaration can only be made in a suit. It does not appear to be the intention of the Legislature that orders in the nature of declaratory decree should be in execution proceedings. **PAPAMMA v. VENKATAPPAYYA**, 3 M.L.J. 298.

(119)—*Decree—Application for execution—Attachment of immovable property—No description or specification of interest—Returned for amendment—Limitation.*—When an application for execution of decree by attachment was made within the period of limitation but it omitted to give any description of the property and the judgment-debtor's interest therein, and the Court, having registered the application, returned it to the decree-holder for amendment, and the amendment was made after the expiry of the period of limitation, *held*, that the amendment related back to the date of the application and the application was not time-barred. **MUHAMMAD RAZI v. ALI SAJJAD**, 2 A.L.J. 367. (20 A. 478, A.W.N. 1893, 112, 10 O.O. 541, R.)

(120)—*Execution of decree—Application for execution—Limitation.*—On the 17th November, 1881, application for execution of a decree was made, which was granted without any objection on the ground of limitation. Within three years from that date, the decree-holders applied again for execution. *Held*, that this latter application for execution being within time from that made by the decree-holders on the 17th November, 1881, and that application having been granted, and no objection having been taken on the ground of limitation, the Court cannot now go behind those proceedings so as to hold that the decree was then barred. **KALI CHARAN v. SHARAF ALI KHAN**, A.W.N. 1884, 39.

(121)—*Civ. Pro. Code, Act X of 1877, s. 230—Execution application—Limitation.*—An application for execution of a decree passed in 1836 was made on 3rd June, 1879. The proceedings connected with that application continued until 23rd October, 1879 when the execution proceedings were struck off, it being expressly declared that the attachment should continue

**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

in force. On 31st December, 1880, an application was made to sell the property attached previously on the application of 3rd June, 1879, *Held*, that the application of the 31st December, 1880, could not be considered as an original application of the formal character of that required by s. 235 of the Code, and so it was not barred by limitation. In order that an application for execution of a decree may be barred under the provisions of the third paragraph of s. 230, there must have been a previous application made and granted under that section. (5 B. 245, F.) The last paragraph of s. 230 must be read as a proviso to the general rule contained in the third paragraph of the section. It is, in effect, a statutory indulgence granted to persons who held decrees at the time when the Act was passed and whose interests might have been materially prejudiced by any sudden change in the law. **PANNUL HAQ v. KISHEN MUN DABEE**, 9 C.L.R. 297. [R., 18 A. 482 = A.W.N. 1894, 142.]

(122)—*Res judicata—Execution of decree—Application for time to pay decretal amount—Estoppel.*—A decree was passed against one R. Subsequently a decree under s. 90, T.P.A., was passed against K, daughter of R, the mother of the objectors. Upon an application for execution of that decree, an application was made for time to pay it up and the application was granted. The decree-holders made a second application to which it was objected that the property attached had come to the judgment-debtors not from their mother but from their maternal grandfather. *Held*, that the objection was barred neither by the rule of *res judicata* nor by that of estoppel. **RAM CHANDER SINGH v. PUTTU LAL**, 8 A.L.J. 844.

(123)—*Substitution of the heirs of a deceased judgment-debtor—Civ. Pro. Code, s. 234—Limitation—Limitation Act, arts. 178, 179, explanation (1).*—An application for execution of a decree, made within time against the judgment-debtors, some of whom may afterwards be found to have died before such application, is sufficient to keep the decree alive against all the judgment-debtors or the representatives of such of them as were dead. Subsequent steps in aid of execution, in the shape of application for execution taken within three years of the previous application, though beyond that period from their death, are sufficient to bar the running of the period of limitation. The Code of Civil Procedure does not prescribe any substantive application for the substitution of the legal representatives of a deceased judgment-debtor and an application made for such substitution is in substance and an application for execution within the meaning of s. 234 of the Code of Civil Procedure and art. 179 of the Limitation Act. **JOGENDRA NATH ROY v. RASIK CHANDRA BANERJEE**, 2 C.L.J. 544.

(124)—*Deposit of security for satisfaction of decree pending appeal—Dismissal of appeal—*



**Execution of Decree—continued.****—3.—Application for execution and powers of Court—continued.**

*Necessity for further execution-proceedings to realise deposit amount—Court, duties of, to deal with the deposit—Trustee—Further execution-proceedings by decree-holder—Limitation.*

When, in applying for stay of a sale in execution of a decree, pending an appeal against the order directing the sale, a judgment-debtor deposits money and jewels in Court in lieu of security (for satisfaction of the decree), and the appeal is since dismissed, it is not necessary for the decree-holder to take any further proceedings in execution, if the deposit is sufficient for the satisfaction of the decree. [D., 6 C.W.N. 343.] When the appeal is dismissed, the deposit money must be taken to have been transferred to the credit of the decree-holder and the Court should similarly deal with the jewels deposited as security, converting them into cash for the decree-holder's benefit. Although, in such a case as the above, the decree-holder does not, since the dismissal of the appeal by the judgment-debtor, draw the deposit amount out of Court for more than three years from the order of the appellate Court and more than three years from any previous proceedings taken to execute the original decree, no question of limitation will arise. *SHEO GHOLAM SAHOO v. RAHUT HOSSEIN*, 4 C. 6.

(125)—*Execution of decree—Execution petition struck off—No withdrawal by decree-holder—Civ. Pro. Code, ss. 373, 647.*—An execution petition not withdrawn by the petitioner but struck off the file does not bar the presentation of a fresh petition of execution and gives a new starting point of limitation. *RAM RUP v. LALJI*, A.W.N. 1888, 253. [D., 12 A. 179.]

(126)—*Civ. Pro. Code, Act X of 1877, s. 230—Execution of decree—Limitation.*—An application for execution of a decree more than 12 years old was made on the 14th May, 1880 under s. 230. An order was passed thereon for the attachment of the moveable property of the judgment-debtor. No moveable property was found; the decree-holder then applied to attach his immoveable property. But the Court refused to do so and struck off the proceedings. On 13th September, 1880, the decree-holder renewed his former application. *Held*, that the former application for execution must be treated as having been granted within the meaning of s. 230 of the Code and, consequently, that the further application was barred under that section, the decree being more than 12 years old. *AFRANNESSA CHODHRANI v. SHARAFUTULLAH CHOWDHRY*, 9 C.L.R. 321.

(127)—*Order dismissing—Removal of attachment—Procedure—Striking off execution case.*—A Court should not, for its own convenience and without notice to parties, order the dismissal of an execution case, and direct the removal of the attachment in such case. When the parties do not appear at the time fixed for hearing, the Court may dismiss an execution case, and leave it open to the parties to apply

**Execution of Decree—continued.****—3.—Application for execution and powers of Court—concluded.**

to have the case re-opened. *N.L.C.T. NARAI-NAN CHETTY v. V.V.R. MEYAPPA CHETTY*, L.B.R. 1898-1900, 340. (20 W.R. 133, 12 B.L.R. 420, D.; 11 W.R. 517, 3 B.L.R., App., 68, 10 C. 416, R.)

Amendment of decree as to costs—Application for execution—Limitation—See CIV. PRO. CODE, 1908, s. 152, O. XX, r. 6. 24 M. 25.

See CIV. PRO. CODE, 1908, O. XXIII. r. 1, s. 141, 17 A. 106=22 I.A. 44, P. C., A.W.N. 1888, 272.

Property wrongfully sold—Temporary injunction—See CIV. PRO. CODE, 1908, O. XXXIX, r. 1, 2 L.B.R. 89.

Partition decree sent to Collector for execution—Collector not competent to refuse execution—Order of Collector *ultra vires*—See COLLECTOR, 14 B. 450.

Hindu Law—Mirasi right in temple—Suit against office-holder—Compromise for sale of office and emoluments—Public policy—Execution of decree passed in terms of compromise—Power of executing Court to refuse to execute decree—See COMPROMISE—GENERAL, 26 M. 31.

See DECREE—DECREE, FORM OF, 13 W.R. 23.

Applicability of the rule that questions relating to execution is to be determined by executing Court to a case where executing Court has no jurisdiction. See JURISDICTION—QUESTION OF JURISDICTION, 17 C.P.L.R. 51.

See LEGAL PRACTITIONERS—PLEADER, APPOINTMENT AND APPEARANCE, 20 B. 198 = P.J. 1895, 4.

Decree obtained by guardian of minor—Application for execution by guardian—Application by minor after attaining majority—Limitation Act (XV of 1877), s. 7—See LIMITATION ACT, 1908, ss. 6, 8, 7 B. 179.

Whether an executing Court can sell what the judgment-debtor himself is unable to alienate privately—See MORTGAGE—GENERAL, 7 P.W.R. 1908=62 P.R. 1908.

Power of executing Court—See MORTGAGE—GENERAL, 9 C.L.J. 288=4 Ind. Cas. 52.

Usufructuary mortgage-decree in suit on mortgage—No provision in decree about possession and interest—Mortgagee in possession after decree—Taking account not necessary—Application for execution—Application for order absolute—See MORTGAGE—USUFRUCTUARY MORTGAGE, 25 M. 537.

Application for execution—Omissions to mention some of the parties—See PENAL CODE, ss. 191, 193, A.W.N. 1887, 223.

See POSSESSION—SUITS FOR POSSESSION, 2 N.W.P. 151.



**Execution of Decree—continued.****—4.—Effect of change of law pending execution.**

(1)—*Effect of change of law pending execution—Execution proceedings in suit commenced before Act VIII of 1859—Act VII of 1855.*—Proceedings in execution of a decree, in a suit begun under the old procedure, were regulated by Act VII of 1855. *In re SUMBOO CHUNDER HALDAR, Bourke, O.C., 59.*

(2)—*Civ. Pro. Code (Acts VIII of 1859 and X of 1877)—Execution of decree—Order setting aside sale, Appeal from.*—Act VIII of 1859 gave no appeal from an order setting aside a sale. Execution proceedings commenced under that Act, ended in a sale after Act X of 1877 came into force. Such sale was set aside. Although Act X of 1877 gave a right of appeal from such order, *held* that the sale was governed by Act VIII of 1859 and no appeal lay from the order setting it aside. *CHINTO JOSHI v. KRISNAJI NARAYAN, 8 B. 214. [Cons., 16 C. 267; R., 8 B. 287, 12 B. 449.]*

(3)—*Civ. Pro. Code, Amendment Act of 1879, s. 230—Effect on pending petitions—S. 6, Act I of 1868.*—S. 230 of the Procedure Code is part of procedure and is subject to the rule that, when an enactment deals with procedure only, it applies to all actions pending as well as future. S. 6, Act I of 1868 does not relate to procedure. *PAPA SASTRIAL v. ANANTA RAMA SASTRIAL 3 M. 98. [R., 7 B. 459, 12 B. 449, 6 M.L.J. 122.]*

(4)—*S. 310-A, Civ. Pro. Code, 1882—S. 2, Act V of 1894—Execution-sale conducted subsequent to Act V of 1894—Execution-proceedings commenced before Act V of 1894—Pending proceedings—Act V of 1894, Retrospective effect of.*—S. 310-A, Civ. Pro. Code, confers a new and substantive right on the judgment-debtor, and is not merely a matter of procedure. Retrospective effect is not ordinarily given to an enactment so as to affect substantive rights, but provisions affecting mere procedure are applied to pending proceedings. An enactment affecting rights of property is not to be so construed as to have a retrospective effect, unless the intention that it shall have such effect clearly appears. Since s. 310-A is not merely a matter of procedure, it has no application to pending proceedings. (*Petheram, C.J., and O'Kinealy, J., dissenting.*) (14 C. 636, 15 C. 376, 383, 16 C. 267, R.) *Per Petheram, C.J., and O'Kinealy, J.*—S. 310-A, merely deals with a matter of procedure and applies to a sale in execution of a decree conducted after Act V of 1894 came into operation, notwithstanding the fact that the execution-proceedings were commenced before. *Per Petheram, C.J.*—All that the new section (310-A) has done as far as the decree-holder and his debtor are concerned, has been to extend the period, during which the debtor may discharge his liability by payment, for 30 days beyond the date of the sale. This is a mere modification of the mode in which the successful litigant may obtain the fruits of his decree. But even if it be held that the new

**Execution of Decree—continued.****—4.—Effect of change of law pending execution—continued.**

section of the Code created a new right in the judgment-debtor, the words used in Act V of 1894 must be regarded to have been used with the express intention that the section shall have retrospective effect, in the sense that it shall take effect on sales made after the Act had come into operation, though the execution-proceedings, of which the sale was a part, had been commenced before it had come into operation. (14 C. 636, 15 C. 383, 16 C. 267, R.) *Per O'Kinealy, J.*—Act XIV of 1882 is an Act to consolidate and amend the laws relating to Procedure of Courts of Civil Judicature. On the face of it, it is an Act of Procedure and nothing more. What the Legislature intended by the amending Act of 1891, was to amend the rules of the Civil Procedure Code in regard to sale and delivery of immoveable property. S. 310-A, both in form and substance, seems to be merely a rule of procedure under which no party has a vested interest. Besides, under s. 316 of the Code, a purchaser has no vested interest in the property before the date of his certificate; if before that date, therefore, the judgment-debtor pays into Court the amount due, the execution would cease, and the purchaser could not insist upon the sale being confirmed and a certificate being given to him. Moreover, when a question arises under s. 244, the fact that the purchaser who is not a party to the suit is interested in the result, has never been held to be a bar to the application of s. 244. *GIRISH CHUNDRA BASU v. APURBA KRISHNA DASS, 21 C. 940, F.B. (14 C. 636, 15 C. 376, 16 C. 267, 19 C. 683, R.) [Overruled, 22 C. 767; F., 18 M. 477; Expl., 6 C.W. N. 57; R., 23 C. 682, 23 B. 450, 88 P.L.R. 1904 = 90 P.R. 1904, F.B.]*

(5)—*Civ. Pro. Code (Act X of 1877), s. 342, Construction of—Judgment-debtor imprisoned under Civ. Pro. Code, Act VIII of 1859—Not entitled to discharge after six months—Construction of statutes—Rule as to retroactivity of enactments.*—*Held by the Full Bench:*—S. 342 of the Civ. Pro. Code, Act X of 1877, read with s. 6 of the General Clauses Act, I of 1868, had no retrospective operation, and, therefore, judgment-debtors imprisoned in satisfaction of decrees against them under the former Code (Act VIII of 1859), were not entitled to be discharged on the coming into force of the Code of 1877, although they had undergone imprisonment for more than six months, but less than to years. (*Sargent and Bayley, JJ., dissenting.*) [*F., 1 A. 668, F.B.; Appl., 4 B. 163; Expl. & D., 8 B. 511; R., 16 C. 267, F.B., 14 B. 516, 20 B. 759.*] *Per Westrop, J.*—(i) As a general rule, a retro-active effect should not, in the absence of express language or necessary implication showing that the intention of the legislature is otherwise, be given to Statutes or Acts. (ii) The rule does not apply where a Statute is remedial, and merely alters procedure, without diverting any pre-existing right. *Per Bayley, J.*—When of two possible constructions, one is in strict



*Execution of Decree—continued.***—4.—Effect of change of law pending execution—continued.**

harmony with the improvements introduced by the Act, and with the spirit of modern legislation, while the other treats the point under consideration as not having been considered by the legislature at all, the former is to be preferred. Cases as to construction of statutes relating to procedure and retrospective effect of enactments generally, reviewed and discussed at great length. *In the matter of the petition of RATANSI KALIANJI*, 2 B. 148. [F., 9 C. 446 = 12 C.L.R. 431; R., 9 C.L.R. 281, 5 B. 653, 6 B. 26, 11 B. 469, 12 B. 449, 21 B. 822, 153, P.L.R. 1901, 88 P.L.R. 1904 = 90 P.R. 1904, 31 B. 630 = 9 Bom. L.R. 917, F.B.]

(6)—*Act XIV of 1859 — Decree in force when Act passed — First execution application after Act, governed by s. 21—Subsequent application—Rule in s. 20 to be followed.*—The provisions of s. 21 of Act XIV of 1859 refer to the first execution which is taken out on a judgment in force at the passing of the Act. So, after execution has been once taken within the time prescribed in s. 21, further proceedings in execution can then be taken unless the provisions of s. 20 have barred them. The above s. 21 cannot be construed as laying down that all processes for execution on judgments enforced at the passing of the Act must be finally closed within three years after the passing of that Act and that the decree would be barred after the lapse of that time. *DOORGA CHURN ROY v. DINO MOYEE DEBIA*, 6 W.R. Mis., 14.

(7)—*Act XIV of 1859, ss. 19 to 23—Suspension of Act XI of 1861 till 1st January, 1862—Limitation for execution.*—The operation of ss. 19 to 23 of Act XIV of 1859 having been merely suspended by Act XI of 1861 until 1st January, 1862, when once Act XIV of 1859 had come actually into operation, all cases would become subject to its provisions and the decree-holder could not get a fresh start from the beginning of 1862. *RAJ BULLUB BHUNG v. TARANATH, ROY*, 6 W.R. Mis., 30. [R., 24 W.R. 282.]

(8)—*Act XI of 1861—Postponement of operation of Act XIV of 1859 by, only up to 1st Jan., 1862.*—Act XI of 1861 only declares that certain sections of Act XIV of 1859 should not take effect or have any operation before 1st January, 1862, and it could not have the effect of deferring the operation of the Act in respect of every case which might thereafter come before the Courts. *GOPAL KISHEN POTEDAR v. RANEE SHURUT SOONDUREE DEBEA*, 6 W.R. Mis., 41.

(9)—*Security for costs—Enforcement of security bond before and after Act VII of 1888—Procedure.*—Though, before the passing of the amending Act VII of 1888, an application by the decree-holder for execution of the decree for costs against the surety was rejected on the ground that under the law as then laid down by the Civ. Pro. Code, the security bond could not be enforced by means of execution of the decree and that the decree-holder must have

*Execution of Decree—continued.***—4.—Effect of change of law pending execution—continued.**

recourse to a fresh suit against the surety, the decree-holder is, after the passing of the Act of 1888, entitled to make a fresh application for execution against the surety under s. 46 of that Act. By Act VII of 1888 the previous statute was not repealed. The new provision of this Act is one of procedure and not one which deals with any right. The right of the decree-holder to recover his money is not affected, nor is the liability of the surety to pay the money. The only alteration is as to the mode in which to recover. *ABDUL WAHED v. FAREEDOONISSA* 16 C. 323.

(10)—*S. 174, Act VIII of 1885 (Bengal Tenancy)—Decree passed before Bengal Tenancy Act came into force—Prior decisions considered.*—The decision in 14 C. 636, so far as it holds that s. 174, Act VIII of 1885, creates a new right in a judgment-debtor, and is, therefore, inapplicable to a case in which the decree was passed before that Act became law, is wrong. 15 C. 383, and 21 C. 940, being based on the principle in 14 C. 636 are incorrectly decided. *Quere.*—Whether the order made in 14 C. 636 was right under s. 6 of the General Clauses Act by reason of the execution proceeding having been commenced under Bengal Act VIII of 1869, which was repealed by the Bengal Tenancy Act. *JOGODANUND SINGH v. AMRITA LAL SARCAR*, 22 C. 767, F.B.

(11)—*Civ. Pro. Code (Act VIII of 1859), s. 270 and (Act X of 1877), s. 295—Effect of change of law pending execution.*—Attachment was effected by one judgment-creditor under Act VIII of 1859, but the sale was held after Act X of 1877 came into force. Another judgment-creditor applied for rateable distribution under s. 295 of Act X of 1877. There being no provision in the Act of 1859 corresponding to s. 295 of Act X of 1877, held that the first attaching creditor was entitled to have his decree fully satisfied out of the sale proceeds and no rateable distribution could be had. *NARANDAS v. BAI MANCHHA*, 3 B. 217.

(12)—*Attachment of political pension—Notice issued under s. 216 of Act VIII of 1859—Civ. Pro. Code, X of 1877, s. 266, cl. g)*—An application was made, on the 28th September, 1877 in execution of a decree for the attachment of a political pension, and on the issue of a notice under s. 216 of Act VIII of 1859, objection was taken to the execution on the ground that no order for the attachment of the pension having been made prior to the 1st October, 1877, the provisions of Act X of 1877 were applicable under which such pension was no longer attachable, but it was held that the right which the decree-holder had, under Act VIII of 1859, to satisfy his decree out of the pension in question was, under the circumstances, preserved to him. All proceedings pending when Act X of 1877 came into operation are, under Act I of 1868, s. 6, to be governed in their course and conduct by the Act theretofore in force, the General rule



**Execution of Decree—continued.****—4.—Effect of change of law pending execution—continued.**

of construction contained in that section not being affected or varied by ss. 1 and 3 of Act X of 1877. Also, a *bona fide* application for the enforcement of a decree in a particular way, coupled with an order of the Court in furtherance of that object, as much constitutes a proceeding in execution commenced and pending as the actual issue of a regular warrant for attachment. **VIDYARAM v. CHANDRA SHEKHARRAM, 4 B. 163.**

(13)—*Bombay Act VI of 1888—Gujarat Taluqdars Act, s. 31—Sale in execution of decree upon a mortgage before the Act—Sanction of Government, if necessary.*—On the 22nd August, 1889, plaintiff in the suit obtained a decree for sale of certain talukdari which had been hypothecated under a *saukhat* executed before the Gujarat Taluqdars Act (VI of 1888) came into force. The decree was transferred for execution to the Collector, who refused to put up the property to sale without the previous sanction of the Governor of Bombay in Council as required by s. 31, cl. 2, of Bombay Act VI of 1888. *Held*, that s. 31 of the Act had no application to the present case. The *san* mortgage having been executed before the Act came into force, and left with its validity untouched by cl. 1 of s. 31, the ordinary right of the mortgagee to bring the property to sale was not taken away by that section. The sanction of the Governor in Council was not therefore required to the sale under the decree obtained on the mortgage. **NAGAR PRAGJI v. JIVABHAI BAVAJI, 19 B. 80.** [*Doubted*, 20 B. 565; *Expl.*, 22 B. 884; *R.*, 11 Bom. L. R. 1372.]

(14)—*Act XVI of 1868, s. 12—Case pending in superior Court on appeal—Immediate lower Court abolished—Court which should execute decree of appellate Court—Jurisdiction—Execution sale—Irregularity—Fraud—Question determinable in execution—Regular suit—Civ. Pro. Code, 1859, s. 256.*—Where an appeal was pending against the decree of a Sudder Amin, at the time of the passing of Act XVI of 1868, which resulted in a modified decree afterwards executed by the Sudder Moonsiff, *held* that, although it may be said that the appeal against the decision of the Sudder Amin was pending in a superior Court, yet, the proceedings in the suit were, within the meaning of the words used in s. 12, Act XVI of 1868, pending in the original Court of trial, and as Act XVI of 1868 abolished Sudder Amin's Courts, the Court which had jurisdiction after the passing of the Act, to execute the decree was the Court of the Sudder Moonsiff. In an execution sale, the facts made out did not establish a case of substantive fraud, but fell very far short of it, amounting utmost to an irregularity in the proceedings, accompanied by a consequence in the shape of a sale of property for a sum considerably below its value. *Held* that, in such circumstances, the remedy was to make an application in proper time under s. 256, Civ. Pro. Code, 1859, to set aside the sale, and

**Execution of Decree—continued.****—4.—Effect of change of law pending execution—concluded.**

that, if such an application failed, it was not open to the applicant (judgment-debtor) to bring a regular suit for the purpose of establishing the same thing. **GOBIND SINGH v. MOHUNT MUNNO RAM DOSS, 19 W.R. 414.**

(15)—*Effect of change of law pending execution—Execution proceedings—Finality of order—Objection taken afterwards—Limitation.*—After certain execution proceedings were struck off the file on the 21st February, 1875, an application was made on the 1st February, 1878, which was dismissed for default as also another on the 10th March, 1880. During the pendency of another application, filed in April, 1881, a house was ordered to be attached on the 28th June, 1881, and an objection by the judgment-debtor that it was satisfied was dismissed on the 27th October. An objection for the first time by the judgment-debtor during the pendency of the same proceedings, was taken on 5th December, 1881, to the effect that the application of the 1st February, 1878, was limitation barred. The order of October, 1881, was final as regards the objections taken, but it would not operate as a bar to any other plea such as limitation not raised before, so long as the proceedings were hanging fire. As the first application barred by limitation was made in 1878, after the passing of the Limitation Act of 1877, the definition of 'suit' in s. 3, excluded applications, from being a stage in a suit, governed by the Act of 1859, and on account of the said definition, the Act of 1877 applied to the present proceedings. **FATTEH MUHAMMAD v. LALJI MAL, 143 P.R. 1883.**

(16)—*Act III of 1870—Execution proceedings during operation of Act—Decree transferred to Civil Court—Civ. Pro. Code, Applicability of—Appeal—Act XXIII of 1861, s. 11.*—Case where it was held that proceedings in execution, while Act III of 1870 was in force, of a decree transferred to the Civil Court, were governed by the Civ. Pro. Code, and that an order passed therein is appealable under Act XXIII of 1861, s. 11. **CHEDEE SINGH v. PEAREEOONNISSA, 20 W. R. 91.**

(17)—*Civ. Pro. Code, s. 310-A—Sale subsequent to Civ. Pro. Code, Amendment Act V of 1894—Right of judgment-debtor to have sale set aside.*—In execution of a decree a house had been attached. Before the date of sale, s. 310-A had been enacted by Act V of 1894. The question was whether the judgment-debtor could apply under the new section to have the sale set aside. *Held* that, when Act V of 1894 came into effect, there was no purchaser in existence. The new law was passed before the purchase was made and the purchaser must take subject to its provisions. **RANGASAMI NAIDU v. VIRASAMI CHETTI, 18 M. 477.** [*R.*, 23 B. 450.]

See BOM. ACT VI OF 1888, S. 31, 20 B. 565.

See EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION, 51 P.R. 1870.



**Execution of Decree—continued.****—5.—Execution by Collector.**

(1)—*Bona fide execution application in time—Refusal—Keeping case alive.*—Case where it was held that a Collector ought not to refuse a *bona fide* application for execution made within time, though he thinks it was made only "to keep the case going." KRISTO BUNDHOO CHUCKERBUTTY v. SUDURUDDEE, 17 W.R. 67.

(2)—*Reg. V of 1812, s. 26—Reg. V of 1827—Order made under section—Functus officio—Collector's liabilities.*—After a Judge has made an order in the terms of Regulation V of 1812, s. 26, as modified by Reg. V of 1827, he becomes *functus officio*, and the Collector as manager and holder takes, at his own proper risk, everything that he finds to be part of the joint estate. RAM RUNGINEE DOSSEE v. GOOROO DOSS ROY, 22 W.R. 212.

(3)—*Satisfaction of decree by temporary alienation—Power and duty of Collector—Procedure.*—Where the Collector finds that the sale of land in execution would be undesirable and that the decree can be satisfied within a reasonable time by a temporary alienation of the land, he may place what he considers proper before the executing Court, which may, after hearing the parties, decide whether effect should be given to such arrangement or not. But such an arrangement cannot be treated as a final settlement of the decree, till the Court accepts it and authorises the Collector to give effect to it. GUJAR SING v. MIT SINGH, 114 P.R. 1886. [R., 25 P.R. 1894.]

(4)—*Civ. Pro. Code, 1882, ss. 320 (=s. 68, new Code), 322-A (=sch. III, para 3, new Code)—Execution of decree by Collector—Authority of Collector to hear objections to execution of decree or to decide as to whether attachment was properly made.*—Where a money decree is transferred to the Collector under s. 320, Civ. Pro. Code, for execution by sale of certain property, it is no part of his duty under s. 322-A, to decide whether the property has or has not been properly attached, nor is he authorized under the section to hear any objections, by parties interested in the property advertised for sale, to the sale of that property. ONKAR SINGH v. MOHAN KUAR, 20 A. 428 = A.W.N. 1898, 96.

(5)—*Civ. Pro. Code, ss. 322, 326—Property taken under Collector's management—Person subsequently obtaining money decree, whether could claim to be entered in list of creditors under s. 322-B.*—Where a money decree is passed against a person after his property had been placed under the management of the Collector in accordance with the provisions of s. 326 of the Civ. Pro. Code, the said property not being liable to be sold in execution of that decree so long as such management continues, the holder of the decree is not entitled to be entered in the list of creditors prepared under s. 322-B of the Code; further, an application to be entered in the list of creditors, in the statement or debts prepared under the section, should be made to the Collector and not to the

**Execution of Decree—continued.****—5.—Execution by Collector—concluded.**

District Judge by whom the Collector had been engaged for the purposes of s. 326. MURARI DAS v. THE COLLECTOR OF GHAZIPUR, 18 A. 313 = A.W.N. 1896, 17.

(6)—*Suit for recovery of money received in execution—Previous application to Collector, Necessity of.*—A suit to recover money which the defendant had received in a Collector's Court in execution of a decree, and to which he was no longer entitled, need not be preceded by the plaintiff making an application to the Collector. KRISTO CHUNDER GOOPTO v. RAMSOONDER SEIN, 17 W.R. 14.

(7)—*Sale set aside under s. 311, Civ. Pro. Code, 1882—Suit for confirmation of sale.*—The plaintiff and another had a joint decree for money against the judgment-debtor. The plaintiff applied for execution in his own name, not mentioning that the application was made for the benefit of both the decree-holders. The property was attached, and the execution of the decree was transferred to the Collector (the property being ancestral land) by whom the property was sold. The plaintiff purchased the property. He did not pay any part of the sale consideration, but merely gave a receipt for the amount of the decree. Subsequently, the Collector set aside the sale under the provision of s. 311, Civ. Pro. Code, and the plaintiff filed the present suit to have the Collector's order set aside and the sale confirmed. Held, that such a suit was maintainable, but that the plaintiff in the present suit was not entitled to succeed, as such confirmation of the sale, while the decree was in the joint names of the plaintiff and another, would be to perpetrate a fraud. MATHURA DAS v. JAMNA PRASAD, 25 A. 355 = A.W.N. 1903, 69. (20 A. 379, R.)

**—6.—Execution by or against representatives.**

(1)—*Death of decree-holder—Right of representative.*—Where a decree-holder whose right of execution has been temporarily suspended dies, his representative has the same rights, as the former had himself to apply for and obtain a revival of the proceedings. KANYAN BHAI DIPCHAND v. GHANASHAM LAL JADUNATHJI, 5 B. 29.

(2)—*Person attaching decree—Representative of decree-holder—S. 244, Civ. Pro. Code—Jurisdiction to execute attached decree.*—A person who attaches a decree is a representative of the decree-holder under s. 244 (c) of the Code, and is in every case entitled to enforce execution of the decree attached by him. [F., 6 C.L.J. 141; Appr., 17 A. 425; R., 16 M. 20, 17 M. 58 = 3 M.L.J. 211, 11 C.W.N. 433 = 6 C.L.J. 437.] Where the same Court has passed the decree which was attached and the decree in execution of which it was attached, the Court has jurisdiction to execute the attached decree on the attaching creditor's application. PEARY MOHUN CHOWDHRY v. ROMESH CHUNDER NUNDY, 15 C. 371. [R., 24 C. 778.]



**Execution of Decree—continued.****—6.—Execution by or against representatives—continued.**

(3)—*Execution of decree—S. 11, Act XXIII of 1861.*—X represented himself to be the purchaser of a decree from the decree-holder and claimed to execute the decree and his claim to do so was admitted. *Held*, that the order of the Judge allowing the claim was without jurisdiction under s. 11, Act XXIII of 1861, as the applicant was neither a party to the suit, in which the decree was passed, nor the representative of such party. *UMRIT LALL BAJPYE v. SHEEB PERSHAD BAJPYE, W.R. 1864, Mls., 35.*

(4)—*Execution of decree—Assignee of decree, Regular suit by—Civ. Pro. Code, 1882, ss. 232 and 244.*—Where an application under s. 232 of the Civ. Pro. Code by the purchaser of the share of the decree-holders in a suit, was dismissed on the ground of his purchase being *benami* for some of the judgment-debtors, *held*, he was neither a party to the suit, nor the representative of any such party, so as to bar a separate suit by him along with persons alleging to be the real purchasers. *HALODHAR SHAHA v. HAROGOBIND DAS KOIBURTO, 12 C. 105. [F., 14 M. 478; R., 20 A. 539 = A.W.N. 1898, 145, 3 O.C. 32; D., 16 A. 483.]*

(5)—*Execution of decree—Co-sharer of judgment-debtor—Execution by co-sharer.*—A mortgaged certain property to B, and afterwards sold a 2-annas share thereof to C, and gave him an *ijara* of a portion. B obtained a decree on his mortgage, which decree was purchased by C, who then applied for execution. The judgment-debtor, A, objected that C was not competent to take out execution, being a co-sharer and *ijaradar*; but this contention was overruled. *KALLY DOSS BHADURY v. GOLAM ALLY CHOWDHRY, 3 C.L.R. 237.*

(6)—*Minor—Representative capacity of applicant for execution—Death of party represented—Effect.*—The death of a minor puts an end to the representative capacity of the party applying to execute a decree on behalf of such minor; further steps in execution must be taken by the deceased's legal representative. *HULODHUR ROY CHOWDHRY v. JUDONATH MOOKERJEE, 14 W.R. 162.*

(7)—*Judgment-debtor becoming decree-holder by inheritance—Extinction of decree—Inheritance.*—If a judgment-debtor becomes a decree-holder by inheritance, his decree would be extinguished to the extent of his inheritance. *N. P. POGOSE v. FUKUROODDEEN MAHOMED AHSAN alias ALIMOODDEEN CHOWDHRY, 28 W.R. 343. [Appr., 10 A. 570; Cons., 5 A. 27.]*

(8)—*Civ. Pro. Code, 1882, s. 244—Property attached—Representatives of debtor—Burden of proof.*—The burden of proof is on the decree-holder to show that certain property which has been seized in execution of a decree against the representatives of a deceased debtor is the property of the deceased debtor in the hands of

**Execution of Decree—continued.****—6.—Execution by or against representatives—continued.**

the representatives and not their private property. *ABDUL RAHMAN v. MAHOMED AZIM, 4 C.W.N. 151.*

(9)—*Legal representative, Execution of decree against—Procedure.*—The Court should call upon the decree-holder to prove what property of the judgment-debtor had come into the possession of the representative or rather of the son of that judgment-debtor; and then, having ascertained from proof which was to be given by the decree-holder what property of this description had come into the possession of this person, the Court should then see whether or not that property had been duly applied; and, if it had not, whether there was any remainder of that property that could be made liable. *RAJAH ROODRA NARAIN ROY v. NITYANAND DOSS, 8 W.R. 195.*

(10)—*Representative not entitled to execution of decree in deceased's favour as of right—Satisfaction of Court—Trial—Determination of question—Civ. Pro. Code, 1859, s. 207—Sufficient cause—Objection to execution by debtors.*—The representative of a deceased person, in whose favour a decree has been made, cannot claim execution as a matter of right, but must convince the Court that he should be granted satisfaction of the decree; and the Court cannot adjudicate upon the question without hearing the opposite side. A co-decree holder cannot claim execution without proving to the Court within the provisions of s. 207, Act VIII of 1859, the existence of sufficient cause for his asking to have execution alone; and the Court is bound to hear all that the judgment-debtors have to urge against the application. *UMRITH NATH CHOWDHRY v. CHUNDER KISHORE SINGH, 21 W.R. 31. [R., 7 C.L.R. 537, 33 C. 306 = 10 C.W.N. 297 = 3 C.L.J. 112.]*

(11)—*Execution of decree—Representation of deceased decree-holder—Act VIII of 1859, s. 103.*—The principle of s. 103, Act VIII of 1859, is applicable to applications made by parties seeking to represent deceased persons in execution of a decree; and the Judge, instead of rejecting the claim of a petitioner to stand in the shoes of the deceased for the purpose of executing the particular decree, should call upon him to produce evidence that he had a right to represent the deceased, and pass an order accordingly. *WOOMA CHURN MOOKERJEE v. BABOO LUCKHEE NARAIN ROY CHOWDRY, 1 W.R., Mls. 10.*

(12)—*Execution of decree against heirs of debtor—Heirs substituted as parties to suit—Property of deceased debtor—Issues—Act VIII of 1859, s. 203.*—When the defendant in a suit for payment of money died before decree, his sons were made parties and a decree for the debt due by the deceased was given against them; and in execution of this decree the decree-holder attached certain property in the hands of one of the sons who objected on the ground that it was his self-acquired property. *Held*,



**Execution of Decree—continued.****—6.—Execution by or against representatives—continued.**

that the proper issues to be determined were (1) whether the property attached by the decree-holder had formed a part of the estate of the deceased debtor, and, if not, (2) whether, if it is separate property of the son, that son has misapplied any property received by him from his father, and, if so, to what extent. **MOORAREE SINGH v. PURYAG SINGH, 2 C.L.R. 189.**

(13)—*Execution of decree against legal representative of Hindu judgment-debtor—Proof of property of judgment-debtor being in representative's hands—Joint Hindu family—Civ. Pro. Code, s. 234—Evidence—Presumption.*—In execution of a money-decree against the legal representatives of a Hindu judgment-debtor, it was proved that the deceased and his representatives were members of a joint Hindu family of which the deceased was the father and manager and that the property attached belonged to the judgment-debtor. On the other side, it was contended that the property attached had always been their own and had not come to them from the deceased. There was no evidence to show that the objectors were not liable to execution by reason of insufficiency of assets. *Held*, that the property must be presumed to have belonged to the deceased and that the decree-holder was not bound to prove that each piece of property attached had belonged to the deceased. **DURGA PRASAD v. CHOKKE LAL. A.W.N. 1888, 49.**

(14)—*Applicability of s. 203, Civ. Pro. Code, 1859—Heirs of judgment-debtor—Condition.*—A decree holder can put s. 203, Act VIII of 1859, in force, only if he proves to the Court that no such property of deceased can be found as he can sell in execution. **INDO NARAIN MISSER v. KRISHTO CHUNDER MAHTO, 14 W.R. 362.**

(15)—*Decree-holder's application of attachment of property with heir—Former application.*—Where a decree-holder applied for attachment of certain property as that of his judgment-debtor, and in the possession of the heir of the latter, the application cannot be rejected though, on a former application, the decree-holder had failed to prove sufficient grounds for proceeding against the same property. **MAHARAJA DHERAJ MAHTABCHUND BAHADOOR v. DOYAMOYEE DOSSEE, 17 W.R. 97.**

(16)—*Civ. Pro. Code, 1859, s. 217—Petition under section—Verification—Necessity.*—It is not necessary that a petition under s. 217, Civ. Pro. Code, 1859, should be verified. **SUNT GOPAL CHUNDER v. MAHA RAJAH JAGUT INDUR BUNWAREE GOBIND, 8 W.R. 200.**

(17)—*Execution of decree—Certificate by representative.*—There is no necessity for a certificate to be taken out by the representatives of a party seeking to execute a decree obtained by their ancestor, if the Court executing the same be satisfied that the parties so seeking to

**Execution of Decree—continued.****—6.—Execution by or against representatives—continued.**

execute are the proper representatives. **RAJ CHUNDER GHOSE v. MOHEEMA CHUNDER PAUL, 1 W.R., Mis., 11.**

(18)—*Civ. Pro. Code, 1859, s. 210—Following judgment-debtor's property in parties' possession—Third party holding certificate under Act XXVII of 1860.*—A decree-holder was held to be at liberty, under s. 210, to follow his deceased judgment-debtor's property in the hands of the parties in possession, though a certificate under Act XXVII of 1860 had been obtained by a third party. **DUNPUT SINGH BAHADOOR v. RANEE RAJESSUREE, 15 W.R. 476. [R., 27 C. 242, 17 M. 186, 21 B. 539.]**

(19)—*Execution of decree—Application by heir who has not obtained succession certificate—"In accordance with law"—Limitation—Method of executing a decree—Procedure, Vested rights in.*—An application for execution made by the heir of a deceased decree-holder, without obtaining a succession certificate, is an application "in accordance with law" and saves the decree from being barred by limitation. (16 A. 26, R.) The right as to the method of executing a decree is one of procedure and not a substantial right. No one can have a vested right in a matter of procedure. **L. PAYNE & CO. v. BRAHMDEO, 9 Ind. Cas. 800.**

(20)—*Execution of decree—Death of decree-holder—Defendant one of several representatives of deceased—Right of other representatives to execute decree.*—Where the judgment-debtor was one of the legal representatives of a deceased decree-holder and as such was entitled to get a share in the estate of the deceased, that fact did not debar the other legal representatives of the deceased from executing the decree against the judgment-debtor. **MR. J.P. WISE v. MOULVIE ABDOL ALI, 7 W.R. 136. [Appl., 10 A. 570 = A.W.N. 1888, 231; Cons., 5 A. 27 = A.W.N. 1882, 140; R., 6 C. 594 = 7 C.L.R. 543.]**

(21)—*Civ. Pro. Code, 1859, ss. 204 and 210—Applications under sections, Disposal of—Grounds of disposal—Judgment-creditor's delay in pursuing debtor's property into his heir's hands—Explanation—Case where an application under s. 210, Civ. Pro. Code, 1859, was not allowed to succeed on the ground that would support an application under s. 204; and where it was held that an application under s. 204 must be disposed of on a state of facts which would give the Judge power to issue the order under s. 204.* It is incumbent on a judgment-creditor, delaying long after judgment-debtor's death to follow such debtor's property into the hands of his heir, to account for the reason of the delay. **SHAH AMBEN AHMED v. SYUD VELAET ALI KHAN, 20 W.R. 422.**

(22)—*Subsequent declaration of illegitimacy—Effect on decree-holders.*—Case where it was held that, though parties seeking to execute a decree had been declared illegitimate by a subsequent



**Execution of Decree—continued.****—6—Execution by or against representatives—continued.**

decision of the High Court in another case, the declaration of illegitimacy could not affect the right of persons who were parties to a decree, when it was made to execute the decree which was in their names. *MIRZA HINMEET BAHADUR v. MR. A. SALANO*, 17 W.R. 428.

(23)—*Decree against deceased person—Execution against legal representatives—Act VIII of 1859, s. 210.*—A decree passed against a dead person cannot be executed against his legal representatives. No provision is made in the Civ. Pro. Code for the issue of execution in such a case. S. 210 of Act VIII of 1859 does not include or provide for such a case. *In the matter of the Petition of GIRENDRONATH TAGORE*, 14 B. L.R. 334, Note.

(24)—*Execution of decree—Defendant dying before decree—Representatives—Decree against dead man.*—Where the sole defendant to a suit dies before decree, a decree passed against him on the supposition of his being still alive, is incapable of being executed. *ROOP NARAIN SINGH v. RAMAYEE SINGH*, 3 C.L.R. 192. [Not F., 21 B. 314.]

(25)—*Execution of decree—Estate of deceased person—Necessity for legal representative being brought on record.*—A decree cannot be executed against the estate of a deceased judgment-debtor, unless some person has been brought on record as his legal representative. *LAKRAJ ROY v. BECHARAM MISSER*, 7 W.R. 52.

(26)—*Execution against the estate bad unless represented by some one.*—There must be some one on the record representing the deceased for execution to issue against the estate of such deceased person. *GOKUL SUDH v. WILLSEY*, 65 P.R. 1867.

(27)—*Civ. Pro. Code, 1882, s. 234—Probate and Administration Act, V of 1881, s. 104—Execution of decree against assets of deceased judgment-debtor—Priority of claim.*—Under s. 234, Civ. Pro. Code, a decree-holder is entitled to have his debt paid out of the assets of a deceased judgment-debtor in the hands of his legal representative, which have not yet been duly disposed of. The right is not affected by the provisions of s. 104 of the Probate and Administration Act, which directs a rateable distribution of the assets of a deceased judgment-debtor. *VENKATARANGAYAN CHETTI v. KRISHNASAMI AYYANGAR*, 22 M. 194.

(28)—*Representatives of deceased decree-holder, Decree executable against property in hands of.*—A decree making the parties liable as representatives of the deceased can only be executed under the provisions of s. 203 of Act VIII of 1859 against property come to their hands. *SHEO NARAIN SINGH v. RAM PURTAB CHOWDHRY*, 6 W.R. Mis. 48.

(29)—*Civ. Pro. Code, 1882 s. 234—Application to execute the decree against alleged representative of deceased judgment-debtor.*—Where,

**Execution of Decree—continued.****—6.—Execution by or against representatives—continued.**

under s. 234 of Act XIV of 1882, an application is presented to execute the decree against the representative of a deceased judgment-debtor, it is the Court which passed the decree that must decide whether the person against whom execution is sought is or is not such representative, and the Court executing the decree must decide to what extent such person is liable as such representative. *SETH SHAPURJI NANA BHAI v. SHANKAR DUT DUBE*, 17 A. 431 = A.W.N. 1895, 74. (13 C. 257, R.) [Appr., 28 M. 466 = 15 M.L.J. 116.]

(30)—*Execution of decree—Position of legal representative.*—Where execution proceedings are taken against the legal representative of a judgment-debtor, he stands in no better position than the judgment-debtor himself, and he will not be permitted to resist the execution under circumstances in which the judgment-debtor himself, if he were alive, could not resist it. *MULCHAND RANCHHODDAS v. CHHAGAN NARAN*, 10 B. 74.

(31)—*Civ. Pro. Code, 1859, s. 203, Scope of—Representative's liability in execution—Assets.*—S. 203 primarily refers to a party who has been substituted before decree for the original debtor, and against whom consequently the decree has been passed as representative of such debtor. It is also applicable to a person who has become representative of an original debtor in execution proceedings, but even in such cases his liability is limited to the extent of debtor's property which may have come into his hands. *SYUD JAFUR HOSSEIN v. HINGUN JAN*, 8 W.R. 161.

(32)—*Decree against deceased, Execution of, against alleged representative—Representative capacity denied—Construction—Civ. Pro. Code, 1859, ss. 26, 203, 210, 211, 246—Act XXIII of 1861, s. 11.*—Execution of a decree against A, since deceased, was applied for against B as A's representative; the answer alleged the holding of property in individual right; held that such answer was not a setting up of claim under Act VIII of 1859, s. 246, but an answer to an application under ss. 210 and 211, and that the case fell under the terms of Act XXIII of 1861, s. 11. S. 203, Act VIII of 1859, did not require the defendant to be sued in any "capacity," but to be described according to s. 26, and the plaint to contain an allegation that he was the representative of the deceased. *AMEEROONNISSA KHATOON v. MEER MAHOMED MOZUFFUR HOSSEIN CHOWDHRY*, 12 B.L.R. 65 = 20 W.R. 280.

(33)—*Representative of deceased decree-holder—Execution once duly issued against, Effect of—Act VIII, of 1859, s. 246 Orders passed under—Appeal not given by s. 11 of Act XXIII of 1861.*—Where execution has, on a previous occasion, been issued against a person as the representative of the deceased judgment-debtor, his liability as such representative can no longer be disputed, especially with reference to



*Execution of Decree—continued.**—6.—Execution by or against representatives—continued.*

the terms of s. 216 of Act VIII of 1859. The order of the lower Court, so far as it declared that the property against which the decree was sought to be executed, was not property belonging to the deceased judgment-debtor and was, on that ground, not liable to attachment, having been made under s. 246, was not one subject to appeal. Where the property has been first attached as belonging to the original judgment-debtor and claimed by respondent as his own private property which never belonged to the judgment-debtor, the respondent is in the position of any third party, an entire stranger to the suit, and his claim would have to be properly and necessarily disposed of under s. 246, and the matter therefore cannot be the subject of appeal. *MAHARAJAH DHERAJ MAHATAB CHUND BAHADOOR v. MUSSAMUT PEAREE DOSSEE*, 6 W.R., Mis. 61. [Appr., 15 W.R. 163; R., 12 W.R. 333, 20 W.R. 280.]

(34)—*Successive applications for execution—Representative—Execution against person of such party.*—Successive applications for execution made against a party merely as a representative, preclude execution from being taken out against him personally, as a co-defendant, even if he is liable in both capacities. *PREM LALL GOSSAMEE v. HOSSEINOODDEEN*, 13 W.R. 36.

(35)—*Hindu Law—Decree against mother representing estate, adopted son being alive—Decree invalid—No further declaratory suit.*—A creditor got a decree against the mother of the debtor, in ignorance of the existence of an adopted child. The child obstructed the execution, and the creditor sued to declare that the estate was bound by the decree. *Held*, the suit would not lie, the inheritance was not properly represented, and the decree would not bind the son. *SUBBANNA v. VENKATAKRISHNAN*, 11 M. 408. (11 C. 45, D.) [R., 19 B. 521.]

(36)—*Act V of 1869, s. 177—Commanding officer not a representative.*—*Held*, that a deceased person would not be represented by the Commanding Officer acting under s. 177, Act V of 1869. *In re the estate of JEMADAR NIHAL SINGH*, 85 P.R. 1870.

(37)—*Execution of decree against one of the sons of the original judgment-debtor—Application for execution on death of such son against other sons, Limitation for, whether saved by previous application.*—On the death of the judgment-debtor, execution was once applied for against one only of his three sons. Pending the application, such son died, and it was sought to continue the proceedings against the other sons, and the latter contended that execution can be had against them only as the heirs and representatives of their father, and the next previous application not having saved time for execution as against them, this application was barred by time. It was held, however, that, though they could not be regarded as the representatives of their deceased brother,

*Execution of Decree—continued.**—6.—Execution by or against representatives—continued.*

they yet constituted joint representatives, along with him, of their father, the original judgment-debtor, so that the execution that had been taken against one of them saved the limitation as against the others. As has been held in 3 A. 517, an application for execution put in against one only of the representatives of a deceased sole judgment-debtor is sufficient for the purpose of saving a subsequent execution against the other representatives from being barred by time. *KRISHNAJI JANARDAN v. MARRARRAV*, 12 B. 48.

(38)—*Civ. Pro. Code, 1882, s. 244, (=s. 47, new Code) — Death of party to suit before final decree in appeal—Proceedings in execution taken against legal representatives—Sale in execution—Suit to set aside sale, if maintainable.*—The last clause of s. 244, Civ. Pro. Code, refers to a case where there is a dispute between two or more persons as to which of them is representative of a person who had been a party to the suit. It cannot be held to include a case in which there could be no representative, as there was no party to be represented and therefore no question as to who was the representative. During the pendency of an appeal by several unsuccessful defendants, one of the latter died. The appellate Court passed a decree against the surviving appellants alone, the representatives of the deceased appellant not having been impleaded. In execution, properties belonging to the deceased's estate were brought to sale, the representatives of the deceased having been made parties to execution proceedings. The representatives now sued to have the sale set aside. *Held*, that the suit was not barred by s. 244, Civ. Pro. Code. *BENI PRASAD KUNWAR v. MUKHTESAR RAI*, 21 A. 316 = A.W.N. 1899, 101. (13 A. 53, P.C., 17 I.A. 150 R.)

(39)—*S. 234, Civ. Pro. Code, 1882—Hindu widow relinquishing husband's estate in favour of reversioners—Deed of release containing condition to discharge widow's debt—Execution of decree against widow after widow's death—Enforcement of decree against reversioners.*—Where a Hindu widow relinquish the estate inherited from her husband in favour of reversioners, on condition of the latter agreeing to pay off a judgment-debt due from the widow to a third person, the reversioners who were on the record as representatives of the widow in execution of the decree against her after her death, not having shown that they applied the estates of the widow in their hands for paying off the debt, were liable under s. 234 to have execution taken out against them to the extent of the assets. *CHINTAMONY DUTT v. MOHESH CHUNDRA BANERJEE*, 23 C. 454. (12 C. 458, D.)

(40)—*Due application of assets by representative not shown—Arrest in execution of decree.*—On the failure of a representative to show that he has duly applied the assets known to have come to him of a deceased-debtor, he may be



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arrested in execution of the decree. **MAHARAJA DHERAJ MAHATAB CHUNDER BAHADOOR v. MUNMOHINEE DOSSEE**, 12 W.R. 517.

(41)—*'Ex parte' money decree against deceased's estate—Son representative of estate, prayer for time by—Property joint family property.*—On the execution of an *ex parte* decree for money, to be realised out of the estate of a deceased person, his son, one of the defendants representing the estate, instead of objecting, prayed for time to pay the amount due. *Held* that the inference was that the property was not the self-acquired property of the son, but the joint property of the family. **GHOTTA SHAYEE v. GOUR MONEE DOSSEE**, 21 W.R. 117.

(42)—*Decree against surety—Execution against property of deceased principal.*—Case where it was held that the property of a deceased principal could not be taken in execution of a decree against his surety. **KALEE CHURN v. SURRERAM**, 11 W.R. 69.

(43)—*Principal and agent—Decree against manager of factory—Judgment-debtor not identified with proprietor—Execution, mode of.*—If there is nothing in a decree on a bond in respect of sums owed by a manager on account of factory expenses, to connect the judgment-debtor with the proprietor, it cannot be executed against the property of the latter. **THE AGRA BANK, LIMITED v. DABEE PERSHAD**, 12 W.R. 208.

(44)—*Decree calling for accounts—Personal decree—Execution against representatives.*—*Held*, that a decree calling for accounts was a personal decree and could not be executed against the defendant's widow and representative. **BIDHOO MOOKHEE DOSSEE v. RAJAH BEJOY KESHUL ROY**, 12 W.R. 495.

(45)—*Decree barred by limitation—Instalment bond subsequently acknowledging balance due under decree—Consideration absent—Decree, Revival of—Representatives.*—An instalment bond by a judgment-debtor acknowledging a balance to be due under the decree, but executed without consideration, after the decree became barred by limitation, could not either revive the decree or be legally binding on his representatives. **HEERA LALL MOOKERJEE v. ROY DHUNPUT SINGH**, 24 W.R. 282 [*Appr.*, 2 A. 443; *R.*, 4 C. 500.]

(46)—*Sale-deed—Dena-pauna—Decree for damages—Liability of purchaser for personal debt—Representative—Act VIII of 1859, ss. 102 and 103.*—A purchaser is not rendered, by the *dena pauna* clause in a deed of purchase, liable for so purely personal a debt as that created by a decree for damages on account of malicious and wrongful conduct. *Quære.*—Whether a contract to pay another's judgment-debt, or the possession of assets out of which such debt is liable to be satisfied, would each of itself constitute the contractor or possessor respectively

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the legal representative of the judgment-debtor within the meaning of ss. 102 and 103, Act VIII of 1859? **MACLEOD v. KUNHOJE SAHOO**, 9 W.R. 271.

(47)—*Decree against wife—Execution against judgment-debtor's second husband—Act VIII of 1859, s. 105.*—A widow, on the death of her husband, was made defendant in a suit which had been pending against him. She married again between the original and final judgments against her. *Held*, that her second husband was not liable to summary proceedings in execution, and the term 'judgment' in s. 105, Act VIII of 1859 did not include the judgment in appeal. **BINDABUN CHUNDER SIRCAR CHOWDHRY v. A. B. MACKINTOSH**, 9 W.R. 442.

(48)—*Death of judgment-debtor after passing of appellate decree—Execution of decree—Representatives of judgment-debtor—Practice—Civ. Pro. Code, 1882, ss. 234, 248, 361 to 372, 583—Course open to decree-holder.*—The Civ. Pro. Code, 1882, does not contemplate the representatives of the judgment-debtor being placed on the record after the appellate decree has been passed. There is no express provision for it in the sections relating to execution. Ss. 361 to 372 relate to changes during suit, and speak only of plaintiffs and defendants—terms which seem to show that they were only intended to apply to proceedings up to final determination by the appellate decree, and not to proceedings in execution between the judgment-creditor and the judgment-debtor. K sued H in the Court of the second class Subordinate Judge of Surat. The suit was dismissed with costs. In appeal, the District Judge confirmed the decree. Thereupon H, for recovering his costs, applied to the second class Subordinate Judge for execution of the decree and prayed for a transfer of the execution proceedings to the first class Subordinate Judge, within whose jurisdiction K (the judgment-debtor) resided. The transfer was ordered as prayed for. Sometime after the transfer, K died and thereupon H applied to the Subordinate Judge to substitute on the record the name of the son of K as his legal representative. The application was rejected and H was referred to the second class Subordinate Judge to produce from him a certificate with respect to the substitution of the name. The second class Subordinate Judge to whom H thereupon applied, rejected the application holding that he had no jurisdiction to entertain the same, because the decree that was being executed was the decree of the appellate Court in which his decree had become merged. On an application having been made to the High Court under s. 622, Civ. Pro. Code, 1882, *held* that the course for the judgment-creditor to adopt was that provided by s. 234, *viz.*, to apply for execution of the decree against the legal representative of the deceased judgment-debtor, in which case the application to so execute the



*Execution of Decree—continued.***—6.—Execution by or against representatives—continued.**

decree, having regard to s. 583, would be to the second class Subordinate Judge, although, by s. 248, the notice to the party against whom execution was applied for would be issued by the first class Subordinate Judge to whom the decree had been transferred for execution. *HIRACHAND HARIJIVANDAS v. KASTURCHAND KASIDAS*, 18 B. 224. [*F.*, 21 B. 314; *Appr.*, 28 M. 466=15 M.L.J. 116; *Expl.*, 11 Bom. L.R. 1358=34 B. 142=4 Ind. Cas. 839; *R.*, 17 A. 243, 10 C.L.J. 396=14 C.W.N. 752=3 Ind. Cas. 324.]

(49)—*Execution of decree—Death of defendant pending delivery of judgment — Decree against all defendants, whether could be executed against heirs of deceased defendant without placing them on record—Practice—Civ. Pro. Code, 1882, ss. 234, 248 to 250.*—In this case, the High Court passed a decree for partition of the property in suit in confirmation of the decrees of the lower Courts. After the conclusion of the arguments in appeal, the High Court took time to consider. Subsequently, and, before judgment was pronounced, one of the defendants died, but the judgment was afterwards passed and decree drawn up dated the day of the judgment as if the said defendant was still living. On plaintiffs application to the first Court to execute the decree, execution was refused by that Court on the ground that the defendant having been dead at the date of the judgment and decree, and the heirs of the deceased party not having been placed on the record before the delivery of judgment, the decree was incapable of execution. The High Court, on appeal, referring to the English practice and that of the Privy Council to show that there was nothing anomalous or contrary to principle in the delivery of a judgment and drawing up of a decree thereon, though one of the parties to the suit was dead but the record not amended, provided that he had been fully heard in his lifetime, *held* that the lower Court was wrong in having refused execution of the decree which on its face was a good decree executable against the legal representatives of the deceased defendant under ss. 234 and 248 to 250 of the Civ. Pro. Code, without placing them on the record of the suit, unless the decree had, by reason of the defendant's death, become inherently defective. *RAMACHARYA v. ANANTACHARYA*, 21 B. 314. [*F.*, 21 A. 314=A.W.N. 1899, 86; *R.*, 26 M. 101=12 M.L.J. 435, 9 C.W.N. 710, 33 M. 167=6 M.L.T. 271, 14 C.W.N. 759=6 Ind. Cas. 170.]

(50)—*Decree in deceased's name—Execution, Application for—Civ. Pro. Code, 1859, ss. 207 and 208—Applicants, Bringing on record of—Protection of other's interests—Procedure as to addition of parties to record.*—Where application is made for execution of a decree standing in the name of a deceased person, the Judge ought, after bearing such application, to put one of the parties at least on the record, in the exercise of his judicial discretion; and further

*Execution of Decree—continued.***—6.—Execution by or against representatives—continued.**

he ought then take such steps as to him might seem right and proper for protecting the interests of the other parties claiming to be assignees. Where the deceased died at that stage of the case during which the suit was pending in appeal in the High Court and, therefore, before the final decree, which stood in the deceased's name was passed, the first amendment which must be affected in the record was that in the deceased's place must be put the names of those persons who were in fact allowed by the High Court to carry on the appeal in the deceased's name. *KAZEE SYUD ABDOLLAH v. SYED REASUT HOSSEIN*, 20 W.R. 51.

(51)—*Execution of decree—Order made under Act VIII of 1859, s. 210.*—An order was made, under s. 210 of Act VIII of 1859, making the legal representatives of a deceased judgment debtor parties to a suit in execution of a decree obtained against the deceased in his lifetime. Subsequently, the decree-holder discovered that certain property, which he claimed to be the property of the deceased, was in the possession of a third person C, and he applied to have C's name put up on the record, and to be allowed to execute the decree against him. *Held*, that the Court had no power to put C's name on the record. *SYED NADIR HOSSEIN v. BISSEN CHAND BASSARAT*, 3 C.L.R. 437. [*R.*, 10 A. 479.]

(52)—*Execution of decree—Attachment of property before death of judgment-debtor—Legal representatives of judgment-debtor, whether should be brought on to record—Civ. Pro. Code, s. 234.*—Where, subsequent to the death of the judgment-debtor pending the proceeding against him in execution, the decree-holder desires to proceed against property which has not been attached during the lifetime of the judgment-debtor, his proper course is that marked out by s. 234 of the Civ. Pro. Code; but if the property has been attached during the lifetime of the judgment-debtor, it then comes into the hands of the law, and attachment does not abate on the death of the judgment-debtor; and for the purpose of proceeding against, and if necessary selling that property, it is not necessary to implead any one as a legal representative. *ABDUR RAHMAN v. SHANKAR DAT DUBE*, 17 A. 162=A.W.N. 1895, 35.

(53)—*Decree declaring lien on judgment-debtor's properties, Execution of—Other decrees against judgment-debtor, Sale under, subject to prior lien—Execution by holder of decree with lien—Claim to attached property not maintainable by other creditors in execution.*—One K obtained a money decree against G declaring certain properties belonging to G liable to be sold in satisfaction of that decree. In execution of one of certain other decrees obtained against G, K himself became the purchaser of the property subject to his lien. In execution of another of the decrees C became the purchaser subject to the lien. On K proceeding to execute



**Execution of Decree—continued.****—6.—Execution by or against representatives—continued.**

his own decree against G by sale of the property purchased by C, the latter applied to the executing Court to have it declared that satisfaction should be entered on the original decree obtained by K to the extent of the value of the property purchased by K. The Deputy Registrar refused to receive the petition from C on the ground that he was no party to the execution proceedings. The High Court held that the Deputy Registrar was right because C could not be deemed by his purchase to have acquired the right to represent G in the execution-proceedings on K's decree. If the property happen to be taken and sold in satisfaction of K's decree, C might possibly take other proceedings by regular civil suit against K to establish his right; but certainly, he could not claim the right to appear in the execution proceedings following upon a case to which he was no party. *GREEJA BHOOSUN MITTER v. KISHEN KISHORE GHOSE*, 7 W.R. 221.

(54)—*Decree declaring liability in general terms—Subsequent ascertainment of liability by operative decree—Death of judgment-debtor in the interval—Representatives not made parties to operative decree—Execution against them—Mesne profits.*—An operative decree, obtained after the death of a defendant, by which the extent and quality of his liability, already declared in general terms, are for the first time ascertained, cannot bind the representatives of the deceased, unless they were made parties to the suit in which it was pronounced. A decree for possession was passed against several defendants, and it also declared that they were accountable for mesne profits. But it did not ascertain the amount of such profits, nor determine the question whether the defendants were liable jointly or severally in respect of their wrongful possession. Some time after, the decree-holder, for the first time, obtained a money-decree in respect of such mesne profits, but one of the defendants died in the interval and his heirs were not made parties to the latter decree. *Held*, that execution could not be taken against those heirs, and that the question of their liability for mesne profits did not wholly depend upon the fact of their ancestor having been a party to the former decree. *RADHA PRASAD SINGH v. LAL SAHIB RAI*, 13 A. 53 = 17 I.A. 150, P.C. = 5 Sar. 600. [R., 21 A. 316, 19 C. 132, F.B., 25 A. 385, 33 C. 867 = 4 C.L.J. 141, 6 M.L.T. 187.]

(55)—*Setting aside appellate order directing execution—Parties to suits.*—D M sued C D, described as the heir of D V and in 1838 got a decree to be satisfied out of the estate of D V. In 1862, the executors of D M's will applied to the Munsif's Court for execution of the decree against the estate of D V, which was then in the possession of R and others, C D having died; and R and others resisted the application on the ground that C D, who alone had been made defendant in the suit, was not the heir of D V. The Munsif rejected

**Execution of decree—continued.****—6.—Execution by or against representatives—continued.**

the application; but his order was reversed on appeal by the District Judge: *Held*, that the Judge's order was wrong on the grounds that C D was not the heir of D V, that neither he, nor his guardian on his account, was, at the date of the decree, in possession or enjoyment of the property against which it was sought to be executed; and that neither the heirs of D V, nor any person through whom they claimed, were parties to the suit in which the decree was passed. *RAYASANGJI MADHAVSANGJI v. THE EXECUTORS OF DAYABHAI*, 3 B.H.C., A.C. 106.

(56)—*Death of party after hearing but before judgment—Judgment pronounced in ignorance of death—Validity.*—Where everything to be done by the parties having been done and nothing remained except the delivery of the judgment, which was reserved by the Court, one of the parties died, and the Court pronounced its judgment in ignorance of the death; *held* that the judgment should be read as from the date on which it was reserved, and the decree that followed was valid notwithstanding the fact that the representatives of the deceased have not been brought on the record. *CHETAN CHARAN DAS v. BALBHADRA DAS*, 21 A. 314 = A.W.N. 1899, 86. (21 B. 314, 19 C. 513, F.) [F., 9 C.W.N. 710, 6 C.L.J. 547 = 12 C.W.N. 590, 12 M.L.J. 435; R., 26 M. 101, 30 A. 505 = 5 A.L.J. 659 = A.W.N. 1908, 228, 11 Bom. L.R. 1070.]

(57)—*Court to which decree has been sent for execution, Extent of powers of—Decree against assets of Hindu widow executable against arrears of maintenance due as a debt at her death.*—It is not for a Court to which a decree capable of execution is sent by another, to enter on a criticism of it and to refuse execution because it is of opinion that there are questions between the parties which could not be entertained and decided in execution and that too much has been left for the executing Court to do. The right of a Hindu widow to maintenance may not be assignable by her, but, where sums due to her for maintenance have become a debt due to her under an agreement capable of precise determination, such a debt, having to be regarded to be assets of the widow, can be proceeded against in execution of a decree obtained against such assets. *A. P. RAJERAV CHANDRARAO v. NANARAO KRISHNA JAGHIRDAR*, 11 B. 528.

(58)—Ss. 234, 248, 249, 578, Civ. Pro. Code, 1882—S. 234, Scope of—Representative of deceased judgment-debtor, Execution of decree against—Omission to make application under s. 234—Effect.—The power of the Court executing a decree to order execution under s. 249, Civ. Pro. Code, against the legal representative of the deceased judgment-debtor, after the issue of notice under s. 248, is not cut down by the provisions of s. 234, which simply empowers the decree-holder to apply to the Court which passed the decree to execute it against the legal



*Execution of Decree—continued.**—6.—Execution by or against representatives—continued.*

representative of the judgment-debtor who is dead. An application to execute a decree against such legal representative may also be made to the Court to which the decree has been transferred for execution. The omission to apply under s. 234, Civ. Pro. Code, to the Court which passed the decree, assuming that such application was a necessary preliminary to proceedings being taken against the legal representative in the Court to which the decree has been sent for execution, is only an irregularity within the meaning of s. 578, Civ. Pro. Code. *SHAM LAL PAL v. MODHU SUDAN SIRCAR*, 22 C. 558. [*R.*, 12 M.L.J. 24; *D.*, 27 C. 488; *Not F.*, 28 M. 466, F.B.=15 M.L.J. 116; *Cons.*, 9 C.L.J. 443=13 C.W.N. 533.]

(59)—*Act XXIII of 1861, Civ. Pro. Code, s. 11=s. 244 of the Civ. Pro. Code (XIV of 1882)—‘Res judicata.’*—The question which may be determined by an execution Court must be between the parties to the suit or their representatives and must relate to execution. [*F.*, 17 M. 399, 19 B. 328; *D.*, 18 M. 13; *Cons.*, 17 C. 711, F.B.; *R.*, 14 B. 206, 10 C.L.J. 396.] A person, who was not on the record when the decree was passed, does not become a party by applying for execution; and a question as to such person's legitimacy is not one that can be determined in execution. *ABID-UNNISSA KHATOON v. AMIRUNNISSA KHATUN* 2 C. 327, P.C.=4 I.A. 66=3 Sar. 677 (*confirming* 20 W.R. 305.) [*F.*, 3 C. 371, 4 C. 209.]

(60)—*Execution against representative—Admission of representative—Enquiry as to assets—Denial—Regular suit.*—A judgment-creditor, who obtained a decree against the assets of the deceased defendant in the hands of his widow, applied for its execution on the death of the widow, against X alleging he was the next representative of the deceased defendant. Should X admit that he was the representative, the executing Court should enquire whether he held the assets of the deceased person, and if X disclaimed the representative capacity, the judgment-creditor must be referred to a regular suit to prove that X was the legal representative and that he held the assets of the deceased. *SHEO SAHAI v. MT. BHAGAR*, 12 P.R. 1875.

(61)—*Sons of deceased judgment-debtor admitted as representatives on record—Re-opening entire case in execution proceedings—Hindu law—Debts.*—The sons of a deceased judgment-debtor, whose estate is declared by the decree to be liable to sale, admitted on the record as his representatives, cannot claim, in the execution stage, to re-open the whole case and ask for a decision as to whether the debt incurred by the father was not for the benefit of the estate, or was in some other way invalid under Hindu law, and not binding on the joint family. *RAM BHUNJUN SINGH v. MUSSAMMUT MUNDER KOER*, 23 W.R. 127. [*F.*, 24 W.R. 264, 22 B. 475.]

*Execution of Decree—continued.**—6.—Execution by or against representatives—continued.*

(62)—*Son's liability for deceased's judgment-debtor's debts—Property held by son, Nature of—Inquiry—Question not for execution, but for suit.*—The question whether property followed by a judgment-creditor in the hands of his deceased judgment-debtor's son, is held by the son under such circumstances as render him liable for his father's debts, is a question not triable in execution proceedings, but in an independent suit. *RAMANOOGRA SINGH v. KISHEN KISHORE NARAIN SINGH*, 23 W.R. 265. [*F.*, 24 W.R. 364, 22 B. 475.]

(63)—*Decree debt, validity of—Question for separate suit—No question for execution stage—Hindu law—Sons—Debt, Nature of.*—Where the sons of a deceased Hindu are in possession of family property they are liable for the payment of their father's debt, unless they prove that the debt was incurred for an immoral purpose or was otherwise invalid. The validity of a decree-debt cannot be re-opened at the execution stage; but must form the subject of an independent suit. *BURTOO SINGH v. RAM PURMESSUR SINGH*, 24 W.R. 364. [*F.*, 22 B. 475.]

(64)—*Joint Hindu family—Decree against father—Execution sought against joint ancestral property in hands of son after death of father—Attachment not made in father's life-time—Civ. Pro. Code, 1882, ss. 224, 244.*—A person obtained a decree for money against the father of a joint Hindu family. After the death of the father, he sought to execute the decree as against the joint ancestral property in the hands of the deceased judgment-debtor's son and grandson. No attachment was made of these properties during the life-time of the judgment-debtor. *Held*, that the remedy of the decree-holder was by way of a separate suit against the son and grandson, and not in execution proceedings. *SRI NEWAS SEWAK SINGH v. JAI KISHEN DAS*, A.W.N. 1894, 203. (A.W.N. 1894, 169, R.)

(65)—*Decree against executors for debts—Will subsequently set aside—Liability of deceased's heir under decree—Remedy of decree-holder.*—The holders of a decree (against certain executors and the adopted son of the deceased testator), which was obtained in respect of moneys borrowed, with the sanction of the Court, for the deceased's funeral expenses, cannot enforce it against the estate in the hands of the legal heir of the deceased, who had since got into possession of it after setting aside the will and the adoption, inasmuch as such legal heir was not the legal representative of the judgment-debtors in the suit. In order to make the estate liable for the debt, the proper course for the decree-holder would be to bring a regular suit against the legal heir. *FANINDRO DEB RAIKUT v. RANI JUGUDISHWARI DABI*, 14 C. 316. [*R.*, 16 C. 603.]

(66)—*Civ. Pro. Code, s. 234—Decree against Hindu father—Execution against son—Determination of nature of debt.*—Courts are not at



**Execution of Decree—continued.****—6.—Execution by or against representatives—concluded.**

liberty to extend the scope of the decree under s. 234 of the Code of Civil Procedure, though the judgment-creditor may enforce the pious obligation of the son of the judgment-debtor under Hindu Law by a regular suit. When there is a money decree against the father, and when the judgment-creditor seeks to attach ancestral property after it has vested in the son by survivorship under Hindu Law upon the father's death, he cannot be considered as executing the decree against the property of the deceased judgment-debtor within the meaning of s. 234. How far the son's pious obligation would make him liable for the decree debt is a matter to be investigated in a fresh suit. *VENKATARAMA v. SENTHIVELU*, 13 M. 268. [F., 6 C.W.N. 223; Appr., 16 A. 449; Expl., 11 C.W.N. 163=5 C.L.J. 80; R., 16 C.P.L.R. 19, 6 O.C. 271, 1 N.L.R. 173.]

(67)—*Application for execution of decree—Appeal—Civ. Pro. Code (Act VIII of 1859), s. 208=s. 232 of the Code of 1882.*—A person, alleging himself to be the real assignee of a decree, does not constitute himself a party to the suit, within the meaning of s. 11 of Act XXIII of 1861 (old Civ. Pro. Code) by merely applying for execution; where, therefore, his application under s. 208 of Act VIII of 1859 had been refused no appeal lay against that order. *SOBHA BIBEE v. MIRZA SAKHAMUT ALI*, 2 C. 371=1 C.L.R. 331. [D., 11 B. 506; R., 15 C.P.L.R. 69.]

Debtor's legal representative without assets of debtor—Suit maintainable against—Form and execution of decree in suit—See DECREE—DECREE, FORM OF, 8 B. 309.

See SUBORDINATE JUDGE, JURISDICTION OF, 8 B.H.C., A.C., 25.

**—7.—Execution of decree on or after agreements or compromise.**

(1)—*Legal effect of decree—Compromise decree. Absence of provision in, for issue of execution in case of default—Enforceability of decree in execution—Fresh suit on decree not ordinarily proper remedy.*—This was an action on a *solanamah* filed in a case which the present plaintiff had instituted in the Civil Court, for the recovery of rent, before Act X came into force. Plaintiff alleged that in consequence of there having been no stipulation inserted in the *solanamah* for taking out execution in case of default, he was unable to recover the money in that way, and so had been compelled to come into Court and sue on the *solanamah*. On the question whether such suit was maintainable, the High Court held that, if the decree had been more formally prepared, it would have contained fully and precisely the terms of the *solanamah* instead of a mere statement that the suit was decided according to the *solanamah*. The legal effect of a decree is the same, whether it is pronounced by the Court after a contest between the parties, or is made by consent upon an adjustment of the suit. In each case it is a

**Execution of decree—continued.****—7.—Execution of decree on or after agreements or compromise—continued.**

judicial command, to be enforced ordinarily by process of execution. Nor was the fact material, in the present case, that the *solanamah* contained no provision for the issue of execution in case of default, because the terms of the *solanamah* having been incorporated in the decree as the language of the Court might, like other decrees, be enforced by execution. It cannot, however, be laid down, as a rule, that a suit cannot be maintained on a decree; because, notwithstanding the facilities provided by the Procedure Code for enforcing execution, the rights which arise from a judgment or decree may frequently themselves require to be ascertained and enforced in a new suit, or, there may be obstacles to the execution of the decree in the usual way. But, in ordinary cases and in the absence of special cause, a fresh suit on the decree is not the proper remedy, and still less is a suit maintainable on any agreement to compromise which may have preceded the decree. *CHUNDER NARAIN GHOSE v. GOURI NATH BOSE*, 4 W. R., S.C.C.R., 7. [R., 2 N.W.P. 382, 15 W.R. 65.]

(2)—*Razinama not embodied in decree—Execution.*—Where a *razinama* was not embodied in a decree of the Court, it could not be executed under the Civ. Pro. Code. *DARBHA VENKATA SASTRI v. VURELLA GANGAIA*, 2 M.H.C. 305. [Cons., 5 M.H.C. 93; D., 5 M.H.C. 285.]

(3)—*Razinama, Decree in pursuance of, if can be made after interval of five years.*—A suit was compromised by a *razinama*, which required that a decree should be passed in conformity with its terms. The District Munsif, instead of passing a regular decree, endorsed an informal order on the *razinama*; and five years afterwards, upon an application for execution, the District Munsif made a formal decree, and gave orders for its execution. Held, that it was competent to the District Munsif to make a decree in pursuance of the *razinama*, on the application of the party interested, even after an interval of five years, and that the decree having been properly made, it should be allowed to be acted on. *VENKATARAMANA HODAI v. BAPANNA PAI*, 7 M.H.C. 103.

(4)—*Agreement before decree between decree-holder and defendant—Manner of execution—Agreement no bar to execution according to terms—Hindu's property liable for his debts—Bom. Act VIII of 1866.*—A covenant before decree, between a person who subsequently becomes the decree-holder and the defendant, his debtor, stipulating that the decree should be enforced in a particular manner, will not present the execution of that decree according to its terms. The property of a Hindu in the hands of his sons and grandsons is liable to his debts, Bombay Act VII of 1866 is not applicable to cases where judgment had been pronounced before its enactment. *SAKHARAM v. GOVIND*, 10 B.H.C. 361. [D., 22 B. 463, F.B.; R., 21 C. 437; 17 B. 23.]



**Execution of Decree—continued.****—7.—Execution of decree on or after agreements or compromise—continued.**

(5)—*Defendant's appeal—Compromise—Case struck off file—Original decree, Validity of.*—After an appeal by the defendant, the parties submitted to the Court that they had arrived at a settlement, and the appeal was struck off the file : *Held*, that the original decree was good except so far as the judgment-creditors were debarred from executing it by their own agreement. **MEWA SINGH v. AZEEZOODDEEN KHAN, 13 W.R. 311.**

(6)—*Judgment-debtor transferring property to decree-holder covenanting payment, if title defective—Construction of agreement—Restoration of decree-holder to original right.*—A judgment-debtor made over property to a decree-holder undertaking that, in case of the latter's dispossession owing to the former's defect of title, the unrealized portion of the decree should be realized by execution thereof. *Held* that the reasonable construction to be put upon this agreement is that the transaction is to be put an end to, and the decree-holder is to revert to his original right. **ROY LUCHMEPUT SINGH BAHADOOR v. MOONSHEE JOWAHUR ALI, 18 W.R. 497.**

(7)—*Satisfaction of decree—Subsequent application for execution.*—After a decree had been satisfied and the case struck out at the request of the decree-holder, he discovered that by resorting to a different mode of calculation, he might have recovered more under the decree. The Court refused to re-open the matter or to allow execution for the difference. **COLONAS v. BULAJAN, Marsh 211 = 1 Hay. 587.**

(8)—*Execution of wrong decree—Acquiescence—Validity.*—In execution of a decree, the judgment-debtor's property was attached. Claims preferred to this property led to a suit by the judgment-creditor against the claimant and the judgment-debtor, which was decreed with costs. The judgment-debtor, was declared not liable for costs. The amount due under the first decree having been partly satisfied by the judgment-debtor's heirs in execution proceedings taken under the second decree, *held*, that the balance of the first decree could not be recovered from them in execution of the second decree, and that no acquiescence in former illegal proceedings could render the illegal execution valid. **BLINDA PRASAD v. AHMAD ALI, 1 A. 368.**

(9)—*Decree-holder claiming less under mistake—Interest—Execution of original decree.*—A decree-holder, who wrongly asked to receive interest, calculating that he was not entitled to more on account of interest than the principal sum decreed, and to whom the judgment-debtor does not pay in the money, may execute the original decree. **ABED HOSSEIN v. ASSUD ALI, 11 W.R. 29.**

(10)—*Execution of money decree without interest—Application struck off—Kistbundi stipulating payment—Suit on kistbundi.*—Execution of a money-decree without interest having been, in a case, taken out, the execution

**Execution of Decree—continued.****—7.—Execution of decree on or after agreements or compromise—continued.**

application was struck off on the date on which the judgment-debtors, with the consent of the decree-holder, filed a *kistbundi* stipulating payment with interest, a suit on the *kistbundi* was held to be maintainable. **ASHIDHAREE CHOWDHRY v. JUGGESSUR KAMAR, 14 W.R. 430.**

(11)—*Execution of decree on or after agreements or compromises—Second execution after debt has been realised under the first and misapplied—Agent not authorised to receive amount of decree.*—Execution was issued upon a decree, and the proceeds of the execution paid over by the officer of the Court to the *mooktear* of the execution-creditor, and misapplied by him. A second execution was afterwards issued on the same decree in ignorance of the first. *Held*, that, although the *mooktear* may not have had authority to receive the proceeds of the first execution, the receipt of such proceeds by the Court officer absolved the execution-debtor from all further liability; and that the second execution was illegal, and the execution creditor was responsible in respect of it. **PURTAB CHUNDER BOROOAH v. BHUGGOBUTTY DABEA, Marsh 59 = 1 Hay. 131.**

(12)—*Cross-decrees—Satisfaction—Application to issue execution on cross-decree.*—Where one of two decree-holders, who had, by mutual agreement, entered up satisfaction in respect of their cross-decrees, appealed from the decree passed against him, obtained its reversal and applied to issue execution on his cross-decree, *held* that the application could not be entertained, as satisfaction has been entered. **GOPINATH ROY v. DINABANDHU NANDI, 3 B.L.R. App. 62.**

(13)—*Satisfaction of decree entered—Refund decreed—Application for further execution.*—Where, in execution of a decree, certain monies are attached and paid to the decree-holder, and satisfaction entered in the register, and it is found that the monies did not belong to the judgment-debtor but to a third party, so that the decree-holder has to refund the monies, the fact, that the satisfaction is entered up, does not prevent the decree-holder, from again applying for further execution. **LAKSHMANA v. NARASIMHASAMI, 7 M. 167.**

(14)—*Adjustment of decree out of Court, Further execution not prevented by, except when notified to Court.*—The judgment-debtor in this case pleaded payment to the agent of the decree-holder and the lower Court held it to be conclusively proved that the amount of the decree had been paid. On appeal against the above order by the decree-holder, the High Court was of opinion that the judgment-debtor had no legal ground of resistance. The words of s. 206 of Act VIII of 1859 are imperative, leaving the Court no option. No adjustment of a decree can be recognised by a Court unless such adjustment shall have been made through the Court and if, as in the present case, the



**Execution of Decree—continued.****—7.—Execution of decree on or after agreements or compromise—continued.**

judgment-debtor chose to pay the money to the decree-holder's agent in an irregular manner, he must take the consequence of his own negligence and pay over again. *KALEE PERSHAD SURMAH ROY v. KHETTURNATH SHAW*, 4 W.R. Mis., 11. [R., 7 W.R. 134, 4 B.H.C., App., 120.]

(15)—*Civ. Pro. Code*, 1859, s. 206—*Execution of decree—Dismissal of defendant's objection—Adjustment of decree out of Court—Right of suit.*—Where under s. 206 of Act VIII of 1859, the defendant's objection, in a Mofussil Small Cause Court, to the execution of a decree on the ground that it had been adjusted out of Court had been disallowed, held that it did not bar his right to sue the execution creditor, for recovery of the thing alleged to have been given in satisfaction of the decree. *GULAWAD CHANDABHAI v. RAHIMTULLA JAMABHAI*, 4 B.H.C., A.C. 76. [F., 4 B. 295; R., 11 B. H.C. 151, 11 B. 6, F.B.]

(16)—*Adjustment of decree not certified—S. 258, Civ. Pro. Code.*—Under s. 258, Civ. Pro. Code, a Court cannot recognize an adjustment of decree, which neither party certifies to the Court within the time limited by law. *CHEDUMBARA PILLAI v. RATNA AMMAL*, 3 M. 113. [R., 25 C. 86.]

(17)—*S. 235, Civ. Pro. Code, 1877—Adjustment after decree, Proof of.*—S. 235, Civ. Pro. Code, puts on the party, applying for execution, the obligation of stating any adjustment between the parties after decree. *PAUPAYYA v. NARASANNAH*, 2 M. 216. [F., 10 B. 288.]

(18)—*Partial execution—Subsequent agreement between decree-holders and judgment-debtors—Cancellation of agreement, Grounds of.*—Because it is apprehended that an agreement between judgment-creditors and judgment-debtors after partial execution may expose them to the risk of certain consequences, it cannot therefore be set aside. *CHUNDERNATH MISSER v. GOUREE KOMUL BHUTACHARJEE*, 19 W.R. 153.

(19)—*Part-satisfaction of transmitted decree prior to execution—Right to certificate.*—A judgment-debtor, who has partly satisfied his decree-holder out of Court, subsequent to the transmission of the decree to another Court but prior to any application for execution, is entitled, on demand of execution in full, to an order from the executing Court calling upon the decree-holder to certify the fact of the part-payment. *RAJENDRO NATH ROY BAHADOOR v. CHUNNOOMUL*, 5 C. 448.

(20)—*Satisfaction (partial) of decree entered up by decree-holder—Further application for execution—Partial satisfaction of decree—Further application for execution against surety.*—Any satisfaction of the decree entered up by the creditor would be absolutely binding upon him, so as to prevent a further application for the execution of the decree in respect of the part so satisfied. Where a partial satisfaction of a

**Execution of Decree—continued.****—7.—Execution of decree on or after agreements or compromise—continued.**

decree against a principal and a surety had been entered up after sale of certain properties of the debtor, a subsequent refund by the creditor of part of the amount so realised in compromise of a suit by the mortgagee of those properties against such creditor and debtor would not, even if such prior satisfaction were not binding upon him, entitle the creditor to execute the decree afresh against the debtor, who was no party to the compromise, or against the surety, who was no party to the suit itself or his representatives, in respect of the same amount. *WAHIDNOONNISSA v. ROY MOHABEER PERSHAD SAHOO*, 5 C. 128.

(21)—*Act VIII of 1859, s. 206, Applicability of, to decree prior to Act but executed after it—Adjustment of or payment for decree out of Court—Settlement made with one of several decree-holders, when binding on others as well.*—The adjustment of a decree was made by the judgment-debtors with one of the three decree-holders in this case, and when execution was taken out by the other decree-holders, the said adjustment was pleaded in defence. The decree had been passed some years prior to the enactment of s. 206 of Act VIII of 1859, but the lower appellate Court, considering that that section was applicable to the case, because execution had been sought only subsequent to the Act, held, that, as the adjustment was not certified to the Court, nor payment made into Court, the defendants could not receive credit for any sum they might have paid. The High Court held that the lower Court was right in its decision. Also the settlement made with one only of the decree-holders, without the knowledge or consent of the other two, could not bind them. *BYKUNT GHOSE v. KISHEN CHUNDER GHOSE*, 2 W.R. Mis., 48.

(22)—*Settlement between decree-holder and judgment-debtor.*—Holds good notwithstanding the partial failure on the part of the latter to fulfil the terms. Where a decree-holder came to a settlement with his judgment-debtors, who agreed to sell a share of certain property, and to have the decree-holder's name registered, held that the non-registration of his name was not a sufficient failure on the part of the debtors after they had executed the deed of sale, to warrant the Court to set aside; but that the decree-holder might apply for execution of his decree according to the settlement come to with his debtors. *BHOOMAN MUNDAY v. BUNDREE SINGH*, 1 W.R. Mis., 25.

(23)—*Settlement in favour of one of the judgment-debtors, Satisfaction of decree by reason of.*—Any private settlement with, or release given to, any of the several judgment-debtors, would not justify a decree-holder in requiring payment, on account of the share or shares so exempted or settled, from the remaining debtors. *MR. WILLIAM FOLEY v. MRS. ANMIE KOLONAS*, 2 W.R. Mis., 15.



**Execution of Decree—continued.****—7.—Execution of decree on or after agreements or compromise—continued.**

(24)—*Agreement for consideration not to execute decree—Injunction to restrain execution—Civ. Pro. Code, 1859, s. 206.*—If, for good consideration, a decree-holder agreed not to enforce his decree, the Court may legitimately, on the suit of the opposite party, issue an injunction against the former to refrain from doing what he has agreed not to do, Act VIII of 1859, s. 206, notwithstanding. **NUBO KISHEN MOOKERJEE v. DEBNATH ROY CHOWDHRY, 22 W.R. 194.** [*Appr.*, 7 A. 124; *D.*, 21 C. 437, 6 C.W.N. 796; *R.*, 11 B. 6, 17 B. 23, 31 C. 480=8 C.W.N. 395.]

(25)—*Sale of decree—Mortgage by vendee—Payment by judgment-debtor under order of Court—Decree, Satisfaction of.*—On the sale of a share of a decree, the vendee mortgaged the same, and the judgment-debtor by order of Court paid in the money, the mortgagee entering up satisfaction; *held* that the decree, was put an end to as against persons liable for the mortgagor's share. **KRISTO DOSS KOONDOO v. C. J. WILKINSON, 17 W.R. 159.**

(26)—*Decree for possession, Satisfaction of, by actual possession—Subsequent dispossession of decree-holder—Revival or re-execution of decree not possible.*—The respondent in this case had obtained a decree for possession and, under it, he was put in possession by an Ameen, and a receipt was got from him acknowledging that he had got possession. The execution case was finally struck off. The respondent alleged that he had been subsequently dispossessed by the appellants and instituted a summary proceeding under s. 15 of Act XIV of 1859 claiming to be restored to possession. That suit having been dismissed, the respondent then applied to revive the proceedings as under the original decree, seeking to execute it anew. The High Court *held* that it was not open to him to do so. The decree had been fully executed and satisfied as appeared from the Ameen's reports, the acknowledgment of the respondent as to his having got possession and from his subsequent claim under Act XIV of 1859. Under these circumstances, the decree having been satisfied, could not be revived or re-executed, because, otherwise, no suit could ever be said to be at an end and no decree to be finally satisfied. **KHATOO BIBEE v. FURUKH ALI, 6 W.R., Mis., 108.** [*D.*, 7 M. 167.]

(27)—*Practice—Procedure—Decree upon a compromise for execution of a conveyance—Execution of decree—Specific performance.*—Where a decree based upon a compromise directed that one party should execute a *kobala* in favour of another within a certain time after the date of the decree: *Held*, that the proper course for the parties would be to proceed regularly as if a decree for specific performance was made. The procedure in such a case laid down. **HARE KRISHNA SOMANTA v. PRIYA NATH KHAMROI, 10 C.W.N. 345.**

**Execution of Decree—continued.****—7.—Execution of decree on or after agreements or compromise—concluded.**

(28)—*Petition of satisfaction of decree—Condition recorded in petition not satisfied—Subsequent application for execution—Intention of parties.*—Where a decree-holder files a petition of satisfaction on the condition recorded in that petition that the judgment-debtor would withdraw a special appeal then pending, the point to be looked to is the intention of the parties. If the special appeal, without being withdrawn, goes to a hearing and is dismissed, the decree-holder is entitled to execute his decree. **DWARKANATH SURMA MOJOOMDAE v. UNNODA SOONDUREE, 5 W.R., Mis., 30.**

(29)—*Execution of decree—Attempt at satisfaction of decree by arbitration—Right to execute decree again.*—An intimation to the Court of a contemplated satisfaction of a decree by arbitration, on which intimation the execution case was removed from the file, did not preclude the decree-holder from suing out execution again, unless it was proved on enquiry that the result of the private arbitration was a satisfaction of the decree in the mode contemplated by the parties. **CHOONNEE LALL v. DOORGA PERSHAD, 8 Agra 252.**

(30)—*Surety for performance of decree after its passing.*—A person who, after a decree is passed, guarantees its performance, cannot be proceeded against in execution of such decree. **BUNSIDHAR v. BEHARI LALL, 62 P.R. 1871.**

(31)—*Execution—Agreement subsequent to decree and incorporated with decree—Enforcement.*—Where the Court recognizes an arrangement come to, subsequent to the passing of the decree, between the decree holder and the judgment-debtor, and such agreement becomes incorporated with the original decree, it may be enforced without the necessity for a fresh suit. **JANKEE v. SREENATH ROY CHOWDHRY, 5 W.R., Mis., 19.** [*F.*, 11 W.R. 86.]

(32)—*Agreement varying decree—Terms enforceable by executing Court by process of execution.*—On filing in Court an agreement varying a decree come to in the course of the execution thereof, the executing Court can enforce, in execution proceedings, the terms of that agreement without referring the judgment-creditor to a regular suit. **BHAI CHARANJIT v. KASHI RAM, 16 P.R. 1876.**

(33)—*Decree according to compromise—Additional security—Failure of execution.*—Where a Court passed a decree in accordance with the compromise arrived at by the parties and certain hundies were given as further additional securities merely, which were subsequently dishonoured on presentation, *held* that the parties could enforce their right to the money by proceedings in execution under the compromise-decree without having to sue on the hundies. **NAOBAT RAI v. TAJ MUHAMMAD, 84 P.R. 1885.** [*R.*, 11 P.R. 1901.]

See **PRINCIPAL AND SURETY—MISCELLANEOUS, 75 P.R. 1876.**



**Execution of Decree—continued.****—8.—Joint Decrees, Execution of.**

(1)—*General principles*—Once a joint decree always a joint decree.—When once a joint decree has been given, that decree remains, as a rule, ever after a joint decree, any act or conduct of the decree-holder notwithstanding. *JUGURNATH SINGH v. SHAIKH AHMEDOOLLAH*, 8 W.R. 132. (6 W.R., Mis., 40, 5 W.R., Mis., 9, 2 W.R., Mis., 49, *Appr.*; 6 W.R. 113, 2 W.R., Mis., 52, R.)

(2)—*Decree in favour of several persons—Transfer of right by some decree-holders—Stranger transferee—Purchaser, if co-decree-holder—Civ. Pro. Code, 1859, ss. 207 and 208—Execution of decree, Joint or exclusive right of—Notice to debtor not to pay decretal amount to decree-holder—Disobedience—Effect.*—When a decree is in favour of several persons, and out of those persons some of them transfer their interests to a third party, the Court would be competent to allow the purchaser to appear as co-decree-holder under Act VIII of 1859, s. 208, or under ss. 207 and 208 together, to allow him alone to execute the whole decree, if the Court should be satisfied that the interest of justice required it. If a judgment-debtor had been served with notice that the decree holder's rights have been attached and if notwithstanding it, he paid the money under the decree to the decree-holders, that would not be a valid payment at all; and the Court, whose duty it was to execute the decree against him, would be fully competent to enter into that question, and to determine whether the alleged satisfaction of the decree was binding upon the auction-purchaser or not. *BYJNATH SAHOO v. DOOLAR CHAND SAHOO*, 24 W.R. 245.

(3)—*Joint decree-holder how to take out execution—Civ. Pro. Code, 1859, s. 207—Execution of entire decree—Procedure.*—The procedure to be followed where one of several holders of the same decree desires to take out execution is that he should apply under s. 207, Act VIII of 1859, to execute the whole decree; the Court may admit the application, passing orders to protect the interests of the other decree-holders. *INDRO COOMAR DOSS v. MOHINEE MOHUN ROY*, 15 W.R. 159.

(4)—*Civ. Pro. Code, 1859, s. 207—One of several decree-holders seeking execution alone—Procedure.*—One of several persons entitled to the benefit of a decree, if he seeks to have it executed without joining the others, must apply under s. 207, Civ. Pro. Code, 1859. *MUSSAMUT AMATTOOL RASSOOL v. MUSSAMUT LUTEEFUN*, 19 W.R. 302.

(5)—*Execution by one of several decree-holders.*—A decree need not be executed as a whole, but may be executed in part by one of several decree-holders. *HURRISH CHUNDER CHOWDHRY v. KALISUNDARI DEBI*, 9 C. 482 = 10 I.A. 4 = 12 C.L.R. 511, P.C. = 4 Sar. 407 (on appeal from 6 C. 394.) [R., 25 M. 431, F.B., 10 C.W.N. 297 = 3 C.L.J. 112 = 33 C. 306.]

**Execution of Decree—continued.****—8.—Joint Decrees, Execution of—contd.**

(6)—*Execution applied for by portion of body of decree-holders—Reason for application in part.*—Applicants for execution of a decree have no right to make application without sufficient cause, where they do not constitute the entire body of decree-holders. *RANEE NYNA KOOR v. DOOLEE CHUND*, 22 W.R. 77. [F., 10 O.L.R. 547; *Expl.*, 24 W.R. 46; R., 25 W.R. 449; *Overruled*, 26 A. 334 = A.W.N. 1904, 34; *Cons.*, 9 C. 831.]

(7)—*Joint-decree—Separate execution—Act VIII of 1859, s. 207.*—A joint decree does not become severed by the mere fact of two out of three sharers in it taking out execution of their shares, or lose its character as an entire and joint decree as regards the share of the third decree-holder. *AZIZUNNISSA KHATUN v. SHASI BHUSHAN BOSE*, 2 B.L.R. *App.*, 47 = 11 W.R. 343. [F., 16 W.R. 29.]

(8)—*Application for execution by one of two joint decree-holders, if valid.*—Where the purchaser of the right and interest of one of two joint decree-holders made an application for execution of a part of the decree only, such application, not being submitted to the Court under s. 207 which provides for the case of one or more decree-holders making application for execution, was held to be unauthorized and the subsequent proceedings were set aside. *RAE DAMODAR DOSS v. BHOLANATH*, 2 N.W.P. 413.

(9)—*Act VIII of 1859, s. 207—Joint decree—Execution by some only of the judgment-creditors.*—An order for execution on the application of some only of the decree-holders ought, in express terms, to reserve the rights of the other decree-holders to share in the proceeds of execution. *TARA SUNDARI BURMONI v. BEHARILAL ROY*, 1 B.L.R., A.C., 28.

(10)—*Act VIII of 1859, s. 270—Applicability—Rival decree-holders—Several persons interested in a decree—Application for execution—Order to be made.*—S. 270 of Act VIII of 1859 applies only to rival decree-holders claiming under different decrees, and not persons claiming under the same decree. When more persons than one are interested in a decree any one or more of such persons may apply for the execution of it under s. 207 of the Civ. Pro. Code, 1859, but the Court, in passing an order for such execution, ought to protect the interests of other persons interested in the decree; and such other persons ought not to apply for a second attachment of the same property under the same decree, but should apply to share in the proceeds realized by the execution which has been ordered. *MIRZA ABID ALI v. MUNNU BYAS*, 2 Agra 183.

(11)—*Satisfaction of one decree-holder—Execution against fractional share of decree for balance remaining—Duty of Court as to rest.*—Execution was taken out against a fractional part of a decree for the residue of the assets after satisfaction of one party: held that the Court



**Execution of Decree—continued.****—8.—Joint Decrees, Execution of—contd.**

was bound to provide safeguards for the interests of other parties entitled under the decree. *AUSEEMOONNISSA KHATOON v. AMEER-ROONNISSA KHATOON*, 22 W.R. 204.

(12)—*Joint decree-holders—Application for execution by one on behalf of himself and others—Leave to bid obtained for himself—Purchase by the applicant alone—Purchase money set off against his share of the decree—Equities in favour of the other decree-holders.*—Where one of several joint decree-holders made an application for execution on his own behalf and on behalf of his co-decree-holders, and then alone obtained leave to bid for the property and purchased it, the purchase-money being equal to the amount of his share of the decree, held, in a suit by the co-decree-holders to recover their share of the property purchased, that they could recover it, the equity being on the side of the plaintiffs. *KESRI v. GANGA SAHAI*, 8 A.L.J. 616, F.B.

(13)—*Execution of decree—Conditional decree—Application by some only of several joint decree-holders—Refusal of the rest to join—Civ. Pro. Code, s. 231.*—Where several persons obtained a joint decree for certain property, the execution of which was conditional on their conveying certain other property to the judgment-debtor, and some of the decree-holders, only took out execution, but the others refused to join them in taking out execution or in making a conveyance, the application was liable to be dismissed, S. 231 of the Civ. Pro. Code was not applicable to such a case. *FARZAND v. ABDULLAH*, 6 A. 69 = A.W.N. 1883, 211.

(14)—*Joint decree-holders, separate application not maintainable by, to execute decree as regards their respective interests.*—In this suit, there were two plaintiffs who had sued jointly and obtained a decree. It was held that neither of the decree-holders was entitled to take out execution only for what he considered to be his own share of the property, the subject of the joint decree. And no execution can be granted save of the decree as a whole. *PRANNATH MITTER v. MOTHORANATH CHUCKERBUTTY*, W.R., Mis., 64. [F., 11 W.R. 488.]

(15)—*Joint decree, Arrangement between decree-holders cannot affect nature of—Proceedings taken by one of the decree-holders sufficient to keep alive rights of all—One decree-holder, whether entitled to execute portion of decree.*—Any arrangement made by the holders of a joint decree as to their relative shares in the amount of the decree would not alter its character, so, any bona fide proceedings taken by one of the decree-holders to execute the decree would keep alive the rights of all of them. In the absence, however, of any order in the decree awarding particular sums to each of the decree-holders, it would be contrary to law to allow one of the decree-holders to take out execution of such portion of the decree as he considered due to himself. S. 207 of Act X of 1859 allows execution to be taken out by one or more

**Execution of Decree—continued.****—8.—Joint Decrees, Execution of—contd.**

of several decree-holders if the Court see sufficient cause for allowing them to do so, but it must be the execution of the whole decree, the Court at the time of granting permission, making such order as is necessary for the protection of the rights of the other decree-holders. *MAHARANEE INDURJEET KOONWAR v. MAZUM ALI KHAN*, 6 W.R. Mis., 76. [F., 16 W.R. 29; Appr., 19 W.R. 417.]

(16)—*Joint decree—Power of executing Court.*—In executing a joint decree against several judgment-debtors, it is not open to the Court to stay the sale of the property of some of the judgment-debtors, upon their offer to pay what they consider to be their respective shares of the judgment-debt, nor can the Court refuse to attach and sell the property of any one of the judgment-debtors in satisfaction of the entire judgment-debt. *KALLY MOHUN BAL v. DINONATH CHUCKERBUTTY CHOWDHRY*, 8 C.L.R. 34.

(17)—*Decree in favour of several joint plaintiffs—Decree passed on appeal of one of such plaintiffs, whether binds other plaintiffs not appealing.*—Where a decree has been passed partly in favour of the joint plaintiffs in a case and only one of such plaintiffs appeals, the claim might be liable to be wholly rejected on the cross-objection of the defendants. The non-appealing plaintiffs might thus be detrimentally affected, but then, they were aware of the possibilities of their co-plaintiff appealing, and also of the rights given by the law to the defendant to file cross-objections therein. Of this right, the Court could not deprive the defendant, merely because only one plaintiff appealed instead of all. Were this course followed, one of several defeated parties would invariably make the appeal, and so gain for all of them the advantage of a re-hearing without the usual risks, for the law does not provide means whereby the respondent raising a cross-objection can bring other parties than the appellant before the Court. *BABAJI BHONDSHET v. THE COLLECTOR OF SALT REVENUE*, 11 B. 596. [D., 12 B. 371, 5 Ind. Cas. 325.]

(18)—*Joint-decree, option of decree-holder to execute, against any of several debtors.*—It is competent to a decree-holder to execute the joint-decree held by him, against any one of the joint judgment-debtors whom he may select. *KRISTO KISHORE CHUCKERBUTTY v. RAM LOCHUN BURDHUN*, 2 W.R., Mis., 49. [Appr., 8 W.R. 132.]

(19)—*Holder of joint-decree against several defendants—Right to proceed against particular defendants, limited to lands or properties in the hands of—Division of liability under decree, not obtainable after passing of it.*—Decree-holders have the right to put joint and common decrees in force against one or all of the defendants in the order they think fit; the claim to be enforced must however be limited to the particular lands or properties with which particular defendants are clearly shown to have been connected. Where, out of a number of defendants, any



**Execution of Decree—continued.****—8.—Joint Decrees, Execution of—contd.**

one man has been in possession only of particular lands or properties, his liability to satisfy the joint and common decree can extend no further than such particular lands or properties. Where the defendants have been content to allow a joint-decree to be recorded against them at the time of delivery of judgment, they cannot re-open the matter at a later date. Any ground for the division of liability and the amount of a joint decree should be urged and the order for division obtained at the time of the decree, but not afterwards. *BULWUNT SINGH v. SHEO SAHOYE SINGH*, 2 W.R., Mis., 51, [R., 8 W.R. 132, 14 W.R. 175.]

(20)—*Joint and several liability—Decree-holder's right of execution—Contribution among persons liable*.—Where the liability is joint and several, a decree-holder cannot be compelled to proceed otherwise than against such of the joint defendants as he may elect. This of course will not prevent any defendant from recovering from his co-defendant in a suit for contribution whatever he may have paid in excess of his just liability. *ROGHOONATH DOSS v. ALLADEEN PATTUCK*, 8 W.R. 201.

(21)—*Joint judgment-debtors—Execution—Part payment by one judgment-debtor—Liability of others*.—A decree-holder can execute his decree against one or any or all of the joint judgment-debtors. If he has received any sum in part-payment of his decree from one of the joint debtors and chooses to absolve him from further liability and to proceed against the others, this will not affect the position of the defendants *inter se* or their mutual responsibilities) or absolve the co-defendant who has paid from contributing if he has paid less than he is liable for as between him and his co-defendants. *GOPAL PERSHAD v. RAMANOOGRA SINGH*, 5 W.R. Mis., 9, [Appr., 8 W.R. 132.]

(22)—*Execution of decree—Process against one of several joint judgment-debtors*.—In a joint decree, the execution-creditor is at liberty to proceed against all or any of his judgment-debtors as he may choose. If a landlord and his gomastah are declared jointly liable, the decree-holder is not wrong in law in proceeding against the gomastah in the first instance. *SREENATH GHOSE v. SAHIB RAM ROY*, 12 B. L.R. 504, Note=12 W.R. 305.

(23)—*Joint and several decree for enforcement of lien—Execution—Rights of decree-holder*.—A joint and several decree obtained by a decree-holder for enforcement of his lien against a certain property hypothecated for the joint debt and belonging to three persons in common, can be executed by him against any one of the judgment-debtors and against his entire rights and interests in the joint property. *SANT LAL v. BAKHTAWAR SINGH*, A.W.N. 1885, 327.

(24)—*Joint decree—Decree-holder proceeding against some judgment-debtors—Effect on joint decree*.—Though a decree-holder may proceed against one or more of the judgment-debtors,

**Execution of Decree—continued.****—8.—Joint Decrees, Execution of—contd.**

severally, the joint decree would yet continue a joint decree, because by doing so, he does not relieve the other debtors from their joint liability. *NUNKOO LALL v. MUSSAMUT DHUNESH KOOER*, 17 W.R. 496.

(25)—*Act VIII of 1859, s. 208, Act XXIII of 1861, s. 11—Execution—Joint decree-holders—Partial execution—Execution in respect of several shares*.—If a Court thinks fit to grant an application made by an assignee of a decree, under s. 208, Civ. Pro. Code, he becomes a party within the meaning of s. 11, Act XXIII of 1861, and his name should be brought on the record. [R., 9 C.L.J. 271=36 C. 543=1 Ind. Cas. 168, 10 C.L.J. 396=3 Ind. Cas. 324=14 C.W.N. 752.] There is no provision of the law which allows a decree-holder to apply for partial execution, nor is there any provision which allows several joint decree-holders to put in separate applications for execution of decree in respect of their several shares, and it would be a grievous hardship on judgment-debtors if such a provision existed. An application for execution made by one of several joint holders of a decree enures for the benefit of all. *BAL-KISHOON v. MAHOMED TAZAM ALLEE*, 4 N. W.P. 90.

(26)—*Joint decree—Some joint decree-holders compromising with judgment-debtor—Claim of remaining joint decree-holders to enforce their right under decree unaffected*.—A joint decree may be executed on the application of any one of the joint decree-holders. Some of the joint decree-holders who, by entering into a compromise with the judgment-debtor, have foregone their right, cannot defeat the right of the remaining decree-holders to execute the decree. *INDERJET v. SEVARAM*, 5 N.W.P. 16.

(27)—*Application for partial execution—Application for all remaining due on decree*.—The principle of law prohibiting an application for partial execution of a decree is no bar to an application for all that remains due on a decree, where the rest has been satisfied. *TEJ NARAIN CHATTERJEE v. RAM TUNOO MOJOOMDAR*, 12 W.R. 370.

(28)—*Civ. Pro. Code, s. 207—Cross-decrees—Joint decree-holders—Execution*.—S. 207 of the Civ. Pro. Code relating to cross-decrees between parties before the Court, relates only to decrees which are in course of execution at the same time. One out of several decree-holders cannot execute a decree in respect of his own separate interest or otherwise than the decree as a whole. *JUDOONATH ROY v. RAM BUKSH CHUTTANGEE*, 7 W.R. 535.

(29)—*Informal application for partial execution—Whole decree, Execution of, asked for—Validity—Decree directing sale of mortgaged property—Non-registration of mortgage—Act*.—Proceedings taken on a partly informal application to partially execute a decree, if they should be in effect in execution of the decree as a whole, are good and valid. A decree for



*Execution of Decree—continued.**—8.—Joint Decrees, Execution of—contd.*

the sale of mortgaged property would not be invalid by the fact of the mortgage not having been registered as required by Act XVI of 1864. *JUGJEEBUN GOOPTO v. GOLUCK MONEE DEBIA*, 22 W.R. 354.

(30)—*Joint decree—Act VIII of 1859, s. 207—Execution of part of decree.*—A joint decree was passed in favour of A and B, and A subsequently applied for execution alone, alleging that B would not join with him in the application. The judgment-debtor stated, and B admitted, that more than half of the decretal money had been paid to the latter out of Court; but the Court disbelieved the statement, and ordered execution to issue for the full amount of the decree. *Held*, that the Court should, under s. 207 of Act VIII of 1859, have allowed execution for half the amount of the decree only. *BROJESWARI CHOWDHURANEE v. TRIPPOORA SOONDEREE DEBI*, 3 C.L.R. 513. [*F.*, 5 A. 27; *R.*, 4 C.L.R. 70; *D.*, 9 C. 831.]

(31)—*Mortgage—Property secured to two share holders—Right of each.*—A mortgaged property burdened with the payment of an entire debt to two share-holders is rightly liable to sale at the instance of either creditor, so long as their claims remain unsatisfied. The act of one of two owners of a bond cannot destroy the lien of the other on property pledged to both as security for a joint debt. *INDURJEET KOONWUR v. BRIJ BILAS LAL*, 3 W.R. 130. [*R.*, 1 A. 297.]

(32)—*Execution—Aliquot parts of decree.*—Execution cannot proceed on an application made with a view to execute an aliquot part of a decree. And where, notwithstanding objection made, applicants persist in making execution of decree for their shares only, they cannot be allowed to amend an application which, after coming up to the High Court, they find it impossible to maintain. *PURNA CHANDRA MOOKERJEE v. SARADA CHARAN ROY*, 3 B.L.R. App. 21=11 W.R. 241. (7 W.R. 535, *D.*)

(33)—*Decree, Construction of—Joint decree—Execution of aliquot part—Decree without interest—Effect on execution—Execution application contrary to decree—Appeal to High Court—Amendment.*—The terms of a decree must, in execution, guide its construction, not the plaint. A joint decree cannot be executed upon an application to execute an aliquot part. When no interest is given in a decree, none can be recovered in execution. An application for execution contrary to the terms of a decree would not, by the High Court in appeal, be allowed to be amended. *NUBO KISHORE MOJOOMDAR v. ANUND MOHUN MOJOOMDAR*, 17 W.R. 19, [*F.*, 23 W.R. 342.]

(34)—*Devolution of portion of rights under decree to judgment-debtor—Effect—Execution by one of several decree-holders.*—Where, subsequent to a decree, a portion of the rights to which the decree relates devolves, either by inheritance or otherwise, upon the judgment-

*Execution of Decree—continued.**—8.—Joint Decrees, Execution of—contd.*

debtor, or is acquired by him under a valid transfer the decree does not become incapable of execution, but is extinguished only *pro tanto*. This rule of law is sufficiently general to comprehend alike, cases in which the decree is for money only and where it is for immoveable property. A co-plaintiff can obtain execution according to the extent of his interest in the decree, and there is nothing in the former Civil Procedure Code which bars such an application. *FAZAL ILAHI v. HABIB BAKHSH*, 61 P.R. 1910=90 P.W.R. 1910=7 Ind. Cas. 474=110 P.L.R. 1910.

(35)—*Execution of decree—Joint decree for possession of immoveable property—Judgment-debtor purchasing rights of some of the joint-decree-holders—Decree extinguished pro tanto—Civ. Pro. Code, 1882, s. 244—Validity of sale and extent of rights purchased to be determined by Court executing decree.*—Where, subsequent to a decree, a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon a judgment-debtor, or is acquired by him under a valid transfer, the decree does not become incapable of execution, but is extinguished only *pro tanto*. The theory of law, upon which this rule proceeds, is sufficiently general to comprehend alike, cases in which the decree is for money only and where it awards possession of immoveable property. (5 A. 27, 7 W.R. 136, 25 W.R. 343, *R.*) Disputes as to the legality of the purchase by the judgment-debtors and the extent of the share which they so purchased are matters which fall within the purview of cl. (c) of s. 244 of the Code. *KUDHAI v. SHEO DAYAL*, 10 A. 570=A.W.N. 1888, 231.

(36)—*Execution of joint decree—Application by one joint decree-holder for execution in respect of his share—Transfer of decree to one of several judgment-debtors, Effect of.*—A joint decree cannot be executed by one of several joint decree-holders in respect only of his own share in the decree. (1 A. 231, 4 A. 72, 3 B.L.R. 114, *F.*) When one of the persons jointly liable under a decree, unites in himself the characters of creditor and joint-debtor in respect of the whole decretal debt, the effect is to extinguish the liability of all the co-judgment-debtors under the decree. But when such person acquires only a share in the rights of the decree-holder, the effect is not to extinguish the entire judgment-debt, but so much only of it as such judgment-debtor has acquired. Where, therefore, the joint judgment-debtors under a decree had inherited the interests therein of one of several joint decree-holders, an application by one of the decree-holders for execution in respect of his share only, and not for the entire unextinguished portion of the debt, was held to be one contrary to law. *BANARSI DAS v. MAHARANI*, 5 A. 27=A.W.N. 1882, 140. (7 W.R. 136, 25 W.R. 343, 9 W.R. 230, N.W.P. 1874, p. 1, *R.*; 3 C.L.R. 513, 4 C.L.R. 70, *F.*) [*Appr.*, 10 A. 570; *R.*, A.W.N. 1890, 62, A.W. N. 1894, 15, 25 M. 431, *F.B.*]



**Execution of Decree—continued.****—8.—Joint Decrees, Execution of—contd.**

(37)—*Joint decree-holders—Bona fide certified payment out of Court to one of them—Effect.*—A judgment-debtor is entitled to credit for any sum paid *bona fide* to one of several joint decree-holders, and duly certified to the Court by the latter; and other joint-creditors cannot execute the decree for more than their own share. The Court, executing a decree in favour of several persons, ought not to recognise payments made out of Court, unless made and certified for the benefit of all the decree-holders, in the case of any portion of the decree in excess of that to which the decree-holder so paid is indisputably entitled. Where payment out of Court of part of the decretal debt was certified by one of the joint decree-holders in satisfaction of his rights under the decree, and the extent of such decree-holder's rights was disputed by the other decree-holders upon an application for execution of the whole decree by them, *held*, the Court would not be justified in totally ignoring the part-payment, but it must determine the share of such other decree-holders in the decree and whether the previous part-payment was a fraud upon them. Such a question would be within the scope of s. 244, Civ. Pro. Code. **TARRUCK CHUNDER BHUTTACHARJEE v. DIVENDRO NATH SANYAL**, 9 C. 831=12 C.L.R. 566. (22 W.R. 77, 3 C.L.R. 513, 2 B.L.R. App. 43, R.) [F., 15 M. 343; R., 18 M. 464, 25 M. 431, F.B., 1 N.L.R. 24, A.W.N. 1904, 34=26 A. 334.]

(38) *Civ. Pro. Code, ss. 231, 258—Joint decree—Execution—Uncertified payment to one decree-holder.*—A payment made out of Court to one of several joint decree-holders, and not certified by him as having been received or applied for the benefit of all, cannot be regarded as made in satisfaction of the decree, except for the purpose of determining what orders should be passed under s. 231, Code of Civil Procedure. **SULTAN MOIDEEN v. SAVALAY-AMMAL**, 13 M. 343=12 M.L.J. 50. [R., 18 M. 464, 25 M. 431, 1 N.L.R. 24, 26 A. 334=A.W.N. 1904, 34.]

(39)—*Discharge given by one of many joint decree-holders—Out of Court—Right of other decree-holders to execute.*—One of several joint decree-holders has no power to give a discharge out of Court to a judgment-debtor for more than his own share in the decree. The other decree-holders, in such a case, are entitled to proceed with execution for the amount of their share, against the judgment-debtor. **MUSSAMUT BIBEEBUDHUN v. MUSSAMUTHAFEZAH**, 4 C.L.R. 70. [F., 5 A. 27, 26 A. 318=A.W.N. 1904, 22; R., 26 A. 334=A.W.N. 1904, 34.]

(40)—*Contract Act (IX of 1872), s. 44—Release of one of several co-debtors—Liability.*—A release of one of two judgment-debtors who are jointly liable under the decree, operates only in favour of the party to whom it was given. It does not otherwise affect the liability of the other judgment-debtor. **KIAM ALI v. KAYAM-ADDI**, 6 C.L.R. 212.

**Execution of Decree—continued.****—8.—Joint Decrees, Execution of—contd.**

(41)—*Release of some debtors on payment of part.*—When a decree-holder, having a joint decree against several persons, deals with some of them as severally liable for certain respective shares, he cannot execute the same decree as a joint one against the remaining judgment-debtors. **BISSONAUTH TEWARRY v. KOYLASH-BANY NARAIN SINGH**, 2 Hay 297.

(42)—*Joint-decree—Release of some of the judgment-debtors for consideration—Decree-holder, if can execute decree for whole of the costs—Proportion, how to be calculated.*—A decree-holder, who has obtained a joint-decree against several judgment-debtors, is entitled at his pleasure to execute the whole decree against any one of them. If, by such execution, he realises any portion of the judgment-debt, there is a satisfaction of the decree to that extent, and he may proceed with execution against any one of the other judgment-debtors only for the balance still due. A release of one judgment-debtor from liability under a joint-decree does not discharge the other judgment-debtors. When there has been a partial payment towards the satisfaction of the decree by one debtor, the decree-holder is not entitled to ignore it and claim satisfaction of the whole against another judgment-debtor; in other words, part-payment of a liquidated claim by one debtor discharges neither debtor *in toto*, but only *pro tanto*. If then the decree-holder releases one judgment-debtor for consideration, he is bound to apply that consideration in reduction of the judgment-debt when he seeks execution against another judgment-debtor; in other words, the matter is in the same position as separate payment by one of several judgment-debtors in consideration of his release from the debt; such payment inures to the benefit of all to this extent, that the decree-holder cannot recover any sum beyond the balance due. As a general rule, the discharge or release of the direct liability of one co-obligor to the obligee will not avail him as a discharge from his liability for contribution to the other co-obligors, unless the discharge be of a character to release the others also. The amount is to be distributed in equal proportion amongst all the defendants. **BHAWANI KOER v. DARSAN SINGH**, 14 C.L.J. 354.

(43)—*Payment to one of joint decree-holders.*—Where, on the death of R, who was a joint decree-holder with S, the latter receives the whole of the money due on the decree, and P, as R's representative, sues out execution to the extent of R's share in it, *held* that payment to S, is not payment to P who may proceed with the execution. **MAHIMA CHANDRA RAY v. PYARI MOHAN CHOWDHRY**, 2 B.L.R., App., 43=11 W.R. 262. [F., 26 A. 334; R., 9 C. 831=12 C.L.R. 566.]

(44)—*Joint decree-holders, compromise by one of several—Effect.*—A joint decree passed in favour of M and two others had been executed in part by M only, and a large amount had



*Execution of Decree—continued.***—8.—Joint Decrees, Execution of—contd.**

been realised, and a compromise come to between M and the judgment-debtor providing for the payment of the balance by instalments. When the other two creditors applied for execution of their shares of the decree, the judgment-debtor objected, contending that the decree, being joint, could not be severally executed, and that the compromise was binding alike on all the decree-holders. *Held*, that the compromise could not bind the other two decree-holders who were not parties to it. **BALGOBIND v. BHAWANEE DEEN SAHOO**, 1 *Agra, Mis.*, 16.

(45)—*Joint-decree—Suit for contribution—Private arrangement between one of several judgment-debtors and decree-holder, invalidity of.*—Plaintiffs having bought the right to sue for reimbursement from certain of the judgment-debtors who had liquidated the whole debt, now instituted this suit against them for such re-imbursement. One of the defendants on appeal pleaded limitation. He urged that, the action should have been brought within the limit prescribed by cl. 9 of s. 1, Act XIV of 1859, laying down the period of limitation for actions for breach of contract and for money had and received. But the High Court *held* that the proper clause was cl. 16, providing for cases not comprised within the previous clauses, a limit of six and not of three years, and that the Legislature never contemplated that action such as the present should be instituted under cl. 9. The appellant said that she had paid a certain amount to the decree-holder and claimed to have that sum deducted entirely in her favour, but it was *held* that she had no right to make a private arrangement with the decree-holder or to urge that the latter exonerated her from payment of a portion of the joint decree. **DOORGA MONEE DOSSEE v. DOORGA MOHAN DOSS**, 2 *W.R.* 266. [*R.*, 7 *W.R.* 377.]

(46)—*Civ. Pro. Code, Act VIII of 1859, s. 271—Sale of property of judgment-debtor in execution of decree—Decree-holder taking out execution subsequent to sale but prior to distribution—His right to share surplus.*—A decree-holder, who has taken out execution of his decree after the property of the judgment-debtor has been attached and sold in execution of other decrees, but prior to the distribution of the sum realized, is entitled, along with other attaching decree-holders, to share rateably the surplus remaining after the satisfaction of the decree of the first attaching decree-holder. **HOOLASSEE RAM v. GUNGA RAM**, 5 *N.W.P.* 98, *F.B.*

(47)—*Execution of decree—Variation of decree by one decree-holder—Execution against the other.*—One of two judgment-debtors having paid a certain portion of the decree-debt, promised to pay the balance increased by the addition of a certain sum with enhanced interest. To this agreement the other judgment-debtor was not a party. After the death of the judgment-debtor who had entered into the agreement, the decree-holder took out execution

*Execution of Decree—continued.***—8.—Joint Decrees, Execution of—contd.**

against the other of the altered decree. *Held*, that the altered decree was unsusceptible of execution as such and that the present decree-holder was not liable in any way under the contract made without his privity. **SAHIB SINGH v. PIRAN SUKH**, *A.W.N.* 1882, 183.

(48)—*Joint decrees—Execution.*—A joint decree was passed against two debtors. On the application of one of them, execution was ordered to be taken out against the other only. The decree was not satisfied. The creditor applied for and obtained an order for attaching the property of both. *Held* that as the property of the one was not shown to be sufficient to cover the amount of the decree, the judgment-creditor was entitled, notwithstanding the previous order, to attach the property of the other debtors, the property of the former being first sold. **MUSSUMAT FURESH MONE v. KISHORE MISSER**, 1 *W.R.*, *Mis.*, 14.

(49)—*Joint decree passed against several defendants, not executable by Court as a several decrees.*—Where several defendants have, it may be through negligence, submitted to a joint decree, they are jointly liable for the sum so decreed against them. And it is not in the power of the Court in execution to go beyond the terms of the decree and treat it as a several decree enforceable against the defendants in respect of their proportionate shares. **MUSSAMUT OMUTOOL KAIR v. MUSSAMUT SOMAYEE BIBEE**, 6 *W.R. Mis.*, 40. [*Appr.*, 8 *W.R.* 132.]

(50)—*Decree—Joint and several—Payment by one judgment-debtor—Default of other judgment-debtor—Effect.*—Judgment-debtors are jointly and severally liable for the whole amount of the judgment-debt and the joint liability under the decree could not be modified in such a way as to exempt one of the judgment-debtors from liability for the default of the other. **SALIG RAM v. BABOO RAM SEWAK**, 1 *Agra.*, *Mis.*, 14.

(51)—*S. 58, Act VIII of 1859—Joint decree against two defendants—Division of amount.*—Case where it was *held* that a joint decree for more than Rs. 500 against two defendants could not be divided so as to fall within the scope of Act VIII (B.C.) of 1869, s. 58, **MIRZA SYEFOOLAH KHAN v. MR. A.J. FORBES**, 25 *W.R.* 55.

(52)—*Civ. Pro. Code, Act XIV of 1882, s. 231—Decree in favour of several defendants for costs.*—Where a decree dismissing a suit directed a certain sum to be paid as costs to a number of defendants, without defining the proportion payable to each, an application by some of them to execute the decree for their proportionate share of costs, not adding all the other defendants but only some of them as parties, is not maintainable under s. 231 of the *Civ. Pro. Code* and should be dismissed. **MUTHUSAMI IYER v. NATESA IYER**, 18 *M.* 464. [*R.*, 25 *M.* 431, *F.B.*, 1 *N.L.R.* 24.]



**Execution of Decree—continued.****—8.—Joint Decrees, Execution of—contd.**

(53)—*Suit for land against many persons—Joint decree for costs against all defendants—Two defendants, Payment by—Default by rest—Claim against defaulters executed against non-defaulters—Defaulters, Suit against by non-defaulters—Procedure.*—Suit to recover land against persons claiming an interest in it. A joint decree for costs against all the defendants was passed. Two of the parties satisfied their share of the decree, but the others did not; and the claim against the latter was enforced with interest against one of the two former, who then sued the defaulters to recover the amount paid. The suit decreed by the Moonsiff, was appealed against by one of the defendants who had not complained, at the time, that the original decree was a joint decree; the Moonsiff's decree with regard to all the defendants was reversed on the ground that the defendants in the original suit and decree ought to be held liable for costs not jointly but according to their interest in the property. *Held*, that this decision was erroneous. **RAM GOVIND SURMA BHUTACHARJEE v. SOORJO MONEE DEBIA**, 24 W.R. 471.

(54)—*Judgment-debtors not sole owners of certain land—Decree for exclusive possession thereof—No partition—Undefined shares—Incapacity of execution.*—A decree awarding exclusive possession of a plot of land, of which the judgment-debtors are not the sole owners, cannot be executed when the shares of the share-holders have not been precisely defined, and there has been no partition. **PROSUNNO COOMAR DUTT v. SREEMUTTY ARDESSUREE**, 18 W.R. 43.

(55)—*Joint and several decree for mesne profits—Possession of particular lands—Liability.*—A decree for mesne profits was in terms a joint and several; *held* that the liability of any one of the defendants, who may be in possession only of particular lands of a mouzah, would in equity extend only to such land, etc., and that for such land the decree-holder could take out execution as against lessor and lessee. **GUNESH DUTT v. BULWUNT SINGH**, 14 W.R. 175.

(56)—*Joint decree for possession and mesne profits—Partition—Exclusive possession of property—Presumption as to partition—Admission.*—A joint decree for possession and mesne profits was passed against two brothers one of whom was the plaintiff and the other the defendant in the present suit. The plaintiff alleged that, since by virtue of a partition made between him and the defendant of the inheritance left to them by their deceased father's property, the mesne profits of which had been decreed to the decree-holder, fell to the exclusive share of the defendant in 1268, and remained in his exclusive possession until 1271, when the decree-holder recovered possession in execution of his decree now prayed in his suit to make defendant exclusively liable for the whole of the mesne profits due to the decree-holder between 1268 and 1271. *Held*, that the defendant's admission

**Execution of Decree—continued.****—8.—Joint Decrees, Execution of—contd.**

of his exclusive possession between 1268 and 1271 was not sufficient to make out the plaintiff's case; and that in the absence of the deed of partition, the division must be presumed to have been made in equal shares between the plaintiff and the defendant, and that the defendant must have got some property in lieu of the lands involved in the decree-holder's suit allotted to the defendant, it being plaintiff's duty to prove the particular equity on which rested his case. **BABOO ROY LUCHMIPUT SINGH BAHADUR v. BABOO ROY DHUNPUT SINGH BAHADUR**, 18 W.R. 291.

(57)—*Joint decree for possession and mesne profits—Application for execution by some decree-holders—Remaining decree-holders retracting tacit consent—Original applicants, Refusal by, to execute decree for mesne profits—No proper application—Purchasers of part decree, Adding of, as parties to suit—Civ. Pro. Code, 1859, ss. 207, 208.*—Two out of several decree-holders moved the Court to execute their share of the decree (for possession and mesne profits) and the other decree-holders, though they virtually joined in the application by signifying their consent, subsequently withdrew their consent, and the original applicants refused to proceed with the execution of the decree for mesne profits. *Held*, that there was no application on the part of all the decree-holders to execute the decree for mesne-profits, nor was there any application by some of them for execution of the whole decree, as provided in s. 207, Civ. Pro. Code, 1859, that the Court's order directing realization of the unpaid portion of mesne profits was passed without any proper application and that that part of the order of the first Court must be cancelled, leaving the parties to proceed according to law. *Quære*.—Can the purchasers of a share in a decree be added upon the record, under Act VIII of 1859, s. 208, as co-decree-holders. **SEETAPUT ROY v. SYUD ALI HOOSEIN**, 24 W.R. 11. [*Diss.*, 17 C. 341; R., 28 M. 64.]

(58)—*Reference to a decree in another suit—Execution, Maintainability of.*—Case where it was held that the judgment-debtor in this suit could not plead a decree in another suit in which no reference was made to the decree in this suit as any bar to the execution of this decree. **BHUGWAN DAS v. BABOO GOUREE SUNKAR**, 9 W.R. 596.

(59)—*Appeal by one defendant, Entire decree imperilled by—Limitation for execution, Commencement of, from date of decision in appeal.*—A decree passed against two defendants, if it was joint and several against the defendants without distinction, would be put in peril by the appeal of one of them, and the time for execution will run only from the date of the decision on appeal. If, however, the decree was not of such a nature that the appeal by one alone of the two defendants could necessarily imperil the entire decree, execution taken against the non-appealing defendant beyond



**Execution of Decree—continued.****—8.—Joint Decrees, Execution of—contd.**

three years after the date of the original decree, though within three years from the decision in appeal, will yet be out of time. **CHEDOO LAL v. NUND COOMAR LAL**, 6 **W.R.**, **Mis.**, 60. [*F.*, 4 **A.** 137.]

(60)—*Limitation—Keeping alive separate decree.*—A decree was in its nature not a joint one against all the defendants, but a separate one as against each batch; held that the proceedings against one batch did not keep alive the decrees against other batches. **KHEMA DEBIA v. KUMALA KANT BUKSHEE**, 10 **W.R.** 10=10 **B.L.R.** 259, **Note**.

(61)—*Joint decree—Execution proceedings by one—Limitation—Act XIV of 1859, s. 20—Division of decree.*—A decree must stand in its original character as a final decree, until it is shown that it has been amended or substituted for by another decree. In the case of a joint decree, any *bona fide* proceeding taken by any one of the decree-holders is a sufficient proceeding within s. 20 of Act XIV of 1859 to keep the whole decree alive. **OUDBEHARI LAL v. BRAJAMOHAN LAL**, 4 **B.L.R.**, **App.** 41=13 **W.R.** 128. [*F.*, 16 **W.R.** 29.]

(62)—*Separate decrees—Keeping decree alive by one decree-holder to the benefit of others.*—An entire sum was decreed to five persons jointly but one moiety to three of them and the other moiety to the remaining two; held that it was the same as if two separate decrees had been passed; and no action by the decree-holders to whom one moiety was assigned, could keep the decree alive to the benefit of the others. **CHOOA SAHOO v. TRIPOORA DUTT**, 13 **W.R.** 244.

(63)—*Joint debt—Execution of a decree against joint family property.*—In a suit against the grandmother and mother of A and B as their guardians to recover rent due from the family which was joint, in respect of a certain mouzah which had been held by the father and grandfather of the infants, a decree for Rs. 8,000 was obtained on the 2nd March, 1862, but it was ordered that "this decree will not be executed against the person and self-acquired property of the debtors, but against the property left by the two deceased lease-holders." On the 9th April, 1862, a second decree was obtained by the same plaintiff against A as heir of his grandfather, and it was ordered that it should be executed only against the property left by the latter; and on the 16th April, 1862, a third against his guardian, a similar direction as to execution being made. In execution of the three decrees, the plaintiff in the suits had the mouzah put up for sale, and at the sale purchased it himself for Rs. 35,000. A and B subsequently sold to the plaintiff in this suit their right to recover the sum which the mouzah was charged with in respect of the last two decrees. Held that the mouzah had been properly sold in execution of all three decrees. **BISSESSUR LALL SAHOO v. LUCHMESSUR SINGH**, 5 **C.L.R.** 477, **P.C.**=6 **I.A.** 238. [*F.*, 2 **A.** 746, 3 **A.** 72, 3 **A.** 191, 3 **A.**

**Execution of Decree—continued.****—8.—Joint Decrees, Execution of—concl.**

443, 9 **C.** 508, 8 **M.** 388, 11 **B.** 361, 16 **M.** 424, 17 **M.** 67; *Expl.*, 3 **A.** 443; *R.*, 8 **C.** 898, 10 **C.** 1, 10 **C.** 996, 8 **M.** 484, 10 **M.** 79, 11 **M.** 64, 12 **M.** 434, 14 **B.** 597, 3 **M.L.J.** 264, 23 **C.** 302, 23 **C.** 374, 20 **B.** 338, 19 **A.** 26, 21 **B.** 539, 20 **M.** 129, 26 **C.** 349, 26 **C.** 677, 1 **Bom. L.R.** 627, 24 **B.** 135, 27 **C.** 724, 10 **C.W.N.** 176=4 **C.L.J.** 63, 7 **A.L.J.** 945; *D.*, 8 **C.** 517, 8 **M.** 208, 10 **M.** 316.]

**—9.—Maintenance.**

Decree for maintenance—Execution against sons of judgment-debtor—See **HINDU LAW—MAINTENANCE**, 5 **M.** 234, **F.B.**

Execution of order for maintenance under **Crim. Pro. Code**—Plea of cessation of relationship of husband and wife, Duty of Court to inquire into—See **MAINTENANCE**, 19 **A.** 50=A. **W.N.** 1896, 173.

**—10.—Mode of Execution.**

See **CIV. PRO. CODE**, 1908, **RR.** 30—36.

(1)—*Execution—Transfer of decree—Fraud.*—In taking out execution, a decree-holder is not bound to produce the original decree or even a copy. A privately executed endorsement on a decree, unregistered and unproved, is no evidence of its transfer. If a decree-holder, in taking out execution, imputes fraud to the judgment-debtor, the Court executing must examine the allegations. **RAMDHUN RUKHIT v. PUNCHANUN CHUCKERBUTTY**, 10 **W.R.** 144=1 **B.L.R.**, **S.N.** 9.

(2)—*Decree between same parties—Earlier and later decrees—Respective operation.*—Case where the High Court held that a later decree confirmed on appeal superseded an earlier decree between the same parties, for all purposes of execution. **ANNUND MOHUN HAZRAH v. SHIBO SOONDUREE DABEA**, 18 **W.R.** 192.

(3)—*Hindu Law—Mitakshara School, Family governed by—Execution of decree—Representatives of judgment-debtor, Relief against, by attachment and sale of joint property—Code of Civil Procedure (Act XIV of 1882), ss. 223, 224, 228—Revival of execution proceedings by the Court which passed the decree, after it had been once transferred to another Court for execution and returned.*—The Court to which a decree is sent for execution must, on the termination of the proceedings in that Court, certify to the Court which passed the decree the result of those proceedings, and after such a certificate, it is necessary that, in order that the decree-holder may subsequently proceed to execute the decree, he should make an application to the Court which passed the decree, so that the decree may again be sent back for execution to the other Court; but it was not the intention of the legislature, nor does it follow from this procedure, that, when an application for execution has been sent back a second time to the same Court for execution against the same property, it must be held that the attachment of that



**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

property which was made in the proceedings in execution in that Court, of necessity came to an end when that case was struck off. The same effect should follow in the course of the proceedings taken in execution in the Court to which the decree had been sent under s. 223 of the Code, as would have followed if the proceedings had been taken in the Court which passed the decree, and the same principles should apply. (20 W.R. 133 ; 19 A. 482, R.) When the Court to which a decree had been transferred for execution sends it back under s. 223, Civ. Pro. Code, to the Court which passed the decree, that Court, *i.e.*, the Court which passed the decree, has power to decide whether the decree-holder could execute the decree against the legal representatives of the judgment-debtor. The property of the judgment-debtor having already been attached by the Court to which it had been sent for execution and an order for its sale having been made, the decree-holder was entitled to follow that property in execution against the sons. *DURGA DASS NARAIN v. UMATUL HOSEIN BEGUM*, 9 C.L.J. 239 = 4 Ind. Cas. 46. (7 M. 339, R.)

(4) — *Procedure—Execution of decree—Production of property—Costs—Interest—Decree silent.*—There is no provision of the Code which authorizes a Court to pass an order calling upon a defendant to appear in Court and produce property decreed to plaintiff. Interest cannot be allowed on costs awarded by a decree of the Privy Council where the decree itself is silent on the point. *BHOZA RUGHUR SINGH v. BHOZA RAJ SINGH*, 3 N.W.P. 319.

(5) — *Mode of execution—Adaptation of mode of execution to nature of case—Civ. Pro. Code. Act VIII of 1859, s. 212.*—The words "otherwise as the case may be" in s. 212 meant that the mode of execution was to be adapted in each case to the nature of the particular relief sought to be enforced under the decree. *DENONATH RUKHIT v. MUTTY LALL PAUL*, 1 Ind. Jur., O.S., 125 = *Hyde*, 158.

(6) — *Decree—Right of severance.*—The right under a decree cannot be severed, so that the remedy against the person can remain in or pass to one, and the alternative remedy against the property to another. *PADMANABHA v. THANAKOTI*, 2 M. 119.

(7) — *Decree—Recurring right—Remedy in case of violation*—Where a decree declares in favour of the decree-holder a constantly recurring right, a violation of it by the judgment-debtor cannot be enforced by the execution of the decree, but will only give rise to an action for damages. *SRI KRISHNA TATA CHARIAR v. SINGARA CHARIAR*, 4 M. 219.

(8) — *Decree-holder with rights to proceed against any further property of judgment-debtor—Petition on attachment of property for sale with notice of lien, Right to proceed against other property of judgment-debtors not precluded by.*—It was contended in this case that the

**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

decree-holder, under the terms of his bond, had a choice either to go against the property pledged or against other property, but not against either indiscriminately, that by his petition to the Court in March 1864, he had clearly indicated his intention of proceeding against the mortgaged property, and, till that was sold and found insufficient to liquidate the debt, he could not proceed against other property, and that the petition of March 1864 was an estoppel. The High Court, however, was of opinion that the decree-holder was, under the terms of the bond, entitled to go against any property belonging to their judgment-debtors. The steps taken by the creditor of preserving his right in the mortgaged property by filing his petition could not operate as an estoppel to his proceeding against other property. If the judgment-debtors had been endamaged by the acts of the decree-holder they could, if so advised, seek the remedy in the shape of a suit for damages. *RAJ COOMAR SINGH v. BIRJ MOHUN THAKOOR*, 2 W.R. Mis., 17.

(9) — *Decree by Court for Sirdars—Execution thereof in Subordinate Judge's Court against heir of Sirdar.*—A decree passed against a Sirdar by the Court for the Sirdars cannot be executed by a Subordinate Judge's Court against the Sirdar's heir (who is not a sirdar). The remedy of the decree-holder is by suit founded upon the decree and not by execution process founded directly upon such decree. *GOVIND VAMAN v. SAKHARAM RAMCHANDRA*, 3 B. 42.

(10) — *Rules of execution—Rules of execution different in different districts—Practice—Procedure.*—Where in different districts, different modes of execution are prescribed, and where the question is how a decree passed in one, but of which execution is sought in another, of such districts is to be executed, the executing Court must be guided by the rules in force in its own district. *MARTAND v. VINAYAK*, 8 Bom. L.R. 832 = 31 B. 5.

(11) — *Appellate decree modifying original decree, Proper form of—Informal appellate decree, if can be executed.*—A obtained a decree for a certain sum with costs in the lower Court. He appealed and the appellate Court granted him certain costs of the appeal, and also a certain sum in addition to the original decree. The appellate Court omitted to enter the sum found in A's favour in its decree. A applied for execution of the decree. *Held*, (a) that the proper form of the appellate decree is to show in itself the ultimate relief granted, *i.e.*, it should have shown in this case a decree in A's favour, not only for the amount of the decree in the Court of first instance, but for the additional amount decreed by the appellate Court, and should also have shown the costs; and, (b) that, although the decree was informal, yet as the amount due to the decree-holder could be ascertained from the record, the decree was practically capable of execution, and that



**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

therefore execution should, as a matter of equity and good conscience, be granted to the decree-holder. *JAWAHIR MAJ. v. KISTUR CHAND*, 13 A. 343=A.W.N. 1891, 119. [Appr., 18 A. 344; R., A.W.N. 1908, 257=5 A.L.J. 742.]

(12)—*Splitting up decree—Separate executions.*—A decree gave possession of lands and of certain zamindari papers, or in default of them a thousand rupees. The judgment-creditor went to the spot to get possession of the land as well as the papers and not having got the papers, his only course was to institute further execution proceedings either to get them, or the money made payable to him by the first decree in default. *Held*, that, under these circumstances, this was not a splitting up of the decree. *WOOMA CHURN CHOWDHRY v. KUMOLAY KAMINEE DABEE*, 25 W.R. 58.

(13)—*Splitting up of decree for execution.*—Where the whole of a decree is perfect for execution, the decree-holder cannot be permitted to split it up as he pleases, taking out execution of a part of it at one time and another part of it at another time. *FATEHCHAND v. PANNA LALL BANIA*, 10 C.P.L.R. 83. (11 W. R. 488, 6 A. 351, R.)

(14)—*Execution of decree—Attachment—Inconsistent claims to attached property.*—A person holding several decrees against the same debtor may attempt to enforce them all against the same property, notwithstanding that he may have failed in one of such cases. The appellant contended that he was entitled under a bill of sale to the shares of all the three judgment-debtors. Two of them happened to be minors and their shares therefore were held not to have been passed by the bill of sale. The appellant however sought to claim that the shares of the minors passed because the sale was to satisfy an ancestral debt. But it was held that he could not be allowed to set up such an entirely new case in contradiction to his previous case that the judgment-debtors were not minors at all and the deed had been executed through the pen of another merely because they were not themselves able to read and write. *MOHIMA CHUNDER BISWAS v. NIL KOMUL GHOSE*, 6 W.R. 239.

(15)—*Civ. Pro. Code, 1859, s. 272—Different decrees against one and same judgment-debtor—Execution, Mode of—Jurisdiction—Letters Patent, cl. 15.*—Two decrees were obtained in different Courts against one and the same judgment-debtor. On the attachment of the property by one decree-holder, the other decree-holder applied to the attaching Court to stay its proceedings on the ground that its decree had been brought about by fraud. The attaching Court threw out the application, and, on appeal to the Judge, the latter refused to stay execution and dismissed the appeal. *Held*, that the application should be made to the Court which gave him the decree, that the Judge's judgment

**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

was on the face of it a good judgment for a reason given and under a jurisdiction which the Judge had and that the case was not one in which the High Court's extraordinary powers should be exercised. *JUMAL ALI v. SHAIKH WAHED ALI*, 11 W.R. 97.

(16)—*Execution of decree according to direction of judgment-debtor—Validity.*—The order of a judgment-debtor upon a pay-master to satisfy a decree out of his salary does not affect the Court, which should execute its decree as directed by law and not according to the consent of the judgment-debtors. *In re MACFARLANE*, 11 W.R. 69.

(17)—*Alterations inconveniencing decree-holder—Effect—Judgment-debtor—Adhering to decree.*—The decretal order will be contravened if the judgment-debtor make alterations which cause inconvenience to the decree-holder. If a judgment-debtor's plan cannot be proceeded with without inconvenience to plaintiff, he must adhere to the decree and carry out its terms at the risk of the decree-holder. *GOPEE KISHEN GOSSAIN v. HEM CHUNDER GOSSAIN*, 16 W. R. 38.

(18)—*Purchase of aliquot part of decree—Execution of decree.*—A decree cannot be executed by purchasers of aliquot parts of it.—*NUND COOMAR FOUTEHDAR v. BUNSO GOPAL SAHOY*, 23 W.R. 342.

(19)—*Execution of decree—Partial execution—Aliquot part.*—A decree cannot be executed for an aliquot portion (3 B.L.R. 114, 23 W.R. 342, R.). But where the objection on that ground to the execution of a decree was not raised either in the original Court or in the lower appellate Court, nor in the grounds of appeal to the High Court, the High Court refused to allow the objection. *ROY GOODUR SAHOY v. DHUNNESHUR KOER*, 7 C.L.R. 117.

(20)—*Act VIII of 1859, ss. 207, 208—Cross-decrees—Set-off—Execution of decrees in parts.*—Where an order of Court is made with the consent of the holders (S and B) of two cross-decrees fixing the mode in which a set-off should be made, and its effect is to prevent S executing his decree without giving credit for B's decree, it would be most inequitable to allow B to execute his decree against S. S. 207, Act VIII of 1859, applies to the execution of the entire decree, not to splitting it up and executing it in portions. S. 205 also applies to the transfer or assignment of a decree in its entirety, and does not intend its assignment in as many portions as the decree-holder may think fit. Although one of two holders of the same decree may take out execution of the whole decree, he cannot be allowed to take out execution of a part of it to the extent only of his own interest. Application may be made for the extension of part of a decree if the applicant admits that the remainder has been satisfied; and where a decree is perfect for execution in certain respects only execution may be taken out for the portion



**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

which is perfect. But after a decree is perfect for execution in its entirety, the execution-creditor cannot take out one execution for one part (*e.g.*, *wassilatt*) and another for another (*e.g.*, costs or interests on costs) nor can by assignment split it up, and subject the judgment-debtor to a plurality of executions. **HARO SANKER SANDYAL v. TARAK CHANDRA BHUT-TACHARJEE**, 3 B.L.R., A.C., 114=11 W.R. 488. [*F.*, 7 C.L.R. 117, 5 A. 27=A.W.N. 1882, 140; *R.*, 15 B. 242.]

(21)—*Mode of execution—Private arrangement after decree — How to enforce such — Registration.*—Where, after the passing of a decree, the parties come to a private arrangement as to the discharge of the obligation under the decree, the decree will merge in the agreement, which cannot properly be enforced in execution but only by a separate suit. A petition presented to a Court to recognise an arrangement between the parties in satisfaction of the decree does not require registration, as the petition by itself, without the approval of the Court, could not be held to have created, declared or assigned any right. **SIRDAR AMAR SINGH v. BASWA MAL**, 51 P.R. 1885.

(22)—*Mode of execution—Decree—Agreement as to mode of execution—Effect.*—Where an agreement is entered into by the parties not in supersession, but in pursuance, of a decree as to the mode of its execution, the decree will be held to be still subsisting and the case cannot, on account of the above agreement, be struck off the file till the decree is satisfied. **SALAMAT RAI v. AKBAR**, 193 P.R. 1882.

(23)—*Act VIII of 1859 (old Civ. Pro. Code), s. 201—Enforcement of decree against person or property of debtor—‘Ex parte’ decree.*—The section gives an option to the creditor of enforcing his decree either against the person or the property of the debtor, and the fact that the decree is an *ex parte* one makes no difference. **RAJ CHUNDER ROY v. SHAMA SOONDARI DEBI**, 4 C. 583.

(24)—*Regulation IV of 1816 — Decree of Village Munsif—Liability of personal property only, in execution.*—Regulation IV of 1816, enables a village Munsiff's Court to execute its decree only against personal property and not against immoveable property. Under the Regulation, a decree may be passed against a personal representative, and a decree may be executed by the transferee of such decree. **KALANDAN v. PAKRICHI**, 9 M. 378, F.B.

(25)—*Limitation Act (XV of 1877), sch. II, art. 180 — Insolvent judgment-debtor, final discharge, if necessary — Execution, if can proceed against properties vested in the Official Assignee—Revivor—Scire facias—Code of Civil Procedure (Act XIV of 1882), ss. 230, 248—Construction of statutes, Rules of—Legal representatives of decree-holders, Substitution of, if necessary in execution.*—In the absence of any proof that a judgment-debtor has obtained his

**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

final discharge, although he was declared an insolvent and his assets were vested in the Official Assignee, he is not entitled to protection from execution under a decree obtained by the decree-holder against him in the original side of the High Court. The law as to revivor and *scire facias* considered and explained. In using the term “revivor of judgment” in art. 180 of sch. II of the Limitation Act (XV of 1877), the Legislature had in view the procedure embodied in s. 216 of the Code of 1859, and s. 248 of the Code of 1877, the object of which was to give notice, so as to prevent undue surprise, to a judgment-debtor, where more than one year had elapsed between the date of decree and the application for execution, or when the decree was sought to be enforced against the legal representatives of the party against whom the decree was originally made. The statute of limitations to which the judgment is subject, ceases to run upon a revivor of judgment and time runs afresh from the date of the revivor. (6 C. 504, *R.*; 20 C. 551, 24 C. 244, 7 M. 540, 26 A. 361, 4 A.L.J. 405, *R. & F.*; 17 C. 491, 30 C. 979, 22 C. 991, *D.*) The legislature is presumed to know not only the general principles of law, but the construction which the Courts have put upon particular statutes. Where a section of an Act which has received a judicial construction is re-enacted in the same words, such re-enactment must be treated as a legislative recognition of that construction. An express recognition of the construction which the Judges have put upon statutes is not always needed; in some cases, the silence of the legislature is, equally emphatic. As the legislature knows what the law is and has the power to alter it, any mistake on the part of the Judges may at once be corrected, and the absence of any such correction, especially during a long period of time, indicates that the Courts have rightly ascertained the intention of the legislature. S. 230, Civ. Pro. Code, 1882, ought not to be so construed as to conflict with the provisions of art. 180, Limitation Act (XV of 1877). The provisions of the two Acts ought not to be so interpreted as to contradict each other and s. 230 of the Code cannot be taken to limit art. 180 of the Limitation Act. (6 B. 258, 7 M. 540, 20 C. 551, *R. & F.*) The Civ. Pro. Code does not expressly provide for an application for substitution of the legal representatives of one or some of the judgment-creditors. There is no provision which renders necessary the actual substitution of the name of the legal representatives for the validity of proceedings in execution. S. 222 of the Code merely requires that the legal representative should apply for execution of the decree and that his name should be brought on the record, **JOGENDRA CHANDRA ROY v. SHAM DAS**, 9 C.L.J. 271=36 C. 543=1 Ind. Cas. 18. (19 W.R. 255, *R.*) [*R.*, 10 C.L.J. 91, 11 C.L.J. 489, 14 C.W.N. 560, 14 C.W.N. 752=3 Ind. Cas. 324, 10 C.L.J. 396; *F.*, 11 C.L.J. 91=4 Ind. Cas. 402.]



*Execution of Decree—continued.**—10.—Mode of Execution—continued.*

(26)—*Sale of rights and interests vested in official assignee—Execution of decree against another decree-holder—Procedure—Manager—Adjustment out of Court—Civ. Pro. Code, 1859, s. 206.*—The sale of a party's rights and interests in a decree at a time when all his assets are vested in the official Assignee, passes nothing to the purchaser. Where a Deputy Collector executes a decree against a party holding another decree from his own Court, he ought, instead of selling that other decree, to appoint a manager under Act VIII of 1859 to realize the judgment-debt thereon. S. 206, Civ. Pro. Code, 1859, did not apply to Revenue Courts, and a Deputy Collector could not decline to inquire whether or not a private adjustment of a decree had been made out of Court. *RAM CHUNDER ROY v. RAM CHURN BUKSHEE*, 9 W.R. 372.

(27)—*Decree directing removal of obstructions in way—S. 200, Civ. Pro. Code, 1859—Case.*—Where the High Court held that the only mode of executing a decree for the performance of a particular act (e.g., the removal of obstructions in a pathway) was to proceed under s. 200, Act VIII of 1859. *BHOOBUN MOHUN MUNDUL v. NOBIN CHUNDER BULLUB*, 18 W.R. 282 = 10 B.L.R., App., 12.

(28)—*Declaratory decree, whether and when executable.—Held* (agreeing with Boddam, J., and dissenting from Michell, J.), that a decree, which declared *inter alia* that the plaintiff, an archaka of a temple, was entitled, as such, to have the key of the temple for the performance of the duties of archaka of the temple, was intended to be imperative, and that execution should be issued, so as to give the plaintiff such possession as he was entitled to under the decree. *RATNA MOODALIAR v. KRISHNA BHATTAR*, 17 M.L.J. 423, F.B.

(29)—*Declaratory decree—Application for execution—Maintainability.*—Where a decree declared the title of the plaintiff to the suit property, the Court could not order execution of the decree by directing the delivery of the property to the plaintiff. *MUNIYAN v. PERIYA KULANDAI AMMAL*, 1 M.H.C 184.

(30)—*Decree declaring boundary line in survey map wrong—Erasure of such line from map, right of decree-holder to get.*—Simply because a decree declares that the boundary line laid down in the survey-map as the boundary line of the plaintiff's permanently-settled estate is not the true boundary line, the decree-holder is not entitled either to have the decree proclaimed on this spot, or to have the line erased from the survey-map. *RAJAH RAJ KRISHNA SINGH BAHADOOR v. THE COLLECTORS OF MYMENSINGH*, 19 W.R. 232.

(31)—*Declaration of decree-holder's lien on property but not of right to sell—Execution—Procedure.*—A decree declaring a decree-holder's lien on certain property, but not declaring his right to sell it, may be executed as against that

*Execution of Decree—continued.**—10.—Mode of Execution—continued.*

property specially, but not without the usual course of attachment and sale, or of attachment and management taking place. *MUDDYA BASHEE DOSS v. REZA CHOWDHRY*, 13 W.R. 337.

(32)—*S. 260, Civ. Pro. Code, 1882—Execution of decree—Opportunity to obey decree not afforded by decree-holders—Refusal of execution—Effect—Subsequent order for execution.*—Where an order of a Court dismissed a petition for execution under s. 260, Civ. Pro. Code, because the petitioning decree-holders had not then afforded to the judgment-debtor an opportunity of obeying the decree directing him to do specific acts, *held*, that another application, made after such opportunity had been afforded to him, was not barred as having been a matter of prior adjudication within the meaning of s. 13, Civ. Pro. Code. *Held* further that the decree, which also declared a right on the part of the decree-holders against him, was not incapable of being executed under s. 260, on the objection that it was only declaratory. *KISHORE BUN MOHUNT v. DWARKANATH ADHIKARI*, 21 C. 784, P.C. = 21 I.A. 89 = 6 Sar. 429. [R., 33 C. 306 = 10 C.W.N. 297 = 3 C.L.J. 112, 17 M.L.J. 423, F.B.]

(33)—*Payment of decree amount by instalments—Failure to pay instalment—Application for execution by decree-holder—Arrest of judgment-debtor before instalment date whether valid excuse for non-payment.*—A judgment-debtor, having agreed to pay the decree amount by instalments, failed to pay an instalment on the due date. When the decree-holders applied for execution of the decree, the judgment-debtor assigned as a reason for his omission, the fact of his arrest by the decree-holders on account of another debt three days before the instalment date. *Held*, that the reason given for the non-payment of the instalment was invalid. *KALEE CHURN SINGH v. BOODH RAM*, 5 N.W.P. 77.

(34)—*Instalment decree—Default—Application to execute whole decree—Payment into Court—Order of postponing sale assented to by decree-holder—Right of decree-holder to execute whole decree without fresh default.*—An instalment decree allowed the decree-holder to execute the whole decree if any default was made in the payment of any instalment. The judgment-debtor failed to pay two instalments whereupon the decree-holder applied to execute the whole decree. The judgment-debtor paid the amount of those two instalments along with a third, which had become due, and the Court ordered the sale to be postponed, and the application to be removed from the file. The decree-holder through his pleader took the money out of Court without objection. *Held*, on the subsequent application of the decree-holder to execute the decree for the whole balance, that by leaving the order postponing the sale unappealed, and by taking out of the Court the three instalments, he had lost his



**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

right to execute for the unpaid balance of the decree until a fresh default occurred. **HURPURSHAD v. BHOWANEE**, 5 N.W.P. 18.

(35)—*Decree for maintenance fixing rate—Instalment decree.*—A decree for maintenance payable at a certain rate every month stands on the same footing as a decree order ordering payment by instalments. **PEAREE NATH BROHMO v. JUGGESSUREE alias RAKHALEE DOSSEE**, 15 W.R. 128. [Appr., 19 C. 139; F., 9 A. 33.]

(36)—*Civ. Pro. Code, Act VIII of 1859, s. 244—Execution of decree—Application by judgment-debtor to Collector—Arrangement to pay by instalments forwarded to District Court—Expression of opinion by District Court that arrangement was proper, Effect of.*—When a decree-holder executed his decree, the judgment-debtor petitioned the Collector that his lands instead of being sold at auction should be transferred to a third party who would discharge the judgment-debt by 12 annual instalments. The Collector approving of the arrangement forwarded it for sanction to the District Court which expressed an opinion that the said arrangement was proper, and sent the case down to the Court of first instance. An order to that effect having been passed by the latter Court, the decree-holder appealed to the District Court which confirmed the lower Court judgment. On appeal to the High Court it was held that the Collector's recommendation should have been dealt with by the Court executing the decree in the exercise of its own judgment and not in reference to the opinion expressed by the Judge, who exceeded his jurisdiction in interfering, in the matter, and that the arrangement proposed by the Collector was not one which could be proposed or accepted under the terms of s. 244 of the Civ. Pro. Code. **MUTTRA PERSHAD v. RAMPERSHAD**, 6 N.W.P. 39. [F., 6 N.W.P. 293; Cited, 14 P.R. 1904, Cr. = 111 P.L.R. 1904.]

(37)—*Execution of decree—Stay, on giving security—Subsequent execution—Judgment-debtor's default—Surety's liability in execution.*—A decree for partition was passed ordering partition of certain property. The defendant appealed and pending the appeal, obtained a stay of execution upon giving security that he would satisfy such decree as might be passed against him by the appellate Court. That Court confirmed the decree of the lower Court. In execution of the decree the defendant deposited in Court certain bonds, decrees and other articles, which were in his possession. He did not, however, produce the whole of the property for which he was liable under the decree, and the Court therefore, ordered execution to proceed against his surety. The surety paid into Court the whole amount of the surety bond. The defendant (the judgment-debtor) contended that the whole sum so paid in by the surety should not be applied in satisfaction of the decree, but only so much as was necessary to make up the balance due after

**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

giving credit for the total value of the property which he had produced in execution. The Court, however, decided that the whole sum should be applied in satisfaction of the decree. On appeal, held (reversing the order of the lower Court) that the property already produced in Court by the judgment-debtor should be first applied towards the satisfaction of the partition decree, and that, if the decree-holder did not obtain complete satisfaction in this way, the money paid into Court by the surety should then be made available. **GOPAL NANA SHET v. JOHERMAL**, 19 B. 578. [R., 10 C.P. L.R. 73.]

(38) — *Principal and Surety — Execution against surety.*—Where, in a suit for the price of goods supplied, all the four defendants filed separate *solehnamas*, the combined effect of which was that each of them was liable, as a principal, to a fourth of the whole debt and that, upon default by any of them, all the property of that debtor having been taken and sold for the purpose of making good that default, the others should be liable for the whole amount remaining due, and where a decree was passed accordingly, it was held that the plaintiff could not, on default by two of them, proceed against the rest, in the absence of proof that the whole property of the defaulting debtors had been exhausted. **RAMANUND KOONDOO v. CHOWDHRY SOONDER NARAIN SARUNGY**, 4 C. 331.

(39)—*Decree for delivery of moveable property—Mode of execution—Damages.*—Moveable property decreed to be delivered must be delivered if capable of delivery; otherwise assessed damages should be paid. **KASHEE NATH KOER v. DEB KRISTO RAMANOOJ DOSS**, 16 W.R. 240.

(40)—*Suit against minor's father as guardian—Bona fides not impugned—Liability of minor—Arrest of minor's person.*—A minor would be liable in a suit against his father, as guardian during minority, where the good faith of the parties is not impugned. Where no proper ground exists to the contrary, execution may be taken out by means of a warrant for the arrest of the minor's person. **SHERAFUTOOLLA CHOWDHRY v. SREEMUTTY ABEDOONISSA BEBEE**, 17 W.R. 374. [Expl., 24 W.R. 264.]

(41)—*Civ. Pro. Code (Act X of 1877), s. 271—Right of bailiff to open outer door.*—An officer executing a process for attachment of moveable property has authority to break open the outer door of the shop or godown in which it may be located. **DAMODAR PARSOTAM v. ISHVAR JETHA**, 3 B. 89. (See, also, 5 B.L.R. 29.)

(42)—*Moveable property, Attachment of—Breaking outer door.*—Where, in execution of a decree, moveable property has to be attached, the Court officer is at liberty to break open the outer door of the house of the person against whose property the attachment is issued. *Quære*;—Whether, for purposes of making an arrest, an outer door may be broken. **MT. CHAOLI v. DINA NATH**, 72 P.R. 1876.



**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

(43)—*Sheriff's officer—Power to break open door—Re-entry, Demand of.*—A sheriff's officer, in execution of a bailable writ, peaceably obtained entrance by the outer door, but, before he could make an actual arrest, was forcibly expelled from the house, and the outer door fastened against him. The officer obtained assistance, broke open the outer door, and made the arrest. *Held*, that the officer was justified in so doing. *Held*, also, that demand of re-entry, under such circumstances, was not requisite to justify his breaking open the outer door. *Quære*.—If indictment for an assault and false imprisonment will, under such circumstances, lie against the sheriff's officer? *AGA KURBOOLIE MAHOMED v. THE QUEEN*, 3 M.I.A. 164.

(44)—*Bom. Act. V of 1864—Mamlatdar's Court—Power to break open door.*—A Mamlatdar having jurisdiction under Act V of 1864 (Bombay), to give immediate possession of lands and premises may order the breaking open of a door, when necessary to give effect to his decree. *BAJI DEV v. SADASHIV BHAI-SHANKAR*, 5 B.H.C. A.C. 158. [*Appr.*, 4 B. 168, F.B., R. 14 B. 157.]

(45)—*Attachment against person or goods—Power of nazir to break open defendants dwelling house—Privilege extends to dwelling house or out house or office—Not to separate building—Outer door open—Inner door may be broken.*—A Nazir or sheriff has no power under a writ of attachment, to break open a defendant's dwelling-house to execute a civil process against his person or goods, if the outer door is closed and locked, even should he find that the defendant has absconded to evade such execution. A man's dwelling-house or out house or any office annexed to the dwelling house is included in the protection but not a building standing at a distance from the dwelling-house and not forming parcel of it. Where, however, the outer door of the defendant's dwelling house is open and the Sheriff or Nazir enter, he is at liberty to afterwards break an inner door to take the goods. *BAS KUVAR v. BENIDAS GANGARAM*, 8 B.H.C. A.C. 127. [*F.*, Rat. Un. Cr. C. 431, 3 B. 89.]

(46)—*Attachment — Moveable property — Removing a lock.*—In execution of a process of attachment of moveable property, a Nazir is empowered to remove any lock upon a door or from any receptacle in which the property is placed, and to put his own lock thereon for the purpose of attachment and safe custody of the property. *SODAMINI DAS v. JAGESWAR SUR*, 5 B.L.R. App. 27 = 13 W.R. 339. (*Appr.* 3 B. 89.)

(47)—*Process directing general attachment of moveable property—Person executing process, Powers of.*—A person executing a process directing a general attachment of moveable property having gained access to a house, has a right to remove the lock from the door of a room in

**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

which he has reasonable ground for supposing moveable property to be lodged. *KONDASAWMY PILLY v. KRISTNASAWMY PILLAY*, 5 M.H.C. 189.

(48)—*House locked by judgment-debtor—Possession of house not given by Court's officers—S. 223, Civ. Pro. Code, 1859—Duty of Court to put party in possession.*—If the officers of a Moonsiff's Court were unable to give a decree-holder possession of a house, because the judgment-debtor had bolted and locked the doors, the Moonsiff was bound, under Act VIII of 1859, s. 223, to remove the locks, and place the decree holder in possession. *GUNESH CHUNDER SHAH v. RAM DHUNEE DOSSEE*, 22 W.R. 283.

(49)—*Decree entitling plaintiff to pass through doorway and to remove brick work—Wooden door not to be removed.*—Case where the High Court held that, in the execution of a decree, which only declared the plaintiff's right to pass through a doorway, and to remove the brick-work with which it was filled, the decree-holder was not authorized to remove a wooden door there in existence. *ROOKNEE KANT CHOWDHRY v. NUNDLALL CHOWDHRY*, 25 W.R. 120.

(50)—*Decree directing removal of attachment—Recovery of money under such decree.*—In execution of a decree declaring that an attachment made by the defendant of a certain quantity of the decree-holder's crop should be removed, the decree-holder could not realise any money from the judgment-debtor; nor obtain money of the judgment-debtor in the hands of the Court without the consent of the debtor. *BOYDONATH SHAW v. SHUMBHOO RAM MITTEE*, 25 W.R. 59.

(51)—*Attachment of land in execution—Postponement of sale—Attachment pending—Property sold by another creditor—Remedy of former judgment-debtor.*—A judgment-creditor attached land in execution, but allowed the sale to be postponed in order that the judgment-debtor might raise the money by mortgage; the attachment was pending, but, in the meanwhile, the property was sold at the instance of another creditor: *Held*, that the former judgment-creditor could proceed against other property of the judgment-debtor. *KALEE PERSHAD DUTT v. RAJAH MAHOMED JOWAHIR JUMMA KHAN*, 18 W.R. 174.

(52)—*Attachment—Produce from State land—Validity.*—*Held*, that a Civil Court may attach the produce of State land in execution of a decree, but that, before paying out the sale proceeds, the Court should ascertain from the Revenue authorities whether all arrears of revenue due on the land from which the produce was obtained, have been satisfied, and, if these dues have not yet been satisfied, should make them good as a first charge from the sale proceeds. *NGA CHIT TUN v. NGA SE GYI*, U.B. R. 1908, 3rd Qr., Land and Rev. Reg. 1. (U.B. R. 1897—1901, Vol. 258, F.)



**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

(53)—*Decree providing for conveyance but not for purchase money—Land acquisition, by Government—Compensation, Separate suit for.*—A decree provided for the execution of a conveyance of land, but not for the payment of money; a portion of the land was taken away by the Government for railway purposes subsequently to the decree; *held* that the decree-holder must bring a separate suit to recover compensation money. *SHUMSOONNISSA BEGUM v. MIRTUNJOY BOSE*, 18 W.R. 189.

(54)—*Acquisition by Government of land covered by mortgage decree—Failure of mortgagee to put in claim under s. 9 of the Land Acquisition Act, Effect of.*—Where before the execution of a mortgage decree for sale of land, such land was acquired by the Government under the Land Acquisition Act, 1870, and the holder of the decree failed to put in a claim under s. 9 of the Act, *held* that he was disentitled to attach, as under the decree, the money in the hands of the Collector, being the amount of compensation awarded by the Government to the mortgagor. *BASA MAL v. TAJAMMAL HUSAIN*, 16 A. 78 = A.W.N. 1893, 223. [*Diss.*, 13 C.W.N. 350 = 6 C.L.J. 745; *D.*, 17 P.R. 1907 = 67 P.W.R. 1907 = 2 P.L.R. 1908.]

(55)—*Decree for land passed prior to enactment of Civ. Pro. Code—Value of produce of land given up to date of decree—Court not competent to grant further produce up to date of execution.*—In execution of a decree for land passed prior to the enactment of the Civ. Pro. Code, in which the value of the produce of the land has been granted up to the date of the decree, it is not competent to the Court executing the decree to grant further produce up to the date of execution. *CHINNAYA CHETTY v. K. NARANAPAIYA*, 6 M.H.C. 15.

(56)—*Plaintiff getting decree for a third of all lands in which she was interested—Total lands possessed by her more than one-third—Execution against lands in her possession or in defendant's—Order.*—A decree was given to the plaintiff for a third of the whole of the lands in which she was entitled to share, and the defendant objected that she ought first to execute it in respect of lands in her possession exceeding the one-third decreed: *Held*, that the decree-holder might execute in respect of the lands in defendant's hands. *RADHA KRISTO PANJAH v. BAMA SOONDUREE DOSSIA*, 13 W.R. 9.

(57)—*Decree—Execution—Division into lots of property to be sold—Separate proclamations, if necessary—Civ. Pro. Code, 1882, s. 274.*—For the purpose of obtaining a better aggregate price, if the property to be sold in execution of a decree is divided into several small lots, it is not necessary that a separate proclamation of the sale should be made on each lot into which it is divided. A mere breaking up of an area into lots does not necessarily make it several properties for the purposes of a proclamation of attachment or sale. Where estates, though embraced in the same process, are really at

**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

such a distance that there is no moral certainty of communication to persons on or interested in the one of what is publicly done on the other, there should be a separate proclamation on each, in order that full intimation may be given of what is to be done. *PEDRO ANTONIO DE PENHA v. JAIBHOY ARDESHIR SET*, 12 B. 368.

(58)—*Order in execution giving possession of specified plot—Effect.*—An order in execution that a decree-holder shall get possession of a specified plot, will preclude him so long as any portion of it remains, from touching the remaining plots. *JOGENDRO NATH MULLICK v. RAJAH BIJOY KESHUL ROY*, 19 W.R. 161.

(59)—*Decree not for possession—Civ. Pro. Code, 1859, s. 223—Execution by ordering possession of property with stranger—Stranger acquiring title after suit—Semble.*—A decree which is not for possession cannot, under s. 223, Civ. Pro. Code, 1859, be executed by an order for delivery of possession of property which is in the possession of a third party, who has acquired a title after the institution of the suit. *AMEEROONNISSA KHATOON v. ABI-DOONISSA KHATOON*, 16 W.R. 307.

(60)—*Possessory suit — Partial success of plaintiff—Some defendants obtain modification of High Court's judgment—Interest—Plaintiff can execute—Inquiry into extent of shares—Power of Court.*—In a possessory suit, the plaintiff succeeds only partially. All the defendants except R and G obtain a modification of the High Court's judgment leaving the decree standing against R and G alone. *Held*, that the plaintiff in applying for execution can only ask for delivery of R and G's shares and interests; but that the Court in execution cannot authorize any inquiry into the extent of those shares in relation to the other defendants. *ANNODA PERSHAD MOOKERJEE v. TROYLUCKHONATH PAUL CHOWDHURY*, 13 W.R. 123.

(61)—*Act VIII of 1859, ss. 224, 230—Execution—Dispossession — Ryot in possession—Procedure.*—Where a person was admittedly in possession of certain property as a ryot, the Court cannot, in execution of a decree, make any enquiry under s. 230 of the Code and dispossess him. The proper procedure in such a case is to retain the ryot in his possession, and the possession to the decree-holders must be given in the mode suggested in s. 224 of the Code of 1859. *SOOBHUDRA DOSSEE v. GOOROO DYAL SINGH*, 3 W.R. 48.

(62)—*Decree for rent—Mode of realization.*—Where the decree was an ordinary decree for rent, and no reference whatever was made in it to the kabuliati or to the terms thereof, and it does not appear that the kabuliati was even filed in the rent suit, it is not open to the judgment-debtor to go behind the decree and to insist that the terms of the kabuliati should regulate the rights and liabilities of the parties



**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

as such for any portion of the costs due under such decree. *ROMA PROSUNNO SINGHEE v. BOY KANTO NATH GHOSAL*, 3 C.L.R. 504.

(80)—*Execution of decree—Competency of decree-holder to proceed against property of judgment-debtor other than that pledged—Extinction of lien on property pledged.*—The judgment-debtor, in this case, held a mortgage on certain property belonging to his judgment-debtor as security for his loan and obtained a decree for the amount. Instead, however, of going against the property pledged, he attached other property in execution and caused it to be sold, and it was held that he had full power to do so. It was competent to him to proceed against any property belonging to his debtor, but by so doing he should be deemed to have thrown up his lien on the property which had been pledged. *RADHA COOMAR SINGH v. LUCHMEE CHUND MARWAREE*, 3 W.R., Mis., 16.

(81)—*Execution of decree—Decree for sale of immoveable property—Purchase of property by decree-holder's brother—Execution of decree against judgment-debtor's person—Equitable considerations.*—The holder of a decree for money, which directed the sale of immoveable property for its satisfaction, applied for execution of the decree against the judgment-debtor personally. It appeared that the decree-holder's brother was able, owing to the existence of such decree, to purchase such property for a very low price in execution of another decree against the judgment-debtor. *Held*, that Courts are not debarred from applying equitable principles to the questions that arise in proceedings relating to execution of decrees, and that, in the circumstances of the case, the decree should be executed first against the hypothecated property in the hands of the decree-holder's brother, and that, should it prove insufficient to satisfy the debt, the judgment-debtor might then be proceeded against personally. *WALI MUHAMMAD v. TURAB ALI*, 4 A. 497 = A.W.N. 1882, 127. [*Expl.*, 9 A. 484; *D.*, 10 A. 35.]

(82)—*Property subject to mortgage—Purchase in execution of money-decree—Assignment of mortgage to purchaser—Enforcement of mortgage-decree against other property of the judgment-debtor—Equities.*—Where a person who purchases, in execution of a money-decree property subject to a mortgage, subsequently becomes the holder of the decree obtained on such mortgage, it would be inequitable to allow him to execute such mortgage-decree against the other property of the mortgagor judgment-debtor, if it appears that he bought the mortgaged property knowing it to be mortgaged, or that he purchased it in consequence of the mortgage for a smaller sum than it would otherwise have fetched. *GULAB SINGH v. PEMIAN*, 5 A. 342 = A.W.N. 1883, 56.

(83)—*Bengal Act VII of 1868, sale under, of mortgaged property—Mortgage-decree—Surplus sale-proceeds, Attachment of.*—The purchaser of

**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

property, sold subject to incumbrances thereon, at a sale under Bengal Act VII of 1868, who subsequently purchased a decree passed prior to such sale, in a suit upon a mortgage of the property, which decree was, in addition to being a charge on the property, also personal against the mortgagor, was held not entitled to execute such decree against the surplus sale-proceeds under such sale, notwithstanding the abandonment of his lien on the property. *GOLUK CHUNDER MAHINTA v. SUBBOMANGALA DEBI*, 6 C. 711 = 8 C.L.R. 189.

(84)—*Mortgage of undivided share—Mortgagee's rights on partition when a person other than the mortgagor gets the undivided share.*—A mortgagee of an undivided co-parcener, not in possession, was not a necessary party to a partition suit; and where there was no fraud or collusion, he was bound by the decision of the partition suit. The owner of an undivided share in certain property mortgaged it to plaintiff in the present suit; subsequently, in a partition suit between the mortgagor and his co-sharer, to which suit plaintiff in the present suit was not made a party, some property other than that mortgaged to the present plaintiff was allotted to his mortgagor and the mortgaged property was allotted to another co-sharer; *Held*, the plaintiff in the present suit could not proceed, for the realisation of his money, against the property mortgaged to him, but must proceed against that which was allotted to his mortgagor, in substitution, in the partition suit. *HEM CHUNDER GHOSE v. THAKO MONI DEBI*, 20 C. 533. (1 I.A. 106, P.C., F.) [*F.*, 8 C.L.J. 478 = 13 C.W.N. 281, 18 M. 316, 2 C.W.N. 29; *Appr.*, 23 B. 385; *R.*, 10 C.L.J. 150; 101 P.R. 1894, 2 Bom. L.R. 32, 24 A. 483 = A.W.N. 1902, 137.]

(85)—*Mortgage-decree—Execution—Properties in the hands of the receiver.*—Properties in the hands of the Receiver of the Court can be sold in execution of a mortgage-decree, though not in execution of a money-decree. (1 C. 403, *D.*) A proceeding by way of attachment appears to be an interference with the possession of a receiver. *JOGENDRA NATH GOSSAIN v. DEBENDRA NATH GOSSAIN*, 26 C. 127 = 3 C.W.N. 90. [*R.*, 34 C. 427 = 11 C.W.N. 1 = 4 C.L.J. 495.]

(86)—*Decree giving mortgagor possession, reversal of—Mortgagee entitled to get restitution.*—On the reversal of a decree giving mortgagors possession of mortgaged property, mortgagees are entitled to get complete restitution, even if the decree reversing the erroneous decree fail to provide for recovery of possession. *SHAH KOONDU LALL v. RAM RUCHA SINGH*, 14 W.R. 465.

(87)—*Decree giving remedy against hypotheca and against judgment-debtor personally—Option of decree-holder to proceed against person in the first instance.*—A person holding a decree, obtained on a hypothecation-bond, ordering sale of the hypotheca and at the same



**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

time allowing him to proceed against the judgment-debtors personally, is, in the absence of any condition to the contrary in the decree itself, entitled to enforce his decree, at his option, either against the person or against the property of the judgment-debtor. He cannot be compelled to go against the property before seeking his remedy against the person, except where the Court is forced to exercise its equitable jurisdiction, so as to compel him, for the purpose of preventing a fraud being perpetrated on the judgment-debtor. *JOHARI MAL v. SANT LAL*, 9 A. 484 = A.W.N. 1887, 101. (4 A. 497, *Expl.*) [R., 10 A. 35.]

(88)—*Decree for personal debts—Execution against property devolving on judgment-debtor.*—A decree-holder is entitled to execute his decree against any property devolving on the judgment-debtor before the decree has been fully executed, and this without reference to whether the property was hypothecated to him; and the denial of the judgment-debtor that he is interested in the property, which it is sought to make subject to execution, can have no effect. Property to which the judgment-debtor succeeded on the death of his brother's widow will be liable to satisfy the decree against him to the same extent to which in ordinary cases immovable property of a Hindu having sons is liable. *BULDEO SINGH v. DWARKA DASS*, 1 Agra 169.

(89)—*Decree—Money decree—Lien—Mortgage decree.*—In a suit upon a mortgage, a decree was made in the form of a money-decree, but also contained a declaration of lien on the mortgaged property. *Held*, that the decree-holder was not bound to proceed against the mortgaged property in the first instance. *KRISHNOKISHORE DUTT v. ROOP LALL DASS*, 8 C. 887 = 10 C.L.R. 609.

(90)—*Transfer of Property Act, s. 43—Mortgage by Muhammadan woman and her eldest son of entire estate—Suit on mortgage—Exoneration of other children—Subsequent death of one of them—Increase in the share of mortgagors—Liability of such increased share to mortgage-debt.*—A mortgage-bond was executed by a Muhammadan woman and her eldest son on account of a debt contracted by the former's deceased husband, the father of the latter. The other children of the deceased were also joined as defendants in a suit on the mortgage, but they and their shares in the property were exonerated from liability for the debt. Since the passing of the decree, one of those three children died and the decree-holder applied to have attached and sold in execution of his decree, not only the shares of the mortgagors on the date of the decree, but also the shares which devolved on them out of the share of the deceased child. *Held*, that the increased shares also were liable to be attached and sold in execution of the decree. *AJIJUDDIN SAHIB v. SHEIK BUDAN SAHIB*, 18 M. 492. [F., A. W.N. 1908, 155; R., 80 P.R. 1903.]

**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

(91)—*Properties outside and within jurisdiction—Prior and subsequent mortgages—S. 85, T. P. Act, 1882.*—Where properties within Calcutta were mortgaged to the first mortgagee, and these together with other properties out of Calcutta were mortgaged to subsequent mortgagees, in a suit by the first mortgagee against the mortgagor and the subsequent mortgagees, *held* that after the passing of the usual mortgage-decree, a subsequent mortgagee was entitled to proceed against the properties outside Calcutta to realise any balance of mortgage money that might remain due to him, in the same proceeding. *KISSORY MOHAN ROY v. KALI CHURN GHOSH*, 24 C. 190 = 1 C.W.N. 156. [D., 1 C.L.J. 31, 10 C.L.J. 150.]

(92)—*Future interest awarded by foreclosure decree—No charge upon land—Transfer of Property Act (IV of 1882), s. 86—Civ. Pro. Code, s. 209.*—A direction in a foreclosure decree that the defendant, mortgage-debtor, should pay future interest until the date of payment, cannot be legally made as under s. 86 of the Transfer of Property Act, which does not empower the Court to make any order for future interest. Even if such an order could be supported under the provisions of s. 209 of the Civ. Pro. Code, the further order for future interest can, on no ground, be treated as a part of the charge upon the property. It can only be recovered against the defendant personally. *BHAWANI PRASAD v. BRIJ LAL*, 16 A. 269 = A.W.N. 1894, 79. [R., 12 C.P.L.R. 78.]

(93)—*Decree for sale of mortgaged property—Execution before time allowed for payment, whether allowable—Transfer of Property Act, ss. 86, 88*—Where a decree passed under s. 88 of the Transfer of Property Act directed that, if the decree were not satisfied within two months, the property should be sold, execution of it could not be allowed before the expiry of such time. *HAR DAYAL v. CHADAMI LAL*, 7 A. 194 = 8 A.W.N. 1884, 332.

(94)—*Transfer of Property Act (IV of 1882), ss. 88, 89—Necessity for order absolute.*—A decree nisi under s. 88 cannot be executed unless and until it is made absolute under s. 89. *RAM LAL v. NARAIN*, 12 A. 539 = A.W.N. 1890, 97. *Overruled*, 13 A. 278 = A.W.N. 1891, 83; F., 22 C. 931, 8 O.C. 75; R., 25 M. 244, F.B. = 12 M.L.J. 279, 8 C.W.N. 609, P.C., 5 O.C. 251; D., 2 S.L.R. 90.]

(95)—*Transfer of Property Act (IV of 1882), ss. 88, 89—Provision for future interest in decree for sale—Order for sale, Mention of future interest not necessary in.*—When the decree under s. 88 of the Transfer of Property Act provides that the sum due to the plaintiff is to bear future interest up to date of payment, it is not necessary in order to empower the Court, executing the decree to allow such interest, that the order for sale under s. 89 following the directions of the decree should also contain express directions as to future



**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

interest. Whether the subsequent order for sale does not make provision for interest accruing after its date is immaterial. **RAJ KUMAR v. BISHESHAR NATH**, 16 A. 270=A.W.N. 1894, 80.

(96)—Ss. 88 and 89, Act IV of 1882 (*Transfer of Property*)—Decree on simple mortgage directing sale of mortgaged property under certain conditions—Execution of decree.—In a suit for sale on a simple mortgage, if the decree directs that the mortgaged property must be sold if default in payment within a specified period is made, such a decree appears to be substantially a decree under s. 88 of the Transfer of Property Act, i.e., to say, a conditional decree or decree *nisi*; and it is clear from the provisions of s. 89 of the Act that, until an order absolute for the sale of mortgaged property has been made, the judgment-debtor has a right to redeem; consequently, it cannot be executed till an order absolute is made. **TARA PRASAD ROY v. BHOBODEB ROY**, 22 C. 931. (12 A. 539, F.; 16 C. 246, R.; 18 C. 139, D.) [F., 25 C. 133; Appr., 9 M.L.J. 349; R., 5 O.C. 251, 28 C. 73, 23 B. 644, 29 C. 651, 6 O.C. 114, 8 O.C. 75, 6 Bom. L.R. 1043, 11 C.W.N. 156; Cited, 26 C. 337; Diss., 25 M. 244, F.B.; D., 10 C.L.J. 91.]

(97)—*Transfer of Property Act* (IV of 1882), ss. 88, 89, 90—Decree for sale under mortgage—Money-decree.—A mortgagee with a decree for sale of the mortgaged property cannot treat such decree as one for money, which entitles him to ask for attachment of the other property of his mortgagor judgment-debtor. The sections lay down that he must first sell the mortgaged property, and if it does not fetch enough to pay his charge, interest, and costs, then he may ask the Court for a decree for the balance, if it is recoverable personally from the defendant and his other property, and execute that in the ordinary manner as a money-decree is executed. **GOPAL DAS v. ALI MUHAMMAD** 10 A. 632=A.W.N. 1888, 254. [R., A.W.N. 1889, 149.]

(98)—*Transfer of Property Act* (IV of 1882), ss. 88, 89, 90—Mortgage-decree for sale of mortgaged property—Sale-proceeds insufficient to satisfy mortgage—Decree for balance is to be in same suit.—Where the proceeds of the sale under a mortgage-decree are insufficient to satisfy the debt, the further decree contemplated by s. 90, read with ss. 88 and 89, is one in the same suit, and a fresh suit to obtain such decree need not be instituted. **RAJ SINGH v. PARAMANAND**, 11 A. 486=A.W.N. 1889, 191. [Diss., 1 N.L.R. 143, 33 C. 867=4 C.L.J. 141; R., 13 A. 356, 14 A. 513; 28 A. 365=3 A.L.J. 171=A.W.N. 1906, 44.]

(99)—*Transfer of Property Act*, ss. 88, 90—Decree not satisfied by sale of mortgaged property—Sale of other property—Rights of mortgagee.—The terms of s. 90 clearly contemplate a decree in the suit for recovery of the mortgage money after sale of the mortgaged properties

**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

under a decree given under s. 88. The decree-holder can then apply to the Court, and if he can show that, after the sale of the mortgaged properties, there is still a balance due to him under the decree obtained under s. 88, and that that amount is legally recoverable from the judgment-debtor, mortgagor, he can ask for and obtain a decree within the terms of s. 90 for realization of the balance from other properties of the debtor. **SONATUN SHAH v. ALI NEWAZ KHAN**, 16 C. 423. [Diss., 14 A. 513=A.W.N. 1892, 80; R., 11 A. 486, 21 C. 26, 4 C.L.J. 141=33 C. 867.]

(100)—Ss. 88, 90, Act IV of 1882 (*Transfer of Property*)—Decree under s. 88, Act IV of 1882—Sale of mortgage property—Decree-holder's procedure for a decree for balance.—Where the decree under s. 88, Act IV of 1882, merely gives the mortgagee a right to sell the mortgaged property and to satisfy his decree from the proceeds, but did not expressly give him any right against any other property or the person of the judgment-debtor, held, that it is necessary for him to apply under s. 90 for a decree for the balance. **LALA TIRHINI SAHAI v. LALLA HURRUCK NARAIN**, 21 C. 26. (16 C. 423, 13 A. 360, R.) [R., 33 C. 867=4 C.L.J. 141.]

(101)—*Transfer of Property Act* (IV of 1882), ss. 88, 90—Court executing decree cannot go behind its terms.—The Court executing a decree cannot go behind its terms and declare that such and such terms can be executed while such and such other terms are based on errors of law or of procedure and may not be executed. Where, therefore, in a suit on a mortgaged bond, decree was passed not merely under s. 88 for the sale of the mortgaged property but also against non-hypothecated property and also personally against the defendant, and the defendant submitted to it and it became final against him, held that the decree holders in such a case could proceed against the non-hypothecated property by way of execution, and it was not necessary for him to apply to the Court for a decree under s. 90. **LALJI LAL v. C. J. BARBER**, 15 A. 334=A.W.N. 1893, 121, (14 A. 513, D.)

(102)—*Transfer of Property Act* (IV of 1882), s. 90—"Legally recoverable," meaning of.—The words "legally recoverable" in the section mean that the balance must be a balance which the mortgagee is not precluded by the terms of the mortgage from realizing otherwise than out of the property sold, or a balance the recovery of which is not barred by limitation, e.g., the suit might have been brought at a period of time when, if the plaintiff was relying on his personal remedy against the defendant, his suit for such remedy would be barred by time, although within time, as a suit for sale on the mortgage. (14 A. 513, R.) Plaintiff held two decrees, for sale under two separate mortgages of the same property. In execution of one of the decrees a third person purchased the property and the sale-proceeds were sufficient to



**Execution of Decree—continued.****— 10.—Mode of Execution—continued.**

satisfy only that decree. Within three years from that date when the money due under the latter of the two bonds became payable, plaintiff applied for a personal decree under s. 90 of Act IV of 1882. *Held*, that he was entitled to such a decree as there was a balance legally recoverable otherwise than out of the property sold. *BAGESHRI DIAL v. MUHAMMAD NAQI*, 15 A. 331 = A.W.N. 1893, 120. [Appr., 6 O.C. 30; R., 20 A. 386, A.W.N. 1899, 72; D., A.W.N. 1899, 208, 31 A. 373 = 6 A.L.J. 451.]

(103)—*Transfer of Property Act (IV of 1882), s. 90, application under—Balance legally recoverable—Limitation.*—Under s. 90 of the Transfer of Property Act, the balance which must be legally recoverable should be a balance which might be legally recoverable on the date of institution of the suit, and not the date on which application for a decree under the section was made. *HAMID-UD-DIN v. KEDAR NATH*, 20 A. 386 = A.W.N. 1898, 83. (15 A. 331, R.) [R., 6 O.C. 30, 3 C.L.J. 403, 33 C. 867 = 4 C.L.J. 141, 30 A. 388 = 5 A.L.J. 670 = A.W.N. 1908, 161.]

(104)—*Transfer of Property Act (IV of 1882), s. 80—Nature of decree under the section—Execution of decree.*—A decree on a hypothecation bond directed that the decretal amount was to be realized by sale of the hypothecated property and in the event of that proving insufficient, by sale of other property of the obligor. The entire debt not being satisfied by the sale of the hypothecated property, the decree-holder applied to proceed against the other property of the judgment-debtor. Upon objection by the latter that it could not be done without a decree under s. 90, the decree-holder applied for and obtained such decree. On appeal by the judgment-debtor that such latter decree was superfluous under the circumstances, *held* that the decree under the section was in fact an order to be obtained in execution of a decree for sale; and that although such a decree was superfluous in the present instance, it might, nevertheless under the circumstances, be regarded as an application for execution of a decree by enforcement of a portion of it against property other than the hypothecated property. *DURGA DAI v. BHAGWAT PRASAD*, 13 A. 336 = A.W.N. 1891, 104. [Diss., 33 C. 567 = 4 C.L.J. 141; F., 21 A. 453; R., 14 A. 513 = A.W.N. 1882, 80, 6 O.C. 114, 28 A. 365 = A.W.N. 1906, 44 = 3 A.L.J. 171.]

(105)—*Construction of mortgage-decree, in substance though not in form—S. 90, T.P. Act, 1882.*—A decree, making the mortgaged properties liable (*pae band kea jae*) for realization of the decretal money, passed in a mortgage suit, in which, the mortgagee asked for a decree under the provisions of the T.P. Act, must be regarded as a mortgage decree governed by the T.P. Act, though not made in the form prescribed by that Act. So it is not open to the decree-holder to ask in the first instance for the sale of properties other than those mortgaged,

**Execution of Decree—continued.****— 10.—Mode of Execution—continued.**

before exhausting the latter, and without obtaining an order such as is prescribed by s. 90 of the Act. *LAL BEHARY SINGH v. HABIBUL RAHMAN*, 26 C. 166 = 3 C.W.N. 8. (22 C. 813, D.; 24 C. 473, 25 C. 580, R.) [R., 2 O.C. 337, 22 A. 401 = A.W.N. 1900, 131, 4 C.L.J. 533.]

(106)—*Transfer of Property Act (IV of 1882), s. 90—Mortgage—Decree against mortgaged property and also against person and other property of judgment-debtor—Separate decree under the section unnecessary.*—Where in accordance with the prayer in the plaint, the decree was partly a decree for sale of the mortgaged property by enforcement of the security, and it also declared that, in the event of the mortgaged property being insufficient to pay the mortgage-debt when sold, the balance should be recoverable from the other property and person of the judgment-debtor, *held* that such a decree could be executed against the person and other property of the judgment-debtor, and that it was not necessary for the decree-holder to obtain a separate decree under s. 90 of the Act. *BETAK NATH v. PITAMBAR DAS*, 13 A. 360 = A.W.N. 1891, 127. (1 A.W.N. 1890, 142, R.) [R., 5 M.L.T. 246, 32 M. 534; D., 14 A. 513, 21 C. 26.]

(107)—*Mortgage—Suit for sale—Personal liability of mortgagor—Relief against other property—Applicability of res judicata to proceedings under s. 90, Transfer of Property Act.*—Even in the absence of any provision in the mortgage-deed to pay the mortgage-money otherwise than out of the mortgaged property, there is still the implied promise to pay, which, if there is nothing in the mortgage from which a contrary intention should be inferred, the law will presume from the fact of the mortgagors accepting the loan. The mortgage contains within itself so to speak, a personal liability to re-pay the amount advanced. (A.W.N. 1889, 149, 13 A. 360, 11 A. 486, A.W.N. 1890, 142, 13 A. 356, R.) In a suit for sale, the first decree should be one under s. 88 of the Transfer of Property Act against the mortgaged property, and any subsequent relief to which, after that decree had been executed, the plaintiff may be entitled, should stand over for a decree under s. 90. The time of making an application under s. 90 and for the Court making a decree under that section does not arrive until the remedies under ss. 88 and 89 have been exhausted. When, on the decree under s. 88 being executed it fails to discharge the money due under the mortgage, then for the first time the Court gets power, to decree the sale of non-hypothecated property. S. 13 of the Civ. Pro. Code, therefore, would not apply to an application under s. 90, no matter whether the plaintiff had or had not claimed originally, in his suit subsequent relief, or whether, if claimed, such subsequent relief had been allowed or disallowed by the Court when making the decree under s. 88, the time for adjudicating on the claim for subsequent



**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

relief not arriving until that decree itself had been exhausted. *MUSAHEB ZAMANKHAN v. INAYAT-ULLAH*, 14 A. 513 = A.W.N. 1892, 80. (16 C. 423, Disc.) [Diss., 28 A. 365 = A.W.N. 1906, 44 = 3 A.L.J. 171; F., 15 A. 331, 20 A. 512, 21 A. 453; Appr., 20 A. 386, 2 A.L.J. 379 = A.W.N. 1905, 144; R., A.W.N. 1899, 72, A.W.N. 1899, 208, 6 O.C. 30, 1 N.L.R. 143, 33 C. 867 = 4 C.L.J. 141, 4 C.L.J. 246, 510, 13 C.W.N. 138 = 9 C.L.J. 5, 5 M.L.T. 246; Diss., 15 A. 334.]

(108)—*Decree for satisfaction of judgment-debt, out of property mortgaged, whether could be executed by arrest of judgment-debtor—Construction of decree—Execution to be restricted to terms of decree—Res judicata in execution proceedings.*

—The decree in this case merely ordered that the judgment-debtor was to satisfy the adjudication "on the answerability or liability of the property mortgaged." There was no order for any payment by the judgment-debtor independently of the property mortgaged. The decree was anomalous and could not be extended beyond the scope of its terms. So the present application for execution against the person of the judgment-debtor was refused. It was urged that the question of the true construction of the deed was already *res judicata* in this case between the parties when the present application was made to the Court. But it was held, that the question of the judgment-debtor's personal liability had not been heard and finally decided on adjudication in the prior proceedings, and so there was no *res judicata*, although, if the possibility of such personal liability had been once determined on contest, that determination so long as it stood unreversed, would, no doubt, be binding on the parties, whether the term *res judicata* properly applied to it or not. *SHEIK BUDAN v. RAMCHANDRA BHUNJ-GAYA*, 11 B. 537. [F., 10 A. 127 = A.W.N. 1888, 21; Rel. on, 14 C.W.N. 433 = 11 C.L.J. 357 = 5 Ind. Cas. 89; R., 13 B. 821, 22 B. 83, 28 M. 355 = 15 M.L.J. 247, 30 M. 255 = 17 M.L.J. 201 = 2 M.L.T. 167, 17 M.L.J. 311, 11 O.C. 220, 12 C.L.J. 312 = 7 Ind. Cas. 55; D., 24 B. 77.]

(109)—*Hindu Law - Decree against undivided brother—Mortgage of family property.*—A mortgage-decree obtained against one of the members of an undivided Hindu family, who alone had executed the mortgage, and who had not been impleaded as the managing co-parcener or representative of the family, does not bind his other brothers. A direction in the decree that the property (which is not described as family property) be delivered to the plaintiff by way of absolute sale, does not avail against the other brothers, and the decree cannot be executed as against them. *GURUVAPPA v. THIMMA*, 10 M. 316. [R., 12 M. 325.]

(110)—*Joint property, Execution of—Procedure.*—A judgment-debtor was jointly interested with another person in immoveable property, and the judgment-creditor sought to sell it in

**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

execution of his decree; held, that the ordinary procedure in such cases was to put up for sale the right, title and interest of the judgment-debtor in his undivided share of the property to be sold. Where the Court below adopted a different procedure, and, after partitioning the property, put up for sale the divided share of the execution debtor, the High Court in the exercise of its extraordinary jurisdiction, refused to interfere in consequence of the laches of the applicant in neglecting to avail himself of an opportunity, which the lower appellate Court had given him, of showing that the partition which had been made was injurious to him. *MATHURADAS GOVARDHANDAS v. FATMA ULKA BEGAM*, 5 B.H.C. A.C., 63.

(111)—*Joint family house, share-holder in—Partition, Right to—Nature of right.*—Case where it was held that the person entitled to a share in a joint family house has an absolute right to the partition of his own specific share in every single part of the premises. *ESHAN CHUNDER BANERJEE v. NUND COOMAR BANERJEE*, 8 W.R. 239. (2 W.R. Mis., 30, F.B., F.)

(112)—*Decree declaring judgment-debtor's right to portion of property—Partition before sale of debtor's property—Purchaser and co-sharer of debtor.*—A decree merely declared the right of a judgment-debtor in certain property to extend to two-thirds of it; the lower Court divided the property before selling the debtor's share. Held, that as the decree did not specify that any particular portion of the property belonged to the debtor as his share, his right, title and interest in the property could only be sold and that this right must be determined in a future adjudication between the purchaser and the co-sharer of the debtor, unless an arrangement could be arrived at. *ATMARAM KALLIANDAS v. FATMA BEGAM*, 5 B.H.C. A.C., 67.

(113)—*Civ. Pro. Code, ss. 263, 332—Delivery of possession under the section, what constitutes—Decree for partition.*—The delivery of possession which is directed to be given by s. 263 of the Civ. Pro. Code, 1882, contemplates the decree-holder being placed in actual possession, and the language of s. 332 of the Code shows that the possibility is assumed that in effecting such delivery a third person may become dispossessed, by which must be understood that such a state of things may have occurred as would amount to his dispossession in the eye of the law, or what is sometimes called judicial dispossession. The mere formal delivery of possession, which consists in the reading by the officers on the land of the order for putting the decree-holder in possession, and taking a receipt from him, cannot of itself effect such dispossession. Whether what occurs on the occasion of giving such formal delivery has that effect, is a question of law and fact, and there is no dispossession in the eye of the law, unless the deprivation of possession is complete as a fact, a conclusion which the Court has to form



**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

on the whole of the evidence, although what may occur may amount to a disturbance or obstruction of possession. It does not make any difference if such a decree is in a partition suit. *RAMCHANDRA SUBRAO v. RAVJI*, 20 B. 351, F.B. [R., 21 B. 98, 27 M. 262.]

(114)—*Execution of decree—Property partly ascertained and partly unascertained—Duty of Court—Act X of 1877, ss. 211, 212.*—In a suit for declaration of a right to certain property and partition, a compromise was entered into by which it was agreed that certain property, already ascertained, should be divided in certain proportions, and that certain other property, not yet ascertained, should, on being ascertained, be partitioned on the same basis. A decree was passed in those terms. *Held*, that the Court, in executing the decree which was made, must restrict itself to dealing with those properties and sums of money which had been ascertained at the time when the decree was made. With regard to the other property, the decree must be taken as declaratory only. The Court, in executing a decree, is bound by the terms of the decree, and it is only in cases provided for by ss. 211 and 212 of Act X of 1877 corresponding with ss. 196 and 197 of Act VIII of 1859 that it is at liberty to determine the rights of the litigants in proceedings taken after decree. *RAM LALIT RAM v. CHOOARAM*, 4 C.L.R. 97.

(115)—*Decree for partition, Execution of—Power of executing Court to put up partition walls—Civ. Pro. Code, s. 396.*—Under s. 396 of the Civ. Pro. Code, it is not competent to the Court executing a decree for partition, to direct one of its officers to have a wall built between the portions of the separated property. The word 'bounds' in third paragraph of s. 396 cannot be taken to include a wall to be built for the purpose of separating distinct portions of the property to be partitioned. So, where the plaintiff selected one of the two lots put up by him under the Court's directions and the defendant took the other lot, and they were put in possession of such respective portions, the execution being thus complete, the Court was held to have no jurisdiction to direct a wall to be built, and its order in that respect was therefore *ultra vires*. *SOHAN LAL v. HARDEO SAHAI*, 19 A. 194 = A.W.N. 1897, 16.

(116)—*Decree for undivided share after removal of trees—Execution—Separation of share—Civ. Pro. Code, s. 265—Act XIX of 1873 (N.W.P. Land Revenue Acts), ss. 107, 139—Partition of Mahal.*—A decree for an undivided share of certain land after removal of the trees planted thereon, cannot entitle the decree-holder to remove the trees from a large area than that to which he was entitled, and can only, as it stands, be executed to the extent of placing him in joint possession along with the owners of the remaining shares. And so long as the possession remains joint, and his share remains unascertained, the trees cannot be removed. Such a decree not being one, "for the partition of or

**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

separate possession of a share of an undivided estate paying revenue to Government," the intervention of the Collector cannot be invoked under s. 265 of the Civ. Pro. Code, for the purpose of executing it. What the Court of first instance ought to have done to meet the exigencies of the decree was, to separate the decree-holder's share, and, in execution, to order the removal of the trees from such share. *RAM DAYAL v. MEGU LAL*, 16 A. 452 = A.W.N. 1884, 165. [R., A.W.N. 1908, 197; D., 10 A. 5.]

(117)—*Execution of decree obtained against one of several partners*—Where a decree has been passed personally against one of the several partners of a firm, it cannot be executed by seizing part of the partnership property and by selling that part and then distributing the proceeds between the execution creditor and the other partners of the firm. *KESHAB GOPAL GINDE v. RAYAPA*, 12 B.H.C. 165.

(118)—*Sale of portion of family residence of judgment-debtor—Rights of purchaser.*—The share in the family residence of a judgment-debtor having been sold in execution, the purchaser in a suit for possession obtained a decree directing that he be put in possession in such a manner as not to annoy or insult the inmates of the house. The purchaser, however, could not make use of the family stair-case and was obliged to build a separate stair-case because of the annoyance to which the ladies of the family might otherwise be exposed, and he was, under the circumstances, held to be entitled to compensation to the extent of the value of his share in the stair-case which happened to be one-seventh, the house being the property of seven brothers. *ODOY CHUNDER MULLICK v. PITAMBUR PYNE*, 6 W.R. Mis., 75.

(119)—*Share in family dwelling house and service rents—Right of execution purchaser.*—The execution purchaser of the interest of one of several joint tenants in a family dwelling house and in certain lands let out in service tenure is entitled to joint possession of the dwelling house with the other share-holders, and also to a right to share in the service rents. *RAJANI KANT BISWAS v. RAM NATH NEOGY*, 10 C. 244. (B.L.R., Sup. Vol., 172 = 2 W.R., Mis., 30, *Commented on.*)

(120)—*Joint family property—Suit to recover immoveable property sold in execution for debt of one member of joint family—Lien, Declaration of, in favour of defendant not enforceable as a decree—Equity.*—In a suit by certain members of a joint Hindu family to recover from the auction purchaser certain immoveable property which had been sold in execution of a decree against one member of the family, a decree was obtained for possession subject to a lien in favour of the defendant for the re-payment of the debt for which the original decree had been made, with interest at 6 per cent. up to the date of realization. *Held*, that the contention



**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

in favour of the defendant was not a decree, and could not be treated as such so as to be capable of being put in execution. *RAMANAGRA SINGH v. RAMYAD SINGH*, 5 C.L.R. 176. (3 B.L.R., F.B., 31, R.)

(121)—*Purchaser of debtor's share in family dwelling house—Suit for chambers and ground—Adjudication of purchaser's claim to land.*—In a suit by the purchaser of a debtor's share in a family dwelling house with gardens and tanks, for the recovery of chambers and ground, although the Court has found that the plaintiff has no right to the chambers in the family dwelling house, however worthless the land may appear without the residence and however inconvenient may be the intrusion of a stranger into the family dwelling house, the plaintiff has a right to have his claim to the land adjudicated. *BUDDUN CHUNDER MADUCK v. CHUNDER COOMAR SHAHA*, 5 W.R. 218.

(122)—*Hindu Law—Joint family—Money-decree against deceased member—Execution against joint family property after judgment-debtor's death, if maintainable.*—Where a decree-holder, having obtained a mere money-decree against a member of a joint Hindu family, took no steps in the life-time of such member to obtain attachment under or execution of the decree, held he could not bring to sale, after the death of the judgment-debtor, the interest which the latter had in the joint family property. *JAGANNATH PRASAD v. SITARAM*, 11 A. 302=A.W.N. 1889, 81. (5 C. 148, 7 A. 131, 8 A. 495, R.) [R., 16 A. 449, 34 C. 642=11 C.W.N. 593=5 C.L.J. 491=2 M.L.T. 207; D., 16 C.P.L.R. 19, 5 C.L.J. 80=11 C.W.N. 163.]

(123)—*Joint family—Money-decree obtained against father—Remedy of judgment-creditor against ancestral property, in son's hands—Defence open to the son on suit by such creditor.*—The separate and self-acquired property of the father in a joint Hindu family governed by the Mitakshara Law, which had not become an accretion to the joint family property in the father's life-time, would, on the death of the father and in the hands of the son, be assets of the father against which a decree obtained against the father alone could be executed after his death, whether the debt covered by the decree was or was not tainted with immorality. Ancestral property in the hands of such a son, however, are not assets of the deceased father, and the son's right to such property is not that of an heir or legal representative of his deceased father, but that of a surviving coparcener. Consequently, the father's creditor who had obtained a simple money decree cannot obtain execution of that decree against the ancestral property in the hands of the son in a proceeding against him instituted after the death of the father. It is open to the son to prove that the property was ancestral property in his hands and not assets representing separate property left

**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

by the father, and, in such a case, if the creditor desires to obtain a remedy against such property in the son's hands, he must seek that remedy in a suit against the son, in answer to which suit when brought the son will be entitled to prove that it is barred by limitation, that the debt was tainted by immorality, or any other matter which would be a defence to the suit against him. *LACHMI NARAIN v. KUNJI LAL*, 16 A. 449=A.W.N. 1894, 169. (6 I.A. 88=5 C. 148, 13 I.A. 1=13 C. 21, 15 A. 751, 12 A. 313, 11 B. L.R. 149=18 W.R. 185, 12 A. 73, 3 M. 42, 10 M. 283, 11 M. 413, 13 M. 265, 9 A. 142, 11 A. 602, 20 C. 895, R.) [Diss., 34 C. 642, F.B.=11 C.W.N. 593=5 C.L.J. 491=2 M.L.T. 207; Not F., 20 B. 385; F., 3 A.L.J. 663=A.W.N. 1906, 281, 6 C.W.N. 223; R., 17 A. 537, F.B., 19 A. 26=A.W.N. 1896, 182, F.B., 1 O.C. 53, 21 A. 301, 6 O.C. 271, 3 A.L.J. 127=A.W.N. 1906, 10, 8 C.W.N. 843, 1 N.L.R. 173, 4 A.L.J. 197, Note; D., 16 C.P.L.R. 19, 11 C.W.N. 163=5 C.L.J. 80.]

(124)—*Execution of decree passed against husband and wife—Order for imprisonment of married woman, Illegality of—Application for release—Liability under decree to extent of stridhan only.*—A decree passed in a suit on a bond in which the petitioner had joined with her husband as surety simply directed her to pay the debt. Under the decree she was liable in law to the extent of her *stridhan* only. A wrong order for imprisonment having been, however, passed against her, she put in this application for release from prison. It was virtually an application for the review of the order for her imprisonment on the ground that it was contrary to law. It was contended that she should have taken the objection when she was arrested and brought before the Judge and that her omission to do so should be deemed a waiver of her right of exemption from arrest, but it was held that, having regard to the nature of the right claimed, there could have been no waiver and it was one which it was the duty of the Court to consider on review, however late the application might have been. *In re the petition of RADHI*, 12 B. 228.

(125)—*Decree providing for future maintenance—Arrears of maintenance—Execution—Suit.*—Where a decree has been passed providing for future maintenance, arrears of maintenance, can be recovered by process of execution in the suit in which the decree was passed; and where they can be so recovered they cannot be made the subject to a fresh suit. *SINTHAYEE v. THANAKAPUDAYEN*, 4 M.H.C. 183. [Appr., 19 C. 139, F.B.]

(126)—*Hindu law—Maintenance decree in favour of widow—Execution—Liability of ancestral estate.*—Maintenance decreed to a coparcener's widow, by reason of her exclusion from succession in a joint family, cannot be regarded as a charge on the family estate, or the decree treated as a decree against the managing member of the family for the time being,



**Execution of Decree—continued.****—10.—Mode of Execution—continued.**

In a regular suit, the undivided son of the judgment-debtor under the maintenance decree, may be held liable to pay the maintenance to the decree-holder, and a decree may be passed against him; but, in execution-proceedings, the decree must be taken as it stands, and if it is a personal decree against the judgment-debtor, it must be executed against the son as his legal representative in the mode prescribed by s. 234, Code of Civil Procedure, and it is not open to extend the scope of the decree in such proceedings. But the case is different if the defendant has been sued as representing the family, or if the maintenance has been charged on the joint family property. *MUTTIA v. VIRAMMAL*, 10 M. 283, F.B. (5 M. 234, *Appr.* & F.) [F., 24 M. 689; R., 13 M. 265, 19 O. 139, F.B., 16 A. 449, 27 M. 106, 8 C.W.N. 843, 30 M. 324=17 M.L.J. 180=2 M.L.T. 83, 17 M.L.J. 541.]

(127)—*Maintenance decree — Execution for arrears of maintenance — Maintainability.*—A decree for maintenance, by payment of a fixed rate per mensem, stands exactly on the footing of a decree ordering payment by instalments, and is not a declaratory decree merely. The decree-holder can enforce payment of the arrears of maintenance by executing the decree, and is not bound to bring separate suits therefore. *MANSA DEBI v. JIWAN LAL*, 9 A. 33. (15 W.R. 128, R.) [*Appr.*, 19 C. 139; R., 13 C.P.L.R. 156.]

(128)—*Decree for maintenance—Omission to specify dates of future payment—Limitation for enforcing decree.*—Where, besides awarding to the plaintiffs the amount of maintenance accrued due to them for one year before the institution of the suit, the decree declared their right to receive such allowance in the future at a particular rate, but contained no order that the payment was to be made in any given month or upon any day of a month, the decree being merely declaratory of plaintiff's the right to future maintenance, held that the payment of such maintenance could be enforced only by suit brought thereon from time to time. *RAM DIAL v. INDAR KUAR*, 16 A. 179=A.W.N. 1894, 17. [R., 17 M.L.J. 423, 13 C.P.L.R. 156.]

(129)—*Decree awarding future maintenance—Maintenance, when falling due, can be recovered in execution—Further suit not necessary.*—A decree having been made declaring a person's right to maintenance at a certain rate, and directing the payment of such maintenance in future, such maintenance, when due, can be recovered in execution of that decree without further suit. *ASUTOSH BONERJEE v. LUKHI MONEE DEBIA*, 19 C. 139, F.B. [R., 17 M.L.J. 423, F.B.; D., 16 A. 179=A.W.N. 1894, 17, 22 C. 903.]

(130)—*Decree for sale of dewutter property—Right of decree-holder to insist on sale.*—Where a decree expressly declares that whatever right the judgment-debtor has in a dewutter property

**Execution of Decree—continued.****—10.—Mode of Execution—concluded.**

is to be sold in execution, the decree-holder is entitled to insist on that right being sold, though the property was held by the judgment-debtor only as *shebait*. *PRANNATH PANREY v. SREE MONGULA DEBIA*, 8 W.R. 176. [F., 8 B. 185; D., 7 W.R. 266.]

Suit to restore attachment removed at instances of intervenient, Court-fees payable on—See COURT FEES, 4 B. 515, F.B.

See DECREE—DECREE, FORM OF, 26 C. 441=3 C.W.N. 139.

See EQUITY OF REDEMPTION, 4 B.L.R., O.C., 83.

See HINDU LAW—PARTITION, 18 W.R. 23,

Hindu widow, maintenance, decree in favour of—Direction in decree for payment of arrears—Mere declaration as to right to future maintenance—Necessity of fresh suit in respect of future maintenance—See HINDU LAW—WIDOW, 9 B. 108.

See MALABAR LAW—MISCELLANEOUS, 11 M. 378.

See ST. 11 AND 12 VIC., C. 21, 3 B.H.C., O.C., 25.

See SURETY—DISCHARGE OF SURETY, 4 C. 331, P.C.

Security for restitution of costs paid over to decree-holder—Surety, whether can be proceeded against in execution—See SURETY—LIABILITY OF SURETY, 8 A. 639=A.W.N. 1886, 238.

See TRANSFER OF PROPERTY ACT, 1882, S. 90, 20 A. 512=A.W.N. 1898, 133.

**—11.—Native States, Decrees of Courts of.**

(1)—*Decree of foreign Court. Execution of, in British India.*—Under the Code of Civil Procedure, a Court in British India is not competent to execute a decree transferred to it by any Court in a Native State out of British India. *HUKUM CHAND ASWAL v. GYANENDRA CHUNDER LAHIRI*, 13 C. 95.

(2)—*Decree obtained in Native State, Nature of—Civ. Pro. Code, 1882, s. 229-B—Want of jurisdiction in Court which passed decree—Execution in British India of decree of Native State—Fraud—Discretion and duty of Court.*—S. 229-B of the Civ. Pro. Code, 1882, does not remove the decree of a Native State falling within its purview from the category of foreign judgments. It merely alters the procedure by which such a judgment can have effect given to it in British India. Notwithstanding the section, such a decree still remains a foreign judgment, and its effect is removed by showing want of jurisdiction in the Court which passed it. [R., 17 A. 478, 21 B. 456, 14 C.P.L.R. 92, 6 Bom. L.R. 342=28 B. 378.] Where the execution of a decree obtained in a Native State is taken out against the defendant residing in British India,



**Execution of Decree—continued.****—11.—Native States, Decrees of Courts of—concluded.**

the Court in British India is entitled to exercise a judicial discretion as to whether it would put into force the provisions of s. 229-B of the Civ. Pro. Code, 1882. The Court is under no obligation to execute the decree of a foreign Court where it is shown that it had been obtained by fraud. Where such a decree is sought to be executed, relief can only be obtained by pointing out the fraud to the executing Court and asking that Court to refrain from executing the decree. The Court will not send British subjects, subject to its territorial jurisdiction, into a foreign country to seek there to be relieved from a fraudulently obtained decree, but will itself refuse to give effect to such a decree. **Haji Musa Naji Ahmad v. Purmanand Nursey**, 15 B. 216. [R., 4 M.L.J. 254, 24 B. 86, 48 P.R. 1906=104 P.L.R. 1906.]

(3)—*Execution in British India of decrees of Native States, Cooch Behar—Properly certified copies, Want of.*—Where a decree of the Court of the Civil Judge of Cooch Behar was sent for execution to a British Court, and the copy of the record, instead of being signed by the Judge, was signed only by the Sberistadar, held, on appeal, that the executing Court acted properly in returning the record to the Cooch Behar Court to be properly certified, and that it should have even set aside the execution proceedings as altogether void. **Ganee Mahomed Sarkar v. Tarini Charn Chuckerbati**, 14 C. 546.

**—12.—Notice of Execution.**

(1)—*Notice required by s. 248, Civ. Pro. Code, 1882, a condition precedent to the execution of decree.*—The issuing of the notice required by s. 248 of the Code of Civil Procedure is a condition precedent to the execution of a decree against the representative of a deceased judgment-debtor. **Gopal Chunder Chatterjee v. Gunamonee Dass**, 20 C. 370.

(2)—*Execution of decree of deceased judgment-debtor—Importance of notice to the legal representative.*—An omission to give a notice under s. 248 of the Civ. Pro. Code to the legal representative of a deceased judgment-debtor affects the validity not only of a sale in execution of the decree but of the entire proceedings in execution; and the Court should set aside any such execution immediately on becoming aware that no notice had issued. **Ramessuri Dassee v. Doorga Dass Chatterjee**, 6 C. 103=7 C.L.R. 85. [F., 3 A. 424=A.W.N. 1881; D., 23 C. 686; R., 10 A. 506, 21 C. 19, 21 B. 424, F.B.]

(3)—*Want of notice required by s. 248, Civ. Pro. Code, vitiating the entire execution proceedings—Auction-purchaser being a third party—Effect.*—Where a notice was necessary under s. 248, Civ. Pro. Code, but without such notice being given, moveable property was attached and sold, held, that the omission to give the notice required by s. 248 to be given

**Execution of Decree—continued.****—12.—Notice of Execution—continued.**

to the judgment-debtor rendered the whole of the execution-proceedings altogether bad and ineffectual to bind the judgment-debtor, so that the sale could not be sustained. The fact that the auction-purchaser was a third party and not the decree-holder himself did not make such difference. **SAHDEO PANDEY v. GHASIRAM GYAWAL**, 21 C. 19. (3 A. 424, F.; 6 C. 103, R.) [R., 21 B. 424, F.B., 9 Bom. L.R. 323; D., 28 A. 193=2 A.L.J. 640=A.W.N. 1905, 241.]

(4)—*Execution of decree more than a year old—Duty of Court.*—A decree more than a year old ought not to be executed by a Court without proof that notice has been duly served on the parties against whom execution is applied for. **Raj Eullub Shaha v. Gossaim Dass Shaha**, 13 W.R. 400.

(5)—*Civ. Pro. Code, 1859, ss. 119, 216—Notice under s. 216 and summons, Difference between—Presumption as to notice—Application to set aside ex parte decree—Order on application—Finality.*—A notice under s. 216, Act VIII of 1859, differs from a summons or other notice which a party is bound to serve, and the presumption would be, until the contrary should appear, that the Court has duly issued such notice when required by law to do so. A Moonsiff's order deciding that an application to set aside an *ex parte* decree is in time does not come under s. 119, Act VIII of 1859, and such order is not final. **Bimola Soonduree Dassee v. Kallee Kishen Mojoondar**, 22 W.R. 5. [F., 25 W.R. 304, 2 C. 114; Expl., 23 W.R. 147.]

(6)—*Sufficiency of notice of execution, Objection as to—Stage of objection.*—Case where it was held that an objection in respect of the sufficiency of the notice of execution should be raised at the earliest opportunity; and not after the execution sale, where the process of execution was known to the judgment-debtor. **Mussamut Rewut Koonwar v. Omrao Bahadoor Singh**, 21 W.R. 148.

(7)—*Service of notice on house of residence, Sufficiency of—Defendant in execution—Application not appearing upon notice, debarred from objecting to application.*—Service of a notice of application for execution of a decree, by affixing a copy of it on the wall of the house in which the defendant (who was absent from his village) was then residing is sufficient; and the defendant, when he does not appear on the notice, will not be allowed, on a subsequent application for execution of the decree, to object to the reception of the application and the proceedings upon it. **Raja Chilicany Baskararayeningaru v. Pillary Setty Ragavulu Naidu**, 5 M.H.C. 100. [D., 2 M. 1.]

(8)—*Decree of twelve years' standing, Execution of—Notice—Presumption of service of.*—In a case of execution of a decree of twelve years' standing, the presumption arises that notices, as



**Execution of Decree—continued.****—12.—Notice of Execution—concluded.**

usual, were served, unless evidence is produced to the contrary. **KASEE KANT TALOOKDAR v. GOPAL KISTO MOITRO, W.R. 1864, 314.**

(9)—*Act VIII of 1859, s. 212 — Application under—Notice to judgment-debtors.*—A Judge is bound to refuse to proceed on an application to give notice to judgment-debtors when there is before him no application to execute, drawn up in conformity with s. 212, Act VIII of 1859. **PURNA CHANDRA MOOKERJEE v. SARADA CHARAN ROY, 3 B.L.R. App., 21=11 W.R. 241. (7 W.R. 535, D.) [R., 3 B.L.R., A.C., 114.]**

(10)—*Act VIII of 1859, s. 216—Service of notice — Bona fide proceedings.*—Service of notice under s. 216, Act VIII of 1859, if made bona fide with a view to take further proceedings, is sufficient to keep a decree alive. **MAHARAJA DHIRAJ MAHTAB CHAND BAHADUR v. LAKHI BIBI, 6 B.L.R. App., 146.**

(11)—*Civ. Pro. Code, 1859, s. 216 — Order passed on previous application for execution—Judgment creditor's suit against judgment-debtor and third party—Previous execution proceedings.*—A judgment-creditor's suit against his judgment-debtor and a third party, though it may be treated previous proceedings in execution for the purpose of saving time in regard to the law of limitation, is not, however, "an order passed on a previous application for execution" within the meaning of Act VIII of 1859, s. 216. **PEARRE SOONDUREE DEBIA v. BHUBO SOONDUREE DEBIA, 23 W.R. 81.**

(12)—*Plaintiff dispossessed—Wassilat and interest directed to be assessed during execution—Interest, Reckoning of.*—In execution of a decree directing wassilat together with interest to be assessed during the execution proceedings, in respect of the period of plaintiff's dispossession, interest cannot be calculated upon each of the separate sums due in respect of the several years of dispossession. **AJODHYA PERSEAD v. JOWAHIR LALL, 22 W.R. 484.**

**—13.—Privy Council, Execution of Orders and Decrees of.**

(1)—*Execution of decree pending appeal to England—Duty of Zillah Courts to refer parties to High Court.*—When parties apply for execution of decrees which have been appealed to England, the Zillah Court to which such application might have been made must hold its hand and merely refer the parties to the High Court. **HUBEEBOULLAH KHAN v. KHAJAH GOWHER ALI KHAN, 7 W.R. 225.**

(2)—*Procedure for executing order of Privy Council—Court which should execute Privy Council decree—Nature of decrees of Privy Council.*—For executing a judgment or order of Her Majesty in Council, application ought to be made to the Court from which the appeal was finally brought, and such Court ought to give directions to the Court by which the suit was originally tried. A declaration of Her Majesty

**Execution of Decree—continued.****—13.—Privy Council, Execution of Orders and Decrees of—continued.**

in Council is a direction to the Court below to clothe it in the form of a mandatory order, and to give effect to such order. **BARLOW v. ORDE, 18 W.R. 175. [D., 19 W.R. 232; R. 9 B.H.C. 398.]**

(3)—*Application for execution of Privy Council's order—Application in Court than High Court—Validity of proceedings—Affirmation of decree by appellate Court—Decree to be executed.*—If application for execution of an order of Her Majesty in Council is made elsewhere than in the High Court, the proceedings are bad: and when a decree is simply affirmed by the appellate Court, the appellate Court's decree is that which has to be executed. **JOY NARAIN GIREE v. GOLUCK CHUNDER MYTEE, 22 W. R. 102.**

(4)—*S. 610, Civ. Pro. Code, 1882—Function of Court purely ministerial—Order erroneous—Effect.*—In receiving and filing for the purpose of execution an order of Her Majesty in Council made on appeal from an order or decree of the Court of original instance, such Court does not exercise a discretionary power, but performs a function of a purely ministerial character. The question as to the effect of the order, even though made under a mistake or misapprehension, on the suit generally, is not one which can be conveniently discussed on applications of this kind. **PREMLALL MULLICK v. SUMBHOONATH ROY, 22 C. 960.**

(5)—*Execution of decree confirmed by Privy Council—Procedure.*—Execution of a decree affirmed by the Privy Council could be ordered to proceed only upon production, with the execution application, of a certified copy of the order of the Privy Council. **JUGGER NATH SAHOO v. JUDOO ROY SINGH, 5 C. 329=4 C.L.R. 387.**

(6)—*Execution of case appealed to Privy Council—Copy of Privy Council, printed judgment—Decree.*—A mere copy of the Privy Council's printed judgment, should not be received, as if it were a decree, in execution of the decree of a case appealed to the Privy Council. **JOY NARAIN GIREE v. GOLUCK CHUNDER MYTEE, 20 W. R. 444. [F., 5 C. 329]**

(7)—*Order of Privy Council—Copy—Privy Council decree—Refusal by High Court Judge to transmit for execution—Appeal—Letters Patent, s. 15—Civ. Pro. Code, s. 588.*—Where the original order of the Privy Council has not been filed in the High Court, a copy of such order, though not certified, may accompany an application for execution under s. 610 of the Code. **[R., 28 M. 557.]** An order, by a High Court Judge, refusing the transmission of a Privy Council decree for execution is a judgment under s. 15 of the Letters Patent and is appealable to the High Court, s. 588 of the Civil Procedure Code not applying to such a case. **HURRISH CHUNDER CHOWDHURY v. KALISUNDERI DEBI, 9 C. 482, P.C.=10 I.A. 4=12 C.L.R. 511=4 Sar. 407 (on appeal from, 6 C. 594).**



**Execution of Decree—continued.****—13.—Privy Council, Execution of Orders and Decrees of—continued.**

[*Disc.*, 14 A. 226=A.W.N. 1892, 14, F.B., 11 A. 375=A.W.N. 1889, 70; *D.*, 17 C 455; *R.*, 18 C. 182, 17 A. 438=A.W.N. 1895, 89, 20 M. 407, 22 M. 68=8 M.L.J. 231, F.B., 26 C. 361, 5 C.W.N. 781, 25 M. 555=11 M.L.J. 346, 4 Bom. L.R. 342, 13 M.L.J. 497, 10 C. W.N. 986=3 C.L.J. 545=33 C. 1323.]

(8)—*High Court, Privy Council decree sent to first Court by—Express decree of High Court.*—A Court of first instance is bound to execute a Privy Council decree forwarded by the High Court, as if it was an express decree of the High Court. GOOROO SURUN DASS v. HANOOMAN PERSHAD SAHOO, 20 W.R. 419.

(9)—*Decree affirmed by Privy Council's order—Execution—Separate decree.*—Where a decree was affirmed by an order of the Privy Council held that it must be executed with the execution of that order, and not as separate decrees. T. C. LETHBRIDGE v. RAJAH SAHEB PROHLAD SEN, 19 W.R. 301.

(10)—*Rival final decrees—High Court's decree—Privy Council's decree—Execution.*—Where there were two cross-suits for possession of the whole of an estate and one-third of the estate respectively, and the suit for the whole estate was finally decreed by the High Court, and the plaintiff put in possession, and the suit for the one-third share finally decreed for the opposite party by the Privy Council; *held*, in an application for execution by the holder of the one-third share, that the decree of the Privy Council can be executed, notwithstanding that it involved the disturbance of possession obtained by the claimant of the whole estate under the High Court's decree, which had become final. The decree of the Privy Council in this case was latter in date, and the claimant of the whole estate, should, if he desired to be secured in possession, have pleaded the decree of the High Court in the cross suit, when the appeal in connection with the one-third share was before the Privy Council. UDAI SINGH v. BHARAT SINGH, 1 A. 456, F.B.

(11)—*Decree for possession and mesne profits—Reversal by Privy Council—Judge making order of restitution, Duty of—Rents and profits.*—A decree giving possession and mesne profits, was reversed in the Privy Council; *held* that the Judge making an order for the restitution of the property should also order repayment of the rents and profits derived therefrom by the plaintiff during his possession. BIBEE HAMDADA alias KAJOO v. BIBEE BHUDHUN, 20 W. R. 288. [*F.*, 22 W.R. 435, 21 C. 989; *R.*, 3 C. 720, 4 C. 625, 22 C. 501.]

(12)—*Mesne profits, Execution for, directed to be taken out in order—Failure to get satisfaction from first source—Tapping of another source—Exhausting one source after another—Protective measures—Inquiry into assets.*—Should the Privy Council order execution for mesne profits to be taken out first against one

**Execution of Decree—continued.****—13.—Privy Council, Execution of Orders and Decrees of—continued.**

defendant (J), and only on failure to seek satisfaction from him against the others, *held* that, before J's assets had been exhausted, attachment could not issue against the property of the others, even as a preliminary and protective step. The inquiry, whether or not J's assets have been exhausted, may be made by the other judgment-creditors being called upon to show cause why execution should not proceed against them. DHUNPUT SINGH BAHADOOR v. ALEXANDER JOHN FORBES, 22 W.R. 104.

(13)—*Civ. Pro. Code, ss. 211, 253, 316, 318. 610—Construction of order giving effect to judgment of Privy Council—Mesne profits—Receiver—Interest—Sureties for execution of decree.*—Land was sold and purchased in execution of a decree. A sale certificate was issued to the purchaser, and possession of the land was made over to him. The judgment-debtor appealed to the High Court, and the order of sale was cancelled on account of certain irregularities. He applied to be put back in possession, and the purchaser had to give up possession on the judgment-debtor and two others (third parties) furnishing security for restoration of possession to the purchaser if he should succeed in his appeal to the Privy Council against the order of the High Court. The Privy Council set aside the order of the High Court and restored the order of the Court of first instance which it confirmed. Under these circumstances, (1) the order passed by the Court of first instance in giving effect to the judgment of the Privy Council is one made under s. 610, Code of Civil Procedure, and is appealable; (2) the purchaser is entitled to mesne profits with interest thereon; (3) the purchaser cannot proceed against the sureties for any claims he may have against them in summary proceedings, but he must proceed by a regular suit; (4) where a receiver had been appointed at the instance of some of the creditors of the judgment-debtors, the charges incurred in his appointment should not be allowed against the purchaser, if his appointment was not necessary for the prudent management of the estate. ARUNACHALLAM v. A. ARUNACHALLAM, 15 M. 203=2 M.L.J. 1. [*R.*, 23 C. 212, 25 B. 409, 2 Bom. L.R. 203, 109 P.R. 1906=1 P.L.R. 1907, 31 M. 330=3 M.L.T. 317.]

(14)—*Privy Council decree—Execution application by one of the decree-holders with respect to his share.*—Where one of the two decree-holders under a decree of the Privy Council applied for execution of the decree, so far as it related to his share, the other decree-holder having assigned his share to one of the (unsuccessful) defendants in the suit, *held*, reversing the order of the Judge in the Privy Council department of the High Court, that execution need not necessarily be of the decree, as a whole, and that the decree must be transmitted to the first Court for execution, which was competent to determine, in execution proceedings, the questions arising in consequence of the assignment.



**Execution of Decree—continued.****—13.—Privy Council, Execution of Orders and Decrees of—continued.**

—*Per White and Mitter. JJ.* KALLY SOONMDERY DABIA v. HURRISH CHUNDER CHOWDHURY, 6 C. 594 = 7 C.L.R. 594. (7 W.R. 136, R.) [R., 25 M. 431.]

(15)—*Decree against several defendants—Appeal by some—Reversal of whole decree—Restoration of original decree on further appeal—Executability of decree against non-appealing defendant—Limitation.*—Where a decree passed against all the defendants in a suit was, on the appeal of all but one of them, reversed by the Sudder Court, and the suit as a whole dismissed, and on appeal by the plaintiff, to which the non-appealing defendant was not made a party, the decree of the first Court was restored by the Privy Council, *held* that such decree was a valid decree and capable of execution against the non-appealing defendant, notwithstanding he was not a party to the appeals in the Sudder Court and the Privy Council. [Obs., 19 A. 136.] Limitation for purposes of execution of the decree in the above case should be computed from the date of the decree of the Privy Council. KISHEN SAHAI v. THE COLLECTOR OF ALLAHABAD, 4 A. 137 = A.W.N. 1881, 152.

(16)—*Appeal to Privy Council—Costs—Practice.*—The costs awarded in sterling by Her Majesty in Council must be converted into Indian Currency at the rate of exchange for the time being fixed by the Secretary of State at the time when the order of Her Majesty in Council was made. MAHOMED ABDUL HYE v. GAJRAJ SAHAI, 25 C. 283 = 2 C.W.N. 89. (23 C. 357, F.)

(17)—*Civ. Pro. Code, 1882, s. 610 — Costs awarded by decree of Privy Council, rate of exchange in estimating—'For the time being,' meaning of.*—Under the last paragraph of s. 610 of the Code of Civil Procedure, the amount of costs payable must be estimated at the rate of exchange "for the time being fixed by the Secretary of State for India in Council." The words "for the time being" mean the year in which the amount is realised or paid, or execution taken out, and not the year in which the decree was passed. The rate of exchange being fixed yearly by the Secretary of State for India in Council, the proper rate of exchange to which the decree-holders must be taken to be entitled would be the rate obtaining on the date of their application for execution. PARAM SUKH v. RAM DAYAL, 8 A. 680 = A.W.N. 1886, 249. [Diss., 23 C. 357.]

(18)—*S. 610, Civ. Pro. Code, 1882—Rate of exchange—"For the time being," meaning of—Court executing decree not entitled to award interest, if decree does not grant it.*—The words "for the time being" in s. 610, have reference only to the time at which the order of the Privy Council was passed. They do not refer to the time at which execution is taken out. (8 A. 650, Diss.) According to s. 610, the amount expressed in sterling in the order of the Privy

**Execution of Decree—continued.****—13.—Privy Council, Execution of Orders and Decrees of—concluded.**

Council, must be converted into rupees, according to the rate of exchange for the time being fixed by the Secretary of State. [F., 25 C. 283.] Where the decree of the Privy Council has not awarded interest on costs, the Courts in this country ought not to allow such interest in execution. DAKHINA MOHUN ROY CHOWDHURY v. SARODA MOHUN ROY CHOWDHURY, 23 C. 357. (3 C. 161, P.C., F.) [R., 32 C. 494 = 9 C.W.N. 372 = 1 C.L.J. 118.]

**—14.—Stay of Execution.**

See CIV. PRO. CODE, 1908, O. XLI, RR. 5 TO 8.

(1)—*Application by person not party to suit—Civ. Pro. Code, 1859, s. 230.*—The Court will not interfere to stay execution upon the application of a person not a party to the suit, who claims immoveable property liable to be taken under the decree. The remedy of such a person is under s. 230 of Act VIII of 1859. KHEAT CHUNDER GHOSE v. PROSUNNOMOYEE DASSEE, Marsh 478.

(2)—*Civ. Pro. Code, 1882, s. 545—Stay of execution, when can be ordered.*—Under s. 545, Civ. Pro. Code, the Court has power only to stay execution. The words "stay of execution" cannot be extended so as to include a case in which execution has been completed. DHARRAM SINGH v. KISHEN SINGH, 12 C.L.R. 532.

(3)—*Liability for wrongful execution—Security—Consent.*—Execution will be stayed only on security being given or by consent. SAGORE CHUNDER CHUCKERBUTTY v. SHERBOURNE, Bourke, O.C. 103.

(4)—*Execution of decree by judgment-creditor—Stay of sale by judgment-debtor—Security.*—In an appeal from the order of a Judge calling upon the judgment-debtor to give security before an order to stay a sale in execution of a decree of the High Court—which was the subject of an appeal to the Privy Council—should be issued, the appellant contended that, as the decree of the High Court might be reversed, it was for the lower Court to call upon the decree-holder, not the judgment-debtor, to give security. *Held*, that the decree of the High Court and of every Court must legally be presumed to be correct, till ruled by a superior Court not to be so, and, therefore, that the judgment-creditor was entitled to take out execution without security and that the judgment-debtor could not stay a sale without giving security. GUREEB HOSSEIN CHOWDHURY v. J. P. WISE, W.R. 1864, Mis, 42.

(5)—*Execution of decree under appeal—Application for stay—Affidavits and counter-affidavits—Application when allowable.*—A rule nisi was issued upon an application made by a judgment-debtor for stay of execution of the decree which was then under appeal. An affidavit was filed in support of the application which stated that the decree-holder was a man of no means and that the amount realized from him could not be recovered when the appeal ends in



**Execution of Decree—continued.****—14.—Stay of Execution—continued.**

his favour. The decree-holder opposed the application but filed no counter-affidavit, arguing that it was not necessary under ss. 545 and 546 of the Civ. Pro. Code. *Held*, that the affidavit for stay of execution not having been contradicted by any counter-affidavit, the rule *nisi* issued might be made absolute, but that, under cl. (c) of s. 545 of the Civ. Pro. Code, security should be given by the applicant for the due performance of the decree that might be ultimately passed. **FARIDUDDIN v. WILAYAT ALI, A.W.N. 1888, 249.**

(6)—*Execution of decree—Appeal—Stay of execution—Practice.*—When a decree directing payment of money is appealed against, by the party directed to pay, the appellate Court, on the application of the appellant, should order execution of the decree to be stayed so far as it directs payment, on his lodging the amount in Court, unless the other party gives security for the repayment of the money in the event of the decree being reversed. If such security be given by the successful party, then, stay of execution should not be granted. **DHUNJIBHOY CHOWASJI UMRIGAR v. LISBOA, 13 B. 241.**

(7)—*Interest on decretal amount during stay charged against judgment-debtor as compensation to decree holder.*—When a judgment-debtor applies for stay of execution of the decree against him, it is open to the decree-holder to ask the Court to make it a term of an order for stay that the judgment-debtor should pay into Court a sum sufficient to cover, not only the money decreed, but also any loss sustained by the decree-holder by reason of the execution being stayed; but, if no such order is obtained by the decree-holder, there is no precedent for the Court executing the decree assessing interest by way of damages against the judgment-debtor to compensate the decree-holder for loss occasioned by the stay. **PITAM MAL v. SARAH SUTHERLAND, A.W.N. 1890, 104.**

(8)—*Appeal—Execution, Stay of, asked for—Security—Excessive nature of security—Reasonable opportunity.*—A judgment-debtor, asking to stay execution-proceedings pending appeal, was granted permission to do so on condition of giving security; *held* that he should have reasonable opportunity for showing that the security demanded exceeded the amount awarded by the decree. **MUSSAMUT BAHORJA DOOHMA KOMAR v. LALLA JUMABUR LALL PAUREY, 20 W.R. 52.**

(9)—*Act X of 1859, s. 78—Payment of decretal amount and costs—Stay of execution beyond period of grace.*—Execution of the decree in a suit for ejectment or cancelment of lease may be stayed if the judgment-debtor pays the money into Court within the period mentioned in s. 78, Act X of 1859. The Court may also stay execution beyond the period of grace specified in this section. **NUBOKRISTO MOOKERJEE v. RAMESSUR GOOPTO, 18 W.R. 412, Note. [F., 18 W.R. 412; Expl., 22 W.R. 460, 23 W.R. 50; R., 26 C. 639.]**

**Execution of Decree—continued.****—14.—Stay of Execution—continued.**

(10)—*Stay of execution of decree pending appeal—Stay upon security being furnished—Security condition precedent—Exercise of Court's discretion to give time—Practice.*—Where, in execution of a decree pending appeal, a stay was ordered by the appellate Court on defendant's furnishing security, *held* that such an order should not be construed as entitling the defendant to an indefinite period of time to keep open the opportunity to file the security and so admit of an indefinite stay of proceedings without the precedent condition for the stay being satisfied. **MADAN LAL v. RASUL BAKSH, A.W.N. 1888, 84.**

(11)—*Act VIII of 1869 (B.C.), s. 52—Act X of 1859, s. 78—Court's discretion to stay execution.*—The Court can, in its discretion, stay execution on other grounds than those on which it is bound to do so under s. 52, Act VIII of 1869 (B.C.). A decree-holder obtained a decree for arrears of rent for two years and for part of the third year. Subsequently he instituted another suit against the judgment-debtor for the balance of rent on account of the last mentioned year, and obtained a decree. There was also in the latter case a prayer for the tenant's ejectment, and the decree-holder adduced the former decree as evidence of the existence of the arrear. The first Court, after serving notice, upon the judgment-debtor to make any objection he might think proper as to why he should not be ejected, *held* that the tenant was liable to ejectment, inasmuch as he had not paid in the amount of the decree within 15 days. On appeal, the Judge was of opinion that, as the decree was *ex parte* and the case peculiar, he ought to exercise the discretion vested in the appellate Court and felt supported by the ruling in 18 W.R. 412, footnote. *Held*, with reference to Act VIII of 1869 (B.C.), s. 52, and the wording of Act X of 1859, s. 78, that the Judge had discretion to extend the time, and under the circumstances, was right in his exercise thereof. **RAO BANEE RAM v. RAMNATH SHAHA KOYAL, 10 B.L.R., App., 2=18 W.R. 412. (2 Wyman 75=18 W.R. 42, footnote, F.)**

(12)—*Appeal from decree—Decree-holder undertaking by security bond to restore property if decree reversed or modified—Construction of bond.*—Where a decree-holder, pending appeal, gives a security-bond, undertaking, if the decision of the first Court is reversed or modified by the appellate Court, to make good any property taken by him in execution, the effect of the undertaking would be that, if the appellate Court decided that the claim of the creditor was in whole or in part untrue, and in that respect reversed or modified the decision of the Court below, then the creditor would be bound to make good to the other party anything which would be taken in respect of the amount so found not to be due; but he did not undertake to conform to a mere direction as to the manner in which the decree was to be executed, when that direction came too late to be acted upon; the security bond



**Execution of Decree—continued.****—14.—Stay of Execution—continued.**

would have to be construed equitably, and under any circumstance, considering the relation between the parties and creditor and debtor, the plaintiff would not be entitled to recover anything, unless it were shown that he has sustained damage. **SHURYUTTOOLLAH MIRDA v. TEETA GAZEE HOWLADAR, 21 W.R. 82.**

(13)—*Execution—Cost of advertising.*—The execution of a decree could not be withheld and sale abstained from because the decree-holder refuses to pay the costs of advertising, which are not required to be paid in advance. **KISTO KISHOR GHOSE v. SOORJONATH SIRCAR, 10 W.R. 354.**

(14)—*Suit for possession by defendant—Previous ejectment decree against defendant—Stay of Execution.*—Case where it was held that the statement of the defendant that he has brought another suit to get his right to possession declared furnished no ground for staying execution of a decree for ejectment. **MAHOMED HOSSEIN KHAN v. LOOTI ALI KHAN, 20 W.R. 393.**

(15)—*Sale of property in execution of decree—Decree-holder privately purchasing property—Application for stay of sale—Court not bound to stay sale.*—The Court is not bound to stay a sale of property going on under its order at the instance of the decree-holder, because the decree-holder desires that it should be stayed on the ground that he has made a private purchase of it. (*Innes, J., dissenting.*) *Per Innes, J.*—When an adjustment is alleged by the judgment-creditor and the Court is asked to act upon it, it must record satisfaction to the amount stated to have been satisfied, and stay any process of execution which the judgment-creditor may in consequence of the adjustment desire to have stayed. **A. V. NARASIMHA APPAROW NAIDU v. K. VENKATAKRISTNIA, 5 M.H.C. 410.**

(16)—*Execution—Injunction restraining execution proceedings—General prayer for relief—Control of execution proceedings—Equity.*—X and Y were joint owners of an estate. On X's default in paying the revenue, Y borrowed money from C on mortgaging her own share, paid off the arrears and sued X for contribution, praying that the debt might be made a first charge on the property for which the money was paid. Pending this suit, X again made default, and the estate was sold by auction and purchased by K (defendant) "subject to all incumbrances." K also obtained an assignment of the above mortgage. Subsequently, the decree for contribution was made in favour of Y who now assigned it to R. R applied for and obtained an order for execution of the decree and attached property other than the estate sold for arrears of revenue belonging to X. Subsequently, the assignee R and the mortgagee C in consideration of K executing a *patni* of the estate formerly held by X to R and C, entered into an agreement with the

**Execution of Decree—continued.****—14.—Stay of Execution—continued.**

auction-purchaser (K) that they would not proceed to realise the decree or enforce the mortgage against the joint estate in his hands, but would release K from all liability and would not take any proceedings in any Court against K and the property in his hands charged under the decree, and, further, would entrust the whole conduct of the execution proceedings to K. In pursuance of this agreement, the assignee and the mortgagee executed a release in favour of K, and K also granted a *patni* lease in favour of the mortgagee, either for himself or for himself and as benamidar of the assignee. The assignee (R) subsequently abandoned all previous execution proceedings and transferred his decree to High Court for execution against certain properties left by the defaulting joint-owner (X) in Calcutta. The defaulting owner's son (his father being dead) now objected to execution being taken against the Calcutta property, and filed a suit against R and K in which, after paying into Court the decree amount due to the assignee (R), he asked for an injunction to stay all further execution proceedings and to be allowed to stand in the shoes of R, the assignee, and to realise the decree amount from the estate of his father (X) in the hands of the defendant purchaser (K), notwithstanding the agreement between (K), (R) and (C), the mortgagee. *Held* that, inasmuch as it appeared that R derived some benefit out of the lien directed by the decree, which benefit the plaintiff might be entitled to have valued at the hearing and the value set against the decree, although there was no specific prayer for such relief in the plaint, the Court would grant the injunction to stay the proceedings. **KRISTO MOHINI DASEE v. KALLY PROSUNNO GHOSE, 6 C. 485=8 C. L.R. 43.**

(17)—*Act XXIII of 1861, s. 36—Property given up for execution—Security for the restitution of property subsequently—Validity.*—After the suit property has been given over to the execution of a decree to the plaintiff, s. 36 of Act XXIII of 1861 does not permit the Court to exact security from the plaintiff for the restitution of such property, in the event of a successful appeal. **MANSUKRAM PURSHOTAM v. JAVAREVOHU, 7 B.H.C., A.C., 122.**

(18)—*S. 36, Act XXIII of 1861—Staying execution of decree or requiring security of decree-holder, Conditions for.*—For staying execution of a decree or requiring the decree-holder to give security under s. 36, Act XXIII of 1861, probable cause must be previously shown of the judgment-debtor's inability to recover the money, should the decree be reversed. **SUKHEE MONEE DEBIA v. BROJORAJ MOOKERJEE, 17 W.R. 69.**

(19)—*Act VIII of 1859, s. 338—Stay of execution—Period of appeal not expired.*—Under s. 338 of Act VIII of 1859, execution of a decree cannot be stayed for the simple reason



**Execution of Decree—continued.****—14.—Stay of Execution—continued.**

that the period of appeal has not expired. **THE DEPUTY COLLECTOR OF THE SONTHAL PERGUNNAHS v. BINODE RAM SEIN**, 5 W.R., Mis., 53.

(20)—*Ground for staying execution sale.*—If the day fixed for sale be very near to the latest sale day for the payment of the Government revenue, it is no sufficient cause for staying a sale in execution. **AHMED REZA v. KHUJOO-RUNISSA**, 13 W.R. 281.

(21)—*Suit against Government servant as such — Personal decree — Defendant ceasing to be Government servant—Execution—Decree, Validity of, not to be questioned in execution.*—Where, in a suit brought against a Government servant as such, a decree was passed against him as being personally responsible for the claim and no appeal was preferred and the decree became final, the decree may be executed against him even though he is no longer in the service of the Government. The validity of a decree cannot be questioned except on the ground that the Court which passed it had no jurisdiction to make the same. **CHOWDHERY MAHOMED TUKEE BEG v. WALLIS**, 2 Agra. Mis., 5.

(22)—*High Court's original side decree—Stay of execution by Principal Sudder Amin—Application for new trial on ground of ex parte decree.*—The execution of a decree of the High Court on its original side may be stayed by a Mofussil Court (that of the Principal Sudder Amin) in order that the judgment-debtor may apply for a new trial, on the ground of the decree having been obtained *ex parte*, without his knowledge. **MIRTOONJOY CHUCKERBUTTY v. JOHN COCHRANE**, 8 W.R. 202.

(23)—*Appeal—Delay—Stay of execution refused.*—Case where stay of execution was refused there being nothing beyond the fact of an appeal, and there having been great delay on the applicant's part. **S.J. LESLIE v. THE LAND MORTGAGE BANK OF INDIA**, 17 W.R. 160.

(24)—*Civ. Pro. Code, 1882, s. 546—Grant of injunction pending appeal in another suit.*—The section only relates to staying proceedings in execution by the Court which passed the decree, in which the proceedings are pending. That Court has a right, under certain circumstances and conditions, to stay the execution of its own decrees, while those decrees are under appeal. [*F.*, 21 C. 561; *Appr.*, 15 A. 196 = 13 A.W.N. 1893-99, *Commented upon*, 12 C. 515; *R.*, 8 C.W.N. 381; 11 C.W.N. 1030 = 6 C.L.J. 298 = 34 C. 1037, F.B.] But a Court has no right to restrain a decree-holder from executing his decree, merely on the possibility of the appellate Court reversing the decision of such Court in another suit, instituted by some of the judgment-debtors, relative to their rights in the decretal property, although it had a right, while the questions in that suit were awaiting trial before it, to

**Execution of Decree—continued.****—14.—Stay of Execution—continued.**

restrain the defendant (decree-holder) by an interim order upon him personally, from enforcing his decree in the former suit. **GOS-SAIN MONEY PUREE v. GURU PERSHAD SINGH**, 10 C. 146. [*F.*, 21 C. 561 *Appr.*, 15 A. 196 = A.W.N. 1893, 99; *Commented upon*, 12 C. 515; *R.*, 8 C.W.N. 381, 11 C.W.N. 1030 = 6 C.L.J. 298 = 34 C. 1037, F.B.]

(25)—*Stay of execution pending suit between decree-holder and judgment-debtor—Civ. Pro. Code, 1882, s. 243.*—S. 243, Civ. Pro. Code, providing for stay of execution pending suit between decree-holder and judgment-debtor, is applicable only to those cases where the execution and the suit are pending in the same Court and between the same parties, and not to a case where the suit between the judgment-debtor and the holder of the decree had been decided by the Court executing the decree and was pending in the Court of appeal. **GUEST v. MCGREGOR**, 41 P.R. 1904. (6 N.W.P. 181, 7 A. 73, 10 A. 389, 20 M. 366, R.) [*Rel. on*, 82 P.R. 1910.]

(26)—*Act VIII of 1859, s. 338—Stay of execution pending appeal.*—Pending the determination of a miscellaneous regular appeal to the appellate Court, against the order of the Court of first instance, refusing to postpone a sale in execution of a decree, the appellate Court has power, under s. 338 of Act 1859, to stay execution. **HARSHANKAR PERSHAD, In re**, 1 A. 178, F.B. [*R.*, 28 C. 734.]

(27)—*Ss. 244 (c), 545, 647, Civ. Pro. Code, 1882—Stay of execution—Appeal from order in execution pending.*—The appellate Court can stay execution, during the pendency of an appeal before it from an order in execution. **PASUPATHI NATH BOSE v. NANDA LAL BOSE**, 28 C 734 = 5 C.W.N. 67. (1 A. 178, F.B., 11 W.R. 494, R.)

(28)—*Decree—Application for stay of execution—Act VIII of 1859, s. 338.*—Application for stay of execution of a decree, an appeal from which has been filed, should, under Act VIII of 1859, s. 338, be made to the Court of appeal and not to the Court which passed the decree under appeal. **ABBASSEE BEGUM v. MAHARANEE RAJ ROOP KOOR**, 1 C.L.R. 368.

(29)—*Civ. Pro. Code, 1882, s. 546 (= O. XLI, r. 6, new Code)—Execution of money decree—Appeal from decree—Application to stay sale of immoveable property in execution, to be made to Court that passed the decree.*—An application under s. 546, Civ. Pro. Code, to stay the execution of a decree for money against which decree an appeal is pending, and in execution of which decree an order has been passed for the sale of immoveable property, should be made to the Court which passed the decree, and not to the appellate Court. *In the matter of the petition of MURAD-UN-NISSA*, 15 A. 196 = A.W.N. 1893, 99. (11 C. 146, R.) [*F.*, 8 C.W.N. 381; *R.*, 34 C. 1037, F.B. = 11 C.W.N. 1030 = 6 C.L.J. 298.]



**Execution of Decree—continued.****—14.—Stay of Execution—continued.**

(30)—*Civ. Pro. Code, 1882, ss. 545, 546—Unappealable decree—Stay of execution.*—These sections do not apply to the stay of execution of an unappealable decree. A Court, after the passing of a final unappealable decree and before granting an application for a review of judgment, cannot order a stay of execution of the decree. A stay of execution or an injunction granted *ex parte* may be varied or set aside by the Judge who ordered it. *AMIR HASSAN v. AHMAD ALI, 9 A. 36.*

(31)—*Civ. Pro. Code, 1882, s. 243 (= O. XXI, r. 29, new Code)—Order for stay of execution of decree—Appealability—Court's power under the section not confined to its own decrees.*—An order passed under the section, for stay of execution of a decree pending a suit between the judgment-debtor and the decree-holder, is appealable. (7 A. 73, 13 O. 111, *F.*; 9 C. 214, *Disappr.*) [*F.*, 20 M. 366, 3 O.C. 42.] A Court in exercising its powers under s. 243 of the Code is not limited to its own decrees, and such powers do apply also to decrees passed either by a Court of co-ordinate jurisdiction, or by a Court of appeal. *KASSA MAL v. GOPI, 10 A. 389 = A.W.N. 1888, 51. (8 W.R. 392 Commented on & Disappr.; 6 A. 351, 7 A. 24, 13 C. 111, R.) [F., 130 P.R. 1908 = 205 P.L.R. 1908; R., 41 P.R. 1904 = 59 P.L.R. 1904.]*

(32)—*Execution case not before Judge—Precept to be sent to subordinate Judge—Party entitled to proper execution.*—Case where it was held that a District Judge had no authority in certain proceedings in execution of a decree in a case not before him, to direct a precept to be sent to a Subordinate Judge, upon which precept the latter stayed execution, and where the Subordinate Judge was reminded that a decree-holder coming and asking for execution of his decree was entitled to have that decree properly executed. *T. C. BARLOW v. MOULVEE ABDOL HAGE, 17 W.R. 341.*

(33)—*Civ. Pro. Code (XIV of 1882)—Stay of execution of decree of Subordinate Court, when no appeal—It can be ordered.*—A obtained decrees against B, in the Sub Divisional Court of C, and attached before judgment some timber and paddy; D applied to have the attachment set aside on the ground that they were mortgaged to him. The application was dismissed. D then sued on his mortgage in the District Court, making A party. The suit was dismissed and D appealed. When the appellant applied for removal of the attachment, the Sub-Divisional Court allowed him to retain and sell the property on his giving a bond for Rs. 5,500. A applied for execution of his decree by an order on D to pay the amount of his bond into Court. Execution was stayed by the Sub-Divisional Court pending the abovementioned suit in the District Court, but a further stay was refused by the Sub-Divisional Court, pending the appeal against the decree of the District Court. The appellant then applied to the Chief Court for stay. *Held*, that s. 545, Civ. Pro. Code, did not

**Execution of Decree—continued.****—14.—Stay of Execution—continued.**

apply, because the decree, execution of which was sought to be stayed, was not the one appealed against, and that the Court had no inherent power to stay the execution. *SAVAPATHI CHETTY v. MG. SEIN, 5 L.B.R. 124 = 4 Ind. Cas. 309.*

(34)—*Appellate Court reversing decree in plaintiff's favour—Staying execution of its own decree—Civ. Pro. Code, 1859, s. 338.*—It is the duty of an appellate Court reversing a decree in favour of the plaintiff in a suit not to stay execution of its own decree under s. 338 of Act VIII of 1859. Order of District Court staying execution under such circumstances set aside. *KAVASJI v. DHONDIRAJ, 10 B.H.C. 411.*

(35)—*Execution of decree—Civ. Pro. Code, ss. 244, 545, 588—Order staying execution—Matter relating to execution—Appeal.*—The provisions of s. 244 of the Civ. Pro. Code are applicable alike to the Court executing a decree and to the Court to which it is sent for execution. (N.W.P. 1874, 181, *R.*) [*R.*, 59 P.L.R. 1904 = 41 P.R. 1904, 156 P.L.R. 1905, 130 P.R. 1908 = 205 P.L.R. 1908.] An order staying execution of a decree, whether passed by the Court which passed the decree, or by the Court to which the decree is sent for execution, is a "question arising between the parties to the suit in which the decree was passed, and relating to the execution" thereof, within the meaning of s. 244 (c), and as such appealable, irrespective of the provision of s. 588 of the Civ. Pro. Code. *GHAZIDIN v. FAKIR BAKHSH, 7 A. 73 = A.W.N. 1884, 226. (7 C. 733, 8 C. 477, F.) [F., 12 C. 624, 13 C. 111, 10 A. 389, 20 M. 366; Appr., 11 B. 57; R., 2 S.L.R. 24.]*

(36)—*Civ. Pro. Code, Act VIII of 1859, s. 209—Transmission of decree for execution—Suit by judgment-debtor against decree-holder—Stay of execution.*—It is provided by the latter part of s. 209, Civ. Pro. Code, that whenever a suit shall be pending in any Court, against the holder of a decree of such Court, by the person or persons against whom the decree was passed, the Court may, if it appears just and reasonable to do so, stay execution of the decree, either absolutely or on such terms as it may think just, until a decree shall be passed in the pending suit. On a comparison of various sections of the Civ. Pro. Code, it is clear that the powers as to stay of execution conferred by the Civ. Pro. Code, upon the Court which passed the decree, are analogous to similar powers conferred by the Code upon the Court to which the decree is sent for execution, both such Courts having in common the qualification of being "the Court executing the decree." The powers are similar in kind, though different in minor details. Indeed, so strong is the analogy that the provisions of s. 209, which relate to stay of execution pending suit between the decree-holder and the judgment-debtor, would seem to be common both to the Court which passed the decree and the Court to which



**Execution of Decree—continued.****—14.—Stay of Execution—continued.**

it is sent for execution. *COOKE v. MUSSUMAT HISEBA BEEBEE*, 6 N.W.P. 181. [F., 130 P.R. 1908=205 P.L.R. 1908; R., 7 A. 73=A.W.N. 1884, 226, 41 P.R. 1904.]

(37)—*Execution of decree—Powers of Court to which decree is sent for execution—Civ. Pro. Code*, ss. 228, 239.—The powers of a Court, to which a decree has been transmitted for execution, are confined to the execution of the decree. It cannot question the propriety or correctness of the order directing execution, nor can it, under s. 239, Civ. Pro. Code, stay execution, except temporarily. *RAM LAL v. RADHEY LAL*, 7 A. 330=A.W.N. 1885, 21.

(38)—*Power of executing Court to stay execution of portion of decree.*—A Court executing a decree is bound to execute it in the shape in which the decree comes before it and has no authority to stay the execution of any portion thereof. *PARKHIT v. CHAMRA*, 15 C.P.L.R. 134. (22 W.R. 460, 23 W.R. 50, F.)

(39)—*Application to Court executing decree—Duty of Court.*—*Held*, that, on *prima facie* good grounds being shown to exist in a proper case for staying execution of a decree, the Court executing the decree may well grant to the judgment-debtor reasonable time for applying to a higher Court for an order for stay of execution. *BHAN SINGH v. HUKAM SINGH*, 52 P.L.R. 1909=63 P.W.R. 1909=4 Ind. Cas. 552.

(40)—*Questions raised in execution—Act VIII of 1859*, ss. 284 and 290.—A judgment-debtor contended that the balance due on a decree of the High Court sent for execution under s. 284, Act VIII of 1859, was less than that for which execution was sought; *held* that, the Judge had no jurisdiction to enquire into the question, but might, under s. 290, stay execution, pending a reference to the High Court. *KISHUB CHUNDER PAUL v. KHELAT CHUNDER GHOSE*, 9 W.R. 361.

(41)—*Application by judgment-debtor for stay of execution of appellate decree—Executing Court not to enquire if notice of appeal served.*—On the application of a judgment-debtor for execution of an appellate Court's decree to be stayed, the Court executing the decree could not enquire into the question whether any notice was served upon the applicant before the appeal judgment was passed. *MUSSAMUT MUKHDOOMUN v. BHUGWAN DASS*, 24 W.R. 33.

(42)—*Stay order by competent Court—Execution application cannot be struck off.*—When an order has been issued by a competent Court that execution be stayed, its legal effect is limited to suspending the execution or temporarily keeping it in abeyance. There is no section of the Civ. Pro. Code, which authorizes the Civil Courts to strike off an application for execution of their own motion when it is held in abeyance for a time. Notwithstanding the action of the Court in striking off the application for

**Execution of Decree—continued.****—14.—Stay of Execution—continued.**

execution in such cases, it is still pending in the contemplation of the law. *PAPAMMA v. VENKATAPPAYYA*, 3 M.L.J. 298.

(43)—*Decree charging immoveable property—Execution—Civ. Pro. Code*, 1877, s. 326.—Where a decree directs the sale of immoveable property in pursuance of a contract specifically affecting the same, s. 326 of the Civ. Pro. Code, 1877, is not applicable so as to enable the Court to stay or postpone the sale of such property, or to authorize the Collector to make arrangements for the satisfaction of the decree. *BHAGWAN PRASAD v. SHEO SAHAI*, 2 A. 856.

(44)—*Scheme for satisfying decree without public sale of attached property—Discretion of Court—Civ. Pro. Code*, s. 326.—On a proposal made to a Civil Court by the Collector, under s. 326 of the Civ. Pro. Code, of a scheme for the satisfaction of the decretal amount, without bringing the attached property to sale, it is perfectly in the discretion of the Court whether or not to sanction such proposal. It is the duty of the Court to hear any objections thereto that may be advanced by the decree-holder, and if the Court is not satisfied, on so hearing the decree-holder, of the feasibility of the proposed scheme on any ground, it ought, in the exercise of its discretion, to refuse its sanction. *HURO PRASAD ROY v. KALI PRASAD ROY*, 9 C. 290, F.B. [R., 121 P.L.R. 1906=63 P.R. 1906.]

(45)—*Temporary stay of warrant of execution—Right to execute at a subsequent time not prejudiced.*—A decree-holder's act in granting his judgment-debtor the indulgence of a temporary stay of the warrant of execution issued to enforce the decree does not prejudice his right to execution at a subsequent time. *M. BUTCHENNER v. RAYUDU*, 5 M.H.C. 283.

(46)—*Decree-holder liable under cross-decree—Assignment of decree—Conditions*—Case where it was held that a decree-holder liable to the judgment-debtor on account of a cross-decree could not assign his decree, until the respective liabilities of the two parties should have been settled. *JODOONATH ROY v. RAM BUKSH-CHULUNGEE*, 8 W.R. 202.

(47)—*Enhancement of rent, Decree for—Appeal.*—Case where it was held that a Judge acted illegally in refusing to decree rent at enhanced rates, merely because the original judgments, in which these enhanced rates were fixed, had been specially appealed against to the High Court on a point of law. *MR. L. THEODORUS v. MOULVI ABOOL BURKUT AMEENOLLAH*, W.R. 1864, Act X, Rul. 106.

See BEN. ACT X OF 1859, s. 78, 1 N.W.P. 89.

See BEN. ACT VIII OF 1869, s. 52, 5 C. 906=6 C.L.R. 239.

See APPEAL—ORDERS, 11 B.H.C. 151, 12 C. 624.



**Execution of Decree—continued.****—14.—Stay of Execution—concluded.**

The Court to which an application for—has been made has no authority to execute it when a superior Court has ordered that execution shall be stayed—See CIV. PRO. CODE, 1908, O. XLI, rr. 5, 6, s. 104. O. XLIII, r. 1, 3 C.L.J. 67=33 C. 927.

Sale of immoveable property in execution of money-decree—Jurisdiction of appellate Court in which appeal pending to stay sale—See CIV. PRO. CODE, 1908, O. XLI, rr. 6, 5, s. 107 (2), O. XXII, r. 11, 11 C.W.N. 1030, F.B.=6 C.L.J. 298=34 C. 1037.

Of decree before admission of appeal to Privy Council—Jurisdiction—See CIV. PRO. CODE, 1908, O. XLV, r. 13 (2) (c). 6 M.L.T. 309=20 M.L.J. 140=4 Ind. Cas. 106.

Decree—Stay of execution—Appeal—See CONTEMPT OF COURT, 10 C.L.J. 631=4 Ind. Cas. 746.

See DEPOSIT IN COURT, 2 C.L.R. 206.

Effect of order staying—See MORTGAGE—GENERAL, 2 Ind. Cas. 265.

Court's order staying, effect of sale by officer in contravention of—See PRE-EMPTION—MISCELLANEOUS, 9 O C. 289.

See RES JUDICATA—RELIEF NOT GRANTED, 4 B.H.C. A.C. 81.

**—15.—Step-in-aid of Execution.**

See LIMITATION ACT, 1908, ART. 182—STEP-IN-AID OF EXECUTION.

**—16.—Striking off Execution proceedings.**

(1)—*Striking off execution proceedings and attachments, Effect of—Conveyance by judgment-debtors.*—The prohibition against an alienation pending an attachment avoids a conveyance only as against the execution creditor or some person claiming under him. If an attachment has been permanently struck off and a new attachment becomes necessary, an alienation by the judgment-debtor between the two attachments will be valid. In India, the striking an execution proceeding off the file is an act which may admit of different interpretations according to the circumstances under which it is done. Accordingly a general rule which would govern all cases cannot be laid down; but when a very long time has elapsed between the original execution and the date at which it is struck off, it should be presumed that the execution was abandoned and ceased to be operative unless the circumstances are otherwise explained. PUDDOMONEE DOSSEE v. ROY MUTHOORANATH CHOWDHRY, 12 B.L.R. 411, P.C.=20 W.R. 183. [F., 20 W.R. 418, 24 W.R. 36, 24 W.R. 56, 23 A. 114, 9 C.L.J. 443=13 C.W.N. 533=1 Ind. Cas. 57; Appl., 25 W.R. 513; R., 21 C. 354, 17 M. 58=3 M.L.J. 211, 17 M. 180, 16 A. 133=A.W.N. 1894, 133, 1 C.W.N. 617, 9 C.L.J. 239.]

(2)—*Alienation pending attachment—Striking off execution case, effect.*—A deed of sale

**Execution of Decree—continued.****—16.—Striking off Execution proceedings concluded.**

conveying property. if executed while the property is under attachment, cannot afterwards be made valid by the release of the property. The striking off of the execution case does not do away with an attachment once made, unless the attachment is expressly abandoned by the party at whose suit it was issued. MAHARAJA DHIRAJ MAHATAB CHAND BAHADUR v. SURNOMOYEE DOSSEE, 12 B.L.R. 414, Note=15 W.R. 222. [D., L.B.R. 1893—1900, 340.]

(3)—*Striking off execution proceedings—Effect—Continuance of attachment under executed decree.*—The striking off of an execution proceeding affects only the files of the Court and the application for sale, and does not interfere with the continuance of any attachment under the decree which is executed. SYUD NADIR HOSSEIN v. PEAROO THOVILDARINEE, 14 B.L.R. 425, Note=19 W.R. 255. [F., 19 A. 482=A.W.N. 1897, 124.]

**—17.—Transfer of decree for execution—Execution out of Court's jurisdiction.**

(1)—*Decrees passed by British Indian Courts, whether could be sent for execution to Courts out of British India.*—The Courts of British India have no jurisdiction to send their decrees for execution to any Court not situate in British India. KASTURCHAND GUJAR v. PARSITA MAHAR, 12 B. 230. [F., 29 C. 400=6 C.W.N. 573; R., 34 C. 576=11 C.W.N. 622=6 C.L.J. 30.]

(2)—*Power of British Courts in India to send decrees to Courts not in British India.*—Ss. 229-A, 229-B, Civ. Pro. Code. 1882.—Under ss. 229-A and 229-B, Civ. Pro. Code, 1882, no decree of a Civil Court in British India can be sent, by such Court, for execution into a territory such as Mayoorbunj, without prior notification in the India Gazette as specified in these sections. RATAN MAHANTI v. KHATOO SAHOO, 29 C. 400=6 C.W.N. 573. (12 B. 230, R.)

(3)—*Simultaneous execution of decree in two or more districts.*—A decree may be simultaneously executed in two or more districts. KRISHNOKISHORE DUTT v. ROOP LALL DASS, 8 C. 687=10 C.L.R. 609. (14 M.I.A. 529=10 B.L.R. 214, F.) [R., 13 C.P.L.R. 169, 1 C.L.J. 315, 28 M. 466=15 M.L.J. 116, F.B.]

(4)—*Transfer of decree—When transfer to be made.*—A decree should be transmitted to another Court for execution only if it cannot be executed within the jurisdiction of the Court which passed it. There is no intermediate procedure between these two. THE MAHARAJAH OF BURDWAN v. SREE NARAIN MITTER, 9 W.R. 346.

(5)—*Civ. Pro. Code, 1859, s. 284—Transfer of decree for execution to another Court where complete execution possible—Certificate of transfer—Jurisdiction.*—Under s. 284, Act VIII of 1859, the granting of a certificate transferring a decree for execution to another Court is proper, when



**Execution of Decree—continued.****—17.—Transfer of decree for execution  
—Execution out of Court's jurisdiction  
—continued.**

it appears that the decree cannot be completely executed by the sale of the property within the jurisdiction of the Court whose duty it is to execute it, but that it could be so executed by the sale of the property in a different district. **KALEE DOSS GHOSE v. LALL MOHUN GHOSE, 19 W.R. 307.**

(6)—*Transmission of copy of decree to another Court for execution—Execution by transmitting Court of same decree.*—A Court transmitting a copy of a decree for execution in another Court cannot itself execute it, before it is certified and returned. **KHOOSALA v. MUSUDDA SINGH, 49 P.R. 1869.**

(7)—*Ss. 224, 226, Civ. Pro. Code, 1882—Order forwarding decree to subordinate Court—Signature of District Judge.*—An order, under s. 226, Civ. Pro. Code, forwarding a decree for execution to a subordinate Court by the District Judge, need not be signed by the latter himself. If such forwarding order is not signed by the Judge himself, but purports to have been signed by his Sheristadar "by order of Court," the absence of the Judge's signature does not vitiate the proceeding. **JOGENDRA CHANDRA GHOSE v. MAHESH CHANDRA DUTTA, 23 C. 480.**

(8)—*Civ. Pro. Code, 1882, s. 223—Construction—Transfer of decree for execution.*—S. 223, which declares that the Court which passes a decree may, on the application of the decree-holder, send it for execution to another Court, should be interpreted to mean another Court having jurisdiction and competent to execute that decree, having regard to the amount or value of the subject-matter of its ordinary jurisdiction. **DURGA CHARAN MOJUMDAR v. UMATARA GUPTA, 16 C. 465. (7 M. 397. Diss.)** [*F.*, 9 P.R. 1901=1 P.L.R. 1901, F.B., U.B.R. 1902—1903, Vol. II, Execution of decree, 5; *Diss.*, 17 M. 309; *R.*, 15 M. 345.]

(9)—*Civ. Pro. Code, ss. 25, 223—Madras Civil Courts Act, s. 12—Jurisdiction—Execution of decree of superior Court.*—As in suits, so in execution proceedings, the competent forum is ordinarily that indicated in s. 12 of the Civil Courts Act, but in the five cases mentioned in s. 223, Civ. Pro. Code, special reasons exist for departing from that rule and creating a special or extraordinary jurisdiction. The condition as to the jurisdiction of the inferior Court to which a suit can be transferred under s. 25, Civ. Pro. Code, is omitted from s. 223 of the Code for the special reasons mentioned therein. **SHANMUGA PILLAI v. RAMANATHAN CHETTI, 17 M. 309=4 M.L.J. 91.** [7 M. 397, *F.*; 16 C. 457, 16 C. 465, *Diss.*] [*Diss.*, 9 P.R. 1901=1 P.L.R. 1901; *R.*, U.B.R. 1902—1903, Vol. II, Execution of decree, 5, 1 N.L.R. 39.]

(10)—*Mad. Civ. Courts Act, s. 12, cl. 11—Jurisdiction of Munsif's Court—Execution of decree of superior Court—Civ. Pro. Code,*

**Execution of Decree—continued.****—17.—Transfer of decree for execution  
—Execution out of Court's jurisdiction  
—continued.**

s. 223.—Although by the Civil Court's Act, 1873, the ordinary jurisdiction of Munsiffs is limited, in suits and applications of a civil nature, to those in which the subject-matter does not exceed Rs. 2,500 in value, yet under s. 223, Civ. Pro. Code, a Munsiff's Court has jurisdiction to execute a decree transferred to it for execution, although the suit in which the decree was passed was beyond the Court's jurisdiction. **NARASAYYA v. VENKATAKRISHNAYYA, 7 M. 397.** [*Diss.*, 16 C. 465, 16 C. 457, U.B.R. 1902—1903, Vol. II, Execution of decree, 5; *F.*, 17 M. 309; *R.*, 15 M. 345, 9 P.R. 1901.]

(11)—*Civ. Pro. Code, ss. 6, 223—Transfer of decree for execution—Jurisdiction.*—The proceedings in a "suit" do not necessarily terminate with the decree, but the word "suit" may be interpreted to include the proceedings taken to execute the decree. S. 6 must therefore operate to limit the jurisdiction conferred by s. 223 and a Civil Court has no jurisdiction to execute a decree sent to it for that purpose under s. 223 of the Code when the decree has been passed in a suit the value or subject-matter of which exceeds the pecuniary limits of its ordinary jurisdiction. **GOKUL KRISTO CHUNDER v. AUKHIL CHUNDER CHATTERJEE, 16 C. 457.** [*F.*, 16 C. 465, 1 P.L.R. 1901=9 P.R. 1901, F.B., U.B.R. 1902—1903, Vol. II, Execution of decree, 5; *Diss.*, 17 M. 309; 16 B. 731; *R.*, 15 M. 345, 39 P.R. 1903.]

(12)—*Transfer of decree for execution, and power of Court as to execution out of its jurisdiction—Notice of execution—Civ. Pro. Code, 1859, s. 285.*—Where a decree had been obtained in a Zillah Court and sent to Calcutta for execution, the Court made an order directing a notice to issue, calling on the defendant to show cause why the decree should not be executed by the High Court. On appeal the order was upheld. **RAM DASS v. LALLA NUNDAKUMAR, 1 Ind. Jur. N.S. 189.**

(13)—*Transfer of execution proceedings—Power of District Court.*—A District Court has no power to transfer execution proceedings to a subordinate Court. The power is only to transfer a suit, and not to make a transfer of a suit after the suit has once been commenced. **KISHORE MOHAN SETT v. GUL MAHOMED SHAHA, 15 C. 177.** [*D.*, 97 P.R. 1907; *Diss.*, 22 B. 778; *R.*, 1 O.C. 117, 32 C. 875=9 O.W.N. 705, 10 C.W.N. 12.]

(14)—*Application for execution to Zillah Judge, Judge not competent to direct lower Court to dispose of.*—Where, after the disposal of an appeal by the High Court, an application for execution of the decree was made to the Judge who passed the first decree in the suit, but that Judge, instead of dealing with it himself, transferred it to the Principal Sudder Ameen for disposal, and the latter went on with the proceedings, the High Court held that the whole



**Execution of Decree—continued.****—17.—Transfer of decree for execution  
—Execution out of Court's jurisdiction  
—continued.**

of the proceedings so taken by the Principal Sudder Ameen was nugatory as having been without jurisdiction, since the transfer of the case by the Judge was *ultra vires*. **RAJEEB RAM DOSS v. MAHOMED HASEEM**, 6 W.R. Mls., 51. [F., 17 W.R. 45; R., 9 W.R. 463.]

(15)—*Act XVI of 1868, s. 19—Power of Zillah Judge to transfer case for execution of decree to lower Court.*—A Zillah Judge who had passed a decree, after having taken some action in the matter, transferred the case for execution to the subordinate Judge. Held that the transfer, not being authorized by any order passed by the High Court under s. 19, Act XVI of 1868, was illegal, and that all the proceedings of the Subordinate Judge thereunder were null and void. **SHEIKH MOHUMMUD KUMROOD-DEEN v. UJOOB-ON-NISSA**, 1 N.W.P. 199. [R., 4 M.H.C. 115.]

(16)—*Act XXV of 1837, s. 8—Civ. Pro. Code—Transfer of execution cases by District Judge from his Court to subordinate Judge's Court.*—Neither under s. 8, Act XXV of 1837, nor under the Code of Civil Procedure was a District Judge competent to transfer execution cases from his own Court to that of the subordinate Judge. **KEDARNATH MAHATA v. BUNGSHEE DHUR ROY**, 17 W.R. 45. [F., 15 C. 177; R., 22 B. 778.]

(17)—*Act XVI of 1868, s. 19—Application under Act IX of 1861 not a suit—Transfer of application by Judge to subordinate Judge.*—Case where it was held that a Judge had power under Act XVI of 1868, s. 19, to transfer to the subordinate Judge a case under Act IX of 1861, an application under the latter Act not being a suit. **SONAMONEE DOSSEE v. JOY DOORGA DOSSEE**, 17 W.R. 551.

(18)—*Transfer of suits from subordinate Courts—Civ. Pro. Code, 1859, s. 6.*—S. 6, Act VIII of 1859, authorising "a District Court to withdraw any suit instituted in any Court subordinate to such District Court and to try such suit itself, or to refer it for trial," etc., does not justify an order by the District Court for the calling up of execution cases from the files of the subordinate Court and for the appointment of a manager. **LUCHMEEPUT DOKUR v. JUGTINDER BUNWARY LALL**, Marsh 195=1 Hay 439.

(19)—*Execution—Judge's jurisdiction—Limitation—Correction of decree.*—A Judge has no jurisdiction, in respect of a judgment-debtor imprisoned in execution of a decree, to hear a petition from him, and order his release while the proceedings are before the subordinate Judge. A Judge is empowered to alter the decree of his predecessor so as to bring it into conformity with what was evidently intended by the judgment of the latter. An application for review and an application for an alteration of a

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clerical error in a decree have not the same period of limitation. **MODHOO SOODUN GHOSE v. ROMANATH GHOSE**, 12 W.R. 65. [R., 4 N. W.P. 23.]

(20)—*Execution of decree—Jurisdiction as between District and Subordinate Court.*—Where a suit instituted in a Sub-Court, to have certain properties substituted for part of mortgaged properties decreed to be sold in a prior suit in the same Court, was transferred to the Court of the District Judge, and an order was passed, upon consent, for sale of the substituted properties, the latter suit being taken as supplemental to the former one, held that the decree (which affected the whole property mortgaged) was that of the District Court, and that it had jurisdiction to execute the decree. **BISHENMUN SINGH v. THE LAND MORTGAGE BANK OF INDIA**, 11 C. 244=12 I.A. 7, P.C.=4 Sar. 588. [D., 19 M. 61.]

(21)—*Act VIII of 1859, s. 6—Miscellaneous proceedings—Act XXIII of 1861—Execution of decree—Transfer.*—Under s. 6 of Act VIII of 1859, and s. 338 of Act XXIII of 1861, a District Judge can transfer, to his own file, execution proceedings pending in a Court subordinate to him. **GAYA PARSHAD v. BHUP SINGH**, 1 A. 180, F.B. [R., 1 A. 668; Not F., 15 C. 177; F., 22 B. 778.]

(22)—*Separate execution applications—Separate causes—Jurisdiction of Courts acting ex necessitate rei.*—Separate applications to execute the same decree do not constitute separate causes or suits; they are merely further proceedings in the same cause. A Judge acting *ex necessitate rei* may execute the decree of a Principal Sudder Ameen to any extent necessary. **SHARODA MOYEE BURMONEE v. WOOMA MOYEE BURMONEE**, 8 W.R. 9.

(23)—*Execution of decree passed by Court of Scheduled District in Court of a Regulation District—S. 284, Civ. Pro. Code of 1859—Scheduled Districts Act, 1874, s. 5—Execution of decree.*—Where a judgment-creditor obtained a decree in 1876 (i.e., before 1st October, 1877, when the Civ. Pro. Code of 1877 came into force) in a Civil Court in a Scheduled District and in that year the decree was at his instance sent with a certificate of non-satisfaction to a Munsif's Court in a Regulation District for execution, and after some unsuccessful attempts he eventually applied for execution in 1886, but the judgment-debtor objected that the Munsif had no jurisdiction to execute under s. 229 of the Code of 1882, held that, as at the time the decree was passed and sent to the Munsif for execution, Act VIII of 1859 was in force, and as the decree-holder had, by s. 284 of that Act, the right to have his decree sent to any Civil Court for execution, he was entitled now to have execution, the Codes of 1877 and 1882 not having deprived him of that right either by express words or by implication. [F., 6 C.L. J. 30=11 C.W.N. 622=34 C. 576.] The inten-



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tion of the Legislature with regard to decrees obtained in Scheduled Districts after the Code of 1877 came into force was that those decrees should not be executed by Courts in British India, unless and until under the provisions of s. 5 of the Scheduled Districts Act of 1874, the Government had issued the notification therein referred to, applying to the Scheduled Districts such portions of the Code of Civil Procedure as they thought proper to apply. **KASHI MOHUN BORUA v. BISHNOO PRIA**, 18 C. 365.

(24)—*Power of Court to recall ex parte order on application of party not heard.*—If a Judge makes an *ex parte* order, unless in cases where he is expressly empowered to make such an order, the party who has not been heard has a right to apply to the Judge to set it aside; and if the Judge finds that such order was wrong, he is at liberty on hearing both parties, to recall it. **SHEO PROSUNNO SINGH v. BULDHAREE LALL**, 13 W.R. 232.

(25)—*Civ. Pro. Code, 1859, s. 286—Decree for possession and mesne profits—Possession obtained—Delay as to mesne profits—Striking off case—Privy Council appeal—Petition to complete—Execution—Mesne profits without fresh certificate.*—A decree-holder having a certificate, under s. 286, Civ. Pro. Code, 1859, for possession and mesne profits of property in another district, and obtaining possession, delays in respect of the mesne profits, and the case is struck off; he subsequently, on the result of an appeal to the Privy Council being in his favour, applied within three years of the Privy Council's decree to complete the execution. *Held*, that he could have the mesne profits ascertained without a fresh certificate. **BUBORIA AHUN BASEE KOER v. JOOBRAJ SINGH**, 23 W.R. 225.

(26)—*Code of Civil Procedure (Act VIII of 1859), ss. 284-5—Decree against third class Sardar—Execution against his son—Procedure.*—Under ss. 284, *et seq.*, the Court of the Agent for Sardars, not having jurisdiction over a Sardar's son, who is not himself a Sardar, is incompetent to transfer a decree passed against the Sardar to a Civil Court for execution against the son. In such a case, for the execution against his heir of a decree against the Sardar, the decree-holder might file a suit in the ordinary Civil Court on his decree. **KHUSALDAS v. SAKHARAM RAMCHANDRA DIKSHIT**, 12 B.H.C. 212. [*F.*, 3 B. 42; *R.*, 3 B. 193.]

(27)—*Court having local jurisdiction—Power to sell outlying part of estate—Major portion of property beyond jurisdiction.*—A Court having local jurisdiction could sell, in execution of a decree, one or more outlying portions of an estate, even though the greater portion of that estate lie beyond its jurisdiction. **SHIBNARAIN SINGH v. GOBIND DOSS BHUKUT**, 23 W.R. 154. [*R.*, 21 B. 456.]

(28)—*Civ. Pro. Code, 1859, s. 286—Court not to sell property lying beyond jurisdiction.*—Case

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where it was *held*, that a Munsiff, under Act VIII of 1859, s. 286, had no authority to bring to sale property lying without his own jurisdiction without reference to any other Court. **SYUD NOWAB ALI v. SHAIKH UZIR MAHOMED**, 23 W.R. 233.

(29)—*S. 13 (2), Bengal, N.W.P. and Assam Civil Court's Act (XII of 1887)—Jurisdiction—Mortgage-decree—Execution-sale.*—Having regard to s. 13 (2), Act XII of 1887, it is quite incompetent for a District Judge to assign to subordinate Judges appointed by the Local Government, with jurisdiction over the whole of a district, different areas, so as to limit or define their respective jurisdictions. When a mortgage-decree has been made by such subordinate Judge, he is the only officer who could entertain an application of the decree-holder for execution, and make an order in furtherance of the application. He is not prevented from doing this, even if the decree is sought to be executed by the sale of property, not subject to the mortgage, lying outside the area assigned by the District Judge, but inside the district. **BACHU KOER v. GOLAB CHAND**, 27 C. 272. (22 C. 871, 25 C. 315, *Rel. on.*)

(30)—*Judgment-debtor residing and receiving salary outside jurisdiction of executing Court—Procedure for executing decree by attachment of salary or otherwise.*—There is no provision in the Civ. Pro. Code, enabling a Court to issue a prohibitory order to the officer disbursing salary to the judgment-debtor, when such officer resides beyond its local jurisdiction, in order to obtain satisfaction of the decree against the judgment-debtor also residing beyond such jurisdiction. In such a case, a copy of the decree must be sent to the Court having local jurisdiction either by reason of the judgment-debtor residing within such jurisdiction or of his having assets, including salary available for the satisfaction of the decree, and that Court can execute the decree in any of the ways provided for in the Code. **GOPAL v. T. H. LAVET**, 12 B. 45, *Note*.

(31)—*Execution of decree—Attachment of salary—Judgment-debtor and disbursing officer beyond jurisdiction of attaching Court—Attachment whether legal—Proper procedure.*—Where, in execution of a decree passed in the Court at B, the pay of the judgment-debtor who was a sorter in the Railway Mail Service travelling between the Stations B and N was sought to be attached by application for execution in that Court, and it was found that neither he nor the officer disbursing his salary lived within the local jurisdiction of the Court at B, it was held that the salary of the judgment-debtor could in no sense be said to be within the jurisdiction, and could not, therefore, be attached by that Court. The proper course would be to send the decree for execution to the Court at N where the judgment-debtor resided and received



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the pay available for the satisfaction of the decree. **RANGO JAIRAM v. BALKRISHNA VITHAL**, 12 B. 44. [R., 11 C.F.L.R. 148, 28 B. 198.]

(32) — *Executing Court, application for attachment of property outside jurisdiction of—Procedure.*—Where the property sought to be attached in execution of a decree is situate in districts not within the jurisdiction of the Court which passed it, that Court should proceed in the manner prescribed by s. 285 of the Code, leaving the petitioner to apply to the Courts within whose jurisdiction the property happens to be situate, for execution in due form. **BAWUN DOSS MOOKERJEE v. MR. C. S. HOGG**, 2 W.R. Mis. 55.

(33) — *Ss. 223, 226, Civ. Pro. Code, 1882—Decree—Execution—Transfer to another Court—Jurisdiction.*—Where a decree passed by a Court of a Munsiff is sent direct to another Munsiff in a different District for execution, held that the latter has no jurisdiction to execute it without an order of the District Judge under s. 226, Civ. Pro. Code, **DEBI DIAL SAHU v. MOHARAJ SINGH**, 22 C. 764.

(34) — *Civ. Pro. Code, ss. 223, 295.*—A District Munsiff may submit his decree to a Subordinate Judge for execution otherwise than through the District Court, when both the Courts have jurisdiction in the same district. A decree passed by a District Munsiff in the exercise of his ordinary jurisdiction may be executed by a subordinate Judge executing a decree passed by him in the exercise of his small cause jurisdiction, and rateable distribution may be granted to the holder of the decree in the Munsiff's Court on its original side, in execution of the Small Cause decree of the Subordinate Judge. **KELU v. VIKRISHNA**, 15 M. 345 = 1 M.L.J. 595.

(35) — *Attachment and sale of property beyond jurisdiction—Order made without jurisdiction—Erroneous order.*—Where a Munsiff orders the attachment and sale of a talook, part of which lies outside the jurisdiction of his Court, the order is, as regards this latter portion, a nullity, and an attachment and a sale pursuant to the order are void. The order of a Court which is not empowered to make any order at all does not stand on the same footing as an erroneous order by a Court empowered to deal with the subject-matter of that order. **UNNOCOOL CHUNDER CHOWDHRY v. HURRY NATH KOONDOO**, 2 C. L.R. 334. [R., 12 C.L.R. 404; D., 12 C. 307.]

(36) — *Execution sale—Property situate beyond jurisdiction of Munsiff, but in the same District.*—An execution sale of property situate within the jurisdiction of three Munsiffs, all subordinate to the same District Court, held by an order of one of the three Munsiffs, would not be limited to that part of the estate alone situate within the jurisdiction of the particular Munsiff,

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but would be valid for the whole estate, though the more convenient course would have been that the sale should have been held by a superior Court with jurisdiction over the entire District. **RAM LALL MOITRA v. BAMA SUNDARI DABIA** 12 C. 307. (11 B.L.R. 56 = 19 W.R. 434, F.) [F., 15 A. 324 = A.W.N. 1893, 140; R., 19 A. 308 = A.W.N. 1897, 71.]

(37) — *Jurisdiction—Property within jurisdiction of different Courts—Power of one Court to attach.*—A single revenue-paying estate though situate within the jurisdiction of different Courts, may be attached and sold by any one of the Courts, in execution of its decree. **GUNGA NABAIN GUPTA v. ANNADA MOYEE BURROOANEE**, 12 C.L.R. 404. (11 B.L.R. 56 = 19 W.R. 434, F.; 2 C.L.R. 334, R.)

(38) — *Property in different districts—Sale in execution of mortgage decree—Jurisdiction—Civ. Pro. Code, 1877, s. 19.*—The Court, in which a suit upon a mortgage of a single estate was instituted under s. 19 of the Code, is competent to order a sale of the whole property in execution of decree in the suit, though such estate may be situated in two different districts. **SHURROOP CHUNDER GOOHO v. AMEERRUNNISSA KHATOON**, 8 C. 703. (11 B.L.R. 56 = 19 W.R. 434, R.) [Appr., 14 C. 661; D., 15 C. 667.]

(39) — *Jurisdiction—Execution—Sale of decree—Act VIII of 1859, s. 288.*—Where A obtained a decree in District Court against B, who had previously obtained a decree in a different district against another party, held that the District Court had jurisdiction to sell B's right, title and interest in his decree, and that the purchaser becoming assignee of that decree had a right to apply for execution in the district where it was passed. **RAMBAKSH CHETLANGI v. MAHARAJA BANWARI GOBIND BAHADUR**, 2 B.L.R. A.C., 65 = 10 W.R. 357.

(40) — *Decree for sale of mortgaged properties in different districts and jurisdictions—Jurisdiction of Court—Civ. Pro. Code, 1882, ss. 19, 223—Construction—Order for sale under money decree of property partly within and partly without jurisdiction of Court.*—Where a suit upon a mortgage of properties situate in the jurisdictions of two different Courts was instituted in one of them under s. 19 of the Civ. Pro. Code, held, the authority given by s. 19 of the Code included an authority to make an order for the sale of the properties (though partly situate out of the jurisdiction of the Court), and that the Court had jurisdiction to direct and carry out the sale. [F., 15 C. 667, 91 P.R. 1898.] S. 223 of the Civ. Pro. Code merely provides that, when it may be necessary for a Court to send a decree for execution to another Court, by reason of the property being situate beyond its local jurisdiction, it ought to do so; and the words "sale of immoveable property situate without the local limits of the jurisdiction of



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the Court which passed it," in cl. (c) of the section, contemplate a case where *the whole of the property*, and not any portion of it, is situate beyond the local limits of the Court which passes the decree, i.e., cl. (c) of s. 223 ought to be read "If the decree directs the sale of immoveable property situate *wholly* outside the local limits of the jurisdiction, etc."—*Per Ghose, J.* [Commented upon, 19 C. 13.] Whether a sale, in execution of a money-decree, of property situate partly within and partly without the local limits of the Court passing the decree, is valid and binding, in respect of the sale of the property lying outside the jurisdiction, in consequence of ss. 19 and 223 of the Civ. Pro. Code? *MASEYK v. STEEL & CO.*, 14 C. 661.

(41)—*Execution proceedings—Sale—Immoveable property within the jurisdiction of different Courts—Ss. 19, 223, cl. (c), Civ. Pro. Code. 1882.*—Where a Court has the power to pass a decree for sale of a property, *held*, that it has also power to carry out its decree by selling that property, whether any portion of it be within the local limits of its jurisdiction or not. *Per Ghose, J.*—S. 223 provides that the Court, which made a decree, may, on the application of the decree-holder, send it for execution to another Court, if the decree directs the sale of property outside the local limits of its jurisdiction. This seems to be directory, and not mandatory. This section leaves it to the discretion of the Court, when the decree-holder makes the application, to send the decree for execution to the other Court having jurisdiction, that is to say, if it thinks it necessary to do so. *GOPI MOHAN ROY v. DOY BAKI NUNDUN SEN*, 19 C. 13. (14 C. 661, *Commented upon.*) [*F.*, 21 C. 639; *R.*, 22 C. 871, 5 O.C. 9.]

(42)—*Court having jurisdiction to pass mortgage decree has power to carry out its decree—Portion of property being situated outside jurisdiction, immaterial.*—Where a mortgage-decree related to property within and without the ordinary local jurisdiction, *held*, that a Court having jurisdiction to pass such a decree was competent to execute its decree, to its fullest extent even to the sale of properties outside its local jurisdiction. It seems, moreover, that it would be impossible to apply the provisions of the Transfer of Property Act relating to sales in accordance with the decree in a suit on a mortgage, if it were necessary to apply to different Courts to obtain realisation of the mortgage-debt by the sale of properties hypothecated. There is nothing, moreover, in the terms of the Code of Civil Procedure itself which would deprive the mortgagee of this very necessary power. *TINCOWRI DEBYA v. SHIB CHANDRA PAL CHOWDHRY*, 21 C. 639. (17 C. 699, *D.*; 19 C. 13, *F.*) [*R.*, 22 C. 271.]

(43)—S. 25, Act XIV of 1882, Civ. Pro. Code—*Execution sale—Jurisdiction—S. 13 (3), Act*

**Execution of Decree—continued.****—17.—Transfer of decree for execution  
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XII of 1887 (*Bengal, N.W.P. and Assam, Civil Courts*)—*Jurisdiction.*—Though, in many cases, it will be more convenient and proper that sales of various lots of the immoveable properties mortgaged, should be held in the districts in which they are situate, still sales may also be held by the Court, which passed the particular decree and order for sale. (19 C. 13, 21 C. 639, *R.*; 17 C. 699, *D.*) Where a suit had been transferred under s. 25 from the Court of the second subordinate Judge of a district to that of the third subordinate Judge, who passed a decree, and the property lay entirely within the territorial limits of the jurisdiction of the Second Subordinate Judge, the contention, that the Third Subordinate Judge had only power to try the suit but not to execute it against immoveable property outside its territorial jurisdiction was overruled. [*F.*, 27 C. 272; *R.*, 163 P.L.R. 1901.] Cl. 3, s. 13, Act XII of 1887, apparently, is designed to deal with matters of the above description. *JAGAR-NATH SAHAI v. DIP RANI KOER*, 22 C. 871.

(44)—*Execution of a decree—Abolition of subordinate Court—Execution by Zillah Court of decree of abolished Court—Re-establishment of abolished Court—Power of Zillah Court to execute same decree.*—Where, after the abolition of a principal Sudder Ameen's Court at a particular place, a decree passed by that Court was transferred to and executed by the Zillah Court, the latter Court was not deprived of its jurisdiction to execute the same decree again by the fact that a Principal Sudder Ameen's Court was re-established at the same place subsequently. *BIROJA MONEE BARMONEA v. WOOMA MOYEE BARMONEA*, 7 W.R. 124.

(45)—*Jurisdiction of Courts—Rajshahye—Pubna—Small Causes and Principal Sudder Ameen's Courts.*—Where the effect of certain Government orders was to divide the whole of the jurisdiction of the former Principal Sudder Amin of Rajshahye into two portions, the Small Causes Court Judge of Pubna had thereafter alone jurisdiction to perform in the District of Pubna the duties which, but for these orders, would previously have been performed by the Principal Sudder Ameen of Rajshahye. *SHAMA SOONDUREE DEBIA v. BINDE LALL PAKRASHEE*, 14 W.R. 396.

(46)—*Jurisdiction—Decree passed by Principal Sudder Amin of North Kanara before its transfer to Bombay—Execution by first class subordinate Judge who succeeded to functions of such Court—No delegation to second class Subordinate Judge by him—Bom. Act III of 1863, ss. 6 and 7—Bombay Courts Act (XIV of 1869).*—Where the Principal Sadar Amin of the district of North Kanara, before that district was transferred to the Bombay Presidency, passed a decree, *held* that it should be executed by the first class subordinate Judge who succeeded to the Court and functions of such Principal



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Sadr Amin, and that it could not by him be delegated for execution by a second class Subordinate Judge, though the amount of such decree be less than Rs. 5,000. Bombay Courts' Act (XIV of 1869) providing that, in suits under Rs. 5,000, second class subordinate Judges only should have jurisdiction, did not affect the execution of decrees passed before that Act came into operation. **PIRJADA NASARUDIN v. VENKAT PRABHU**, 9 B.H.C. 113.

(47)—*Property situate within jurisdiction of one Court at the time of decree—Transfer of jurisdiction to another Court—Execution of decree—Civ. Pro. Code, s. 223 (c)—Construction—Discretion of Court.*—A Court, which had jurisdiction to make a decree for the sale of mortgaged property, has also jurisdiction to execute its decree and bring the property to sale, although after the decree the district within which the property was situate was transferred and placed under the local jurisdiction of another Court. [R., 22 B. 640.] The use of the word "may" in "the Court which passed a decree may, on the application of the decree-holder" in s. 223 (c), does not take away from the Court the power to execute its own decree conferred by the previous part of the section, but rather gives it a discretion either to execute the decree itself or on the application of the decree-holder, to send it to another Court for execution. It is in fact an extension rather than a limitation of the Courts powers. **KARTICK NATH PANDEY v. TILUKDARI LALL**, 15 C. 667. [R., 163 P.L.R. 1901.]

(48)—Ss. 223, 610, 649. Act XIV of 1882 (Civ. Pro. Code)—*Effect of ss. 610 and 649—Decree, Execution of—Transfer of decree for execution to Court having territorial jurisdiction.*—The effect of ss. 610 and 649 of the Civ. Pro. Code, is that the Court which formerly had, but no longer has territorial jurisdiction ought when the decree is sent to it, to exercise by its own motion, or when applied for, the provisions of s. 223, and transfer the decree for execution to the Court which has territorial jurisdiction. **GIRINDRO CHUNDER ROY v. JARWA KUMARI**, 20 C. 103. [R., 163 P.L.R. 1901.]

(49)—Ss. 223 and 649, Civ. Pro. Code, 1882—*Court which passed decree—Transfer of jurisdiction.*—Where, after the plaintiff obtained a decree in the Court of the first Munsiff of Howrah, the local area, within which the cause of action arose and the judgment-debtor resided, was transferred from the first to the second Munsiff, held that the second Munsiff had no jurisdiction for entertaining the application and for allowing execution, and the Court of the first Munsiff was the proper Court in which the application ought to have been made. **KALI PADHO MUKERJEE v. BINO NATH MUKERJEE**

**Execution of Decree—continued.****—17.—Transfer of decree for execution  
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25 C. 315. [F., 27 C. 272; R., 9 O.C. 281, 30 M. 537 = 17 M.L.J. 417 = 2 M.L.T. 466; D., 28 C 238. = 5 C.W.N. 150, 35 C. 974 = 12 C.W.N. 859.]

(50)—*Execution—Decree for land and mesne profits—Change of jurisdiction—Transfer of decree.*—The district in which the property decreed was situate, was, by the order of Government, removed from the jurisdiction of the Ghazipur Court to that of the Sahadabad Court. The decree was transferred for execution to the latter Court also. Held, that the transfer was a perfectly legal proceeding and unimpeachable in any way. The Court at Sahadabad had power to send the decree to the Ghazipur Court for execution in respect of the mesne profits declared by the order of the Shahadabad Court to be due; and the latter was bound by such order as to the amount of such mesne profits. **LALU RAI v. RADHA PRASAD SINGH**, A.W.N. 1838, 139.

(51)—*Transfer of jurisdiction—Civil and Revenue Courts—Execution of decree.*—Case where it was held that a decree of 1850 which could not be executed by the Revenue authorities in consequence of the transfer of their jurisdiction to the Civil Courts, could be executed by the latter. **LACHMEEKANT GHOSE v. BAMUN DOSS MOOKERJEE**, 17 W.R. 471.

(52)—*Rent-decree—Transfer to another district for execution—24 & 25 Vic., c. 104, s. 15—Execution of decrees for rent by Civil Court.*—The High Court is competent, in the exercise of its power of superintendence under s. 15 of 24 and 25 Vic. c. 104, to decide the question of transferring a decree for rent made in one district, under Act X of 1859, to a different district for execution. [R., 22 M. 68 = 8 M.L.J. 231, F.B., 30 C. 155, F.B., 35 C. 990 = 12 C.W.N. 893, 12 C.W.N. 888 = 35 C. 789 = 7 C.L.J. 426; F., 31 M. 60 = 3 M.L.T. 246.] Rent-decrees made by the Collector, under s. 23 of Act X of 1859, can be transferred to a Civil Court for execution under the provisions of the Civ. Pro. Code. **NILMONI SINGH DEO v. TARANATH MUKERJEE**, 9 C. 295, P.C. = 12 C.L.R. 361 = 9 I.A. 174 = 4 Sar. 392. [F., 5 A. 406 = A.W.N. 883, 92, F.B.; Expl., 15 C. 179; R., 5 C.W. N. 279 = 28 C. 532, 12 C.W.N. 888 = 35 C. 789 = 7 C.L.J. 426; 36 C. 252 = 9 C.L.J. 125 = 13 C.W.N. 791, 26 M. 518; D., 21 C. 514.]

(53)—*Decree—Proceedings not pending in Collector's Court—Act III (B.C.) of 1870, s. 3—Transfer from Revenue Court.*—Case where it was held that a decree, under which no actual proceedings were pending in the Collector's Court at the commencement of Act III (B.C.) of 1870, was properly transferred to the Civil Court under thereof. **HURO PERSHAD ROY CHOWDHRY v. FOOL KISHORE DOSSEE**, 16 W.R. 308.

(54)—*Collector's decree transferred to Civil Court for execution—Effect—Presumption by*



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—continued.**

*High Court as to Court to which transferred—Appellate jurisdiction of High Court.*—On the transfer of a Collector's decree to a Civil Court for execution the effect is to make it as it were a case of execution on a decree of that Court, and it is incumbent on the High Court to presume that the lower Court acted properly and with jurisdiction, and its appellate jurisdiction follows as a matter of course. *DINDYAL PARAMANICK v. DINOBUNDHOO CHOWDHRY*, 21 W.R. 412.

(55)—*Ben. Act III of 1870—Transfer of decree—Application to set aside—Jurisdiction—Act X of 1859, s. 58.*—An *ex parte* decree for rent obtained in the Court of a Deputy Collector before Bengal Act, III of 1870, came into force was subsequently transferred to the Munsiff's Court under s. 2 of the Act. The defendant, stating that he wished to apply under s. 58 of Act X of 1859, to have the case re-heard, applied to the Munsiff to send the record back to the Deputy Collector, and on his refusal, an application was made to the Deputy Collector who sent for the record from the Munsiff and ordered a fresh trial, and the case was re-heard by him and decided in favour of the defendant. The Collector on appeal held that the Deputy Collector had no power to set aside the order. On appeal to the High Court:—*Held per Macpherson, J.*—That the Deputy Collector had no jurisdiction in the matter and that, under Bengal Act III of 1870, it was by the Munsiff and the Munsiff alone that the application for the hearing of the case under s. 58, Act X of 1859, could be heard and that the whole of the proceedings of the Deputy Collector were irregular and without jurisdiction and the fact that the Deputy Collector was acting without jurisdiction did not give the Collector jurisdiction in the matter. *Per Jackson, J.*—That the order of the Collector setting aside the original order of the Deputy Collector need not be quashed, but a direction should be added to it that the application made by the defendant to the Deputy Collector for a new trial be transferred to the Court of the Munsiff who should consider the propriety of granting such application. *In the matter of petition of WOOMA CHURN MOZOOMDAR*, 13 B.L.R. 215, Note = 16 W.R. 255. [*Expl.*, 18 W.R. 207.]

(56)—*Beng. Act III of 1870, ss. 3 and 5—Decree transferred to another Court for execution—Ex parte decree—Application to set aside decree—Jurisdiction.*—After an *ex parte* decree of a Revenue Court has been transferred to the Civil Court for the purpose of execution under the provisions of Bengal Act III of 1870, an application to set the decree aside or any application in relation to the decree should be made to the Court to which it has been transferred. *KRISHNA KISHORE PODDAR v. WOOMESH CHUNDER ROY*, 13 B.L.R. 214, F.B. = 21 W.R. 48.

**Execution of Decree—continued.****—7.—Transfer of decree for execution  
—Execution out of Court's jurisdiction  
—continued..**

(57)—*Beng. Act III of 1870, ss. 2, 5—Transfer of decree.*—Where, by the operation of Act VIII (B.C.) of 1869 and Act III of 1870, a decree is transferred, *e.g.*, from the Court of a Deputy Collector to that of a subordinate Judge, any application as to a matter prior to, or which may affect, the decree (*e.g.*, an application for a review), must be made, to the Court which passed the decree. *In re SRIMUTTY JUGGODUMA DOSSEE*, 10 B.L.R. App., 22, note = 15 W.R. 75.

(58)—*Beng. Act III of 1870—Decree transferred to Civil Courts for execution—Appeal—Ben. Act VIII of 1869, s. 108—Act X of 1859, ss. 153, 155.*—In a suit brought for recovery of Rs. 75 for arrears of rent the plaintiff obtained an *ex parte* decree on 18th March, 1869, in the Court of the Deputy Collector. In October 1871, he applied to the Munsif for and sued out execution of his decree. In January 1872, one of the defendants applied to the Deputy Collector for a review of his judgment and the Deputy Collector admitted the review and dismissed the plaintiff's suit. On appeal, the Judge held that the Deputy Collector had no jurisdiction to entertain the application for review or to hear the case, the decree having been transferred under Ben. Act III of 1870 to the Munsif for execution, and reversed the judgment of the Deputy Collector. *Held*, that the suit having been decided by the Deputy Collector, before Ben. Act VIII of 1869 came into operation, the procedure, therefore, would be that laid down by s. 108, of the Act, *i.e.*, under Act X of 1859, and the appeal would lie to the Collector, not to the Judge under ss. 153 and 155 of that Act. The decree alone was transferred to the Civil Court, and the application for review was rightly made to the Court of the Deputy Collector. *In re RAM SOONDAR BANDOPADHIA*, 19 W.R. 128 = 10 B.L.R. App. 21. (15 W.R. 75, R.)

(59)—*Decree sent for execution to Collector, when Civil Court may interfere on ground of irregularities.*—It is competent to a Civil Court to control the proceedings of a Collector, to whom a decree has been referred for execution, only when such Court has been set in motion by one of the parties to the proceedings in execution. *HARGOVAN PARBUDAS v. HIRA HARBIBHAI*, 8 B. 301.

(60)—*Civ. Pro. Code (Act X of 1877), ss. 320 to 325—Powers of Collector executing decree—Competency of Court to call for record sent to Collector.*—The Court that has made a decree or judicial order, which has then been transmitted for execution to a Collector, is not deprived of the judicial powers with respect to it which may still, at any particular time be, competent to such Court, and, in exercising such powers, the Court has and must have authority to re-call its own records transmitted to the Collector. In the case of the execution of a



**Execution of Decree—continued.****—17.—Transfer of decree for execution  
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—continued.**

decree for the sale of mortgaged property, the Collector is a subordinate ministerial officer of the Court, and is bound implicitly to obey its orders. In matters of dispute, the Legislature has, by s. 322-B. provided for a reference to the Court. In such a case, the Collector has no power to allow payment of the debt by instalments since it would not be competent for the Court itself to so allow, s. 210 of the Civ. Pro. Code, being inapplicable to such a case. **MAHA-DAJI KARANDIKAR v. HARI D. CHIKNE**, 7 B. 332. [F., 19 M. 435, Appr., 11 B. 478; R., 8 B. 301, 31 B. 120=8 Bom. L.R. 963.]

(61)—*Local Government Rules under s. 320, Civ. Pro. Code—Delivery of possession—Jurisdiction.*—Where a decree had been transferred for execution to the Collector in accordance with the rules framed by the Local Government under s. 320, the matter of delivery to the purchaser of property sold in such execution was still within the jurisdiction of the Court which passed the decree, notwithstanding the terms of s. 320 of the Civ. Pro. Code, and notwithstanding the Full Bench Ruling in 5 A. 314. **SUNDER DAS v. MANSA RAM**, 7 A. 407= A.W.N. 1885, 187.

(62)—*Transfer of decree to Collector for execution—Power of Court passing decree to postpone date of sale.*—Where the execution of a decree, is transferred to the Collector, the Court which passed the decree, so long as it remained with the Collector, has no power to interfere with the proceedings, as by postponing the date of sale. Only the Collector himself could do that. **DAULAT SINGH v. JUGAL KISHORE**, 22 A. 108=A.W.N. 1899, 205. [R., 24 A. 239=A.W.N. 1902, 49, 26 A. 447=A.W.N. 1904, 61=1 A.L.J. 65.]

(63)—*Executing Court bound to execute decree as it comes before it—Permanent stay of execution of part.*—It is incumbent on a Court whose duty it is to execute a decree to execute it in the form in which it comes before it. No authority to permanently stay the execution of any portion thereof can be assumed by the executing Court. **SUNKUR SINGH v. HUREE MOHUN THAKOOR**, 22 W.R. 460. [R., 26 C. 639.]

(64)—*Transfer of decree for execution, and power of Court as to execution out of its jurisdiction—Power of Court to alter decree.*—Where a decree is transmitted by one Court to another for the purpose of execution, the latter Court has no jurisdiction to alter the decree or the amount mentioned in the order for execution. **ALLY HOSSEIN v. JOOGULKISHORE**, Marsh 244=2 Hay, 113.

(65)—S. 207, Act VIII of 1859—*Joint-decree—Execution by some of the decree-holders—Modification of decree—Effect.*—A joint judgment for damages in favour of several persons, some of whom die, may be executed by the survivors alone on behalf of all interested. They may, at any rate, proceed under

**Execution of Decree—continued.****—17.—Transfer of decree for execution  
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s. 207, Act VIII of 1859. An executing Court has no power to modify the decree. **TEJA SINGH v. POKHUR SINGH**, 10 W.R. 98.

(66)—*Court of Subordinate Judge executing decree of subordinate Judge of another Court—Requisition to transmit records.*—It is the duty of a subordinate Judge's Court executing a decree of a subordinate Judge's Court in another district, to comply with a requisition of the latter Court to transmit the records of the case. **INDUR CHUNDER DOOGUR v. GOPAL CHUND SATIA**, 11 W.R. 230.

(67)—*Question raised for first time at time of execution of decree—Not expressly reserved—Question may be inquired into and decided by executing Court—Act XXIII of 1861, s. 11.*—A question raised for the first time between the parties to a decree, in execution proceedings, although not expressly reserved in that decree for determination at the time of its execution, may be inquired into and determined by the Court executing the decree, under s. 11 of Act XXIII of 1861. **JANOJI BANAJI v. VYANKATESH SHRINIVAS**, 2 B.H.C. 371. [Overruled, 12 B.H.C. 160, F.B.; Not F., 12 B.H.C. 163.]

(68)—*Assignment of decree—Powers of Court in executing transmitted decree—Civ. Pro. Code, 1877, ss. 228 and 232.*—When a decree is transferred to a Court for execution, and subsequently transferred by assignment, the assignee's application for execution must be made to the Court which passed the decree, and not to the Court to which the decree has been sent for execution. **KADIR BAKHSH v. ILAHI BAKHSH**, 2 A. 283. [F., 27 C. 488.]

(69)—Ss. 228, 232 and 578. Civ. Pro. Code, 1882—*Execution of decree—Transfer to another Court—Jurisdiction of that Court to substitute the name of transferee of decree—Can order passed without jurisdiction be rectified by s. 578.*—An application for execution to a decree by a transferee, after the substitution of his name, can be entertained only by the Court which passed the decree, and the Court to which the decree has been transferred for execution had no jurisdiction to entertain it. (14 W.R. 65, 9 B.H.C. 46, 2 A. 283, R.) An order passed by a Court to which a decree has been transferred for execution, directing the execution to proceed after substitution of the name of the assignee of the decree, is one passed without jurisdiction. Such an order can be set aside on appeal. It cannot be cured by the provisions of s. 578, Civ. Pro. Code. **AMAR CHUNDRA BANERJEE v. GURU PROSUNNO MUKERJEE**, 27 C. 488. (22 C. 558, D.) [R., 12 M.L.J. 24, 25 A. 443, 28 M. 466, F.B.=15 M.L.J. 116, 1 C.L.J. 315, 11 O.C. 112, 13 C.W.N. 533=9 C.L.J. 443.]

(70)—*Assignment of decree before wrong Court—Execution—Payment of money by judgment-debtor—Suit for refund whether maintainable.*—A decree of the Court of L was



**Execution of Decree—continued.****—17.—Transfer of decree for execution  
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transferred for execution to the Court of S. The decree-holders assigned the decree to one B at S which was irregular, as the assignment should have taken place before the Court of L. The judgment-debtor deposited a certain sum of money in the Court at S which sum was paid to B, the assignee. Subsequently when the judgment-debtor objected to the irregular assignment, B got a fresh assignment from the original decree-holders before the Court of L. The judgment-debtor sued for the refund of the money paid to the assignee. *Held*, that the money of which refund was claimed, though paid to the assignee before the assignment had been sanctioned by the Court of L, he was still undoubtedly entitled to it, and that, as the irregularity of the procedure of the Court of S had since been cured, and the assignee was now in a position to execute the decree, it would clearly be inequitable to refund the money on the score of that irregularity. **MOHUN LALL v. BAROO MULL**, 6 N.W.P. 69.

(71)—*Civ. Pro. Code*, 1882, s. 223—*Execution of decree—Jurisdiction of Court to which decree transferred for execution*—The Court to which a decree is sent for execution retains its jurisdiction to execute the decree until the execution has been withdrawn from it, or until it has fully executed the decree and has certified that fact to the Court which sent the decree, or has executed it so far as that Court has been able to execute it within its jurisdiction and has certified that fact to the Court which sent the decree, or until it had failed to execute the decree and has certified that fact to the Court which sent the decree. The mere striking off of an application for execution on the ground of informality in the application does not terminate the jurisdiction of the Court to execute the decree, nor does it render it necessary for the Court to send any certificate to the Court which forwarded the decree for execution. **ABDA BEGAM v. MUZAFFAR HUSEN KHAN**, 20 A. 129 = A.W.N. 1897, 218. (1 B.L.R., F.B. 91, R.) [R., 13 C.P.L.R. 169, 4 O.C. 332, 13 C.W.N. 533 = 9 C.L.J. 443.]

(72)—*Power of Court to which decree is sent for execution—Civ. Pro. Code*, 1908, O. 20, r. 19.—The Court, to which a decree is sent for execution by another Court, may take all steps, including the issue of a notice under s. 216 of the Code of Civil Procedure, as if execution is of its own decree. **CHHAGANLAL NARBHERAM v. JAMNADAS MANCHARAN**, 11 B.H.C. 19.

(73)—*Transfer of decree for execution—Executing Court may refer objector to original Court—Civ. Pro. Code*, s. 239.—The Court to which the decree is transferred for execution may entertain objections against the execution, and the Court may also refer the objector to the Court that passed the decree. **JASSODA KOER v. THE LAND MORTGAGE BANK OF INDIA**, 8 C. 916. [Appr., 23 C. 39].

**Execution of Decree—continued.****—17.—Transfer of decree for execution  
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(74)—*Civ. Pro. Code*, ss. 239, 244—*Jurisdiction of Court passing decree, whether can be questioned by Court executing on transfer for execution*—The intention of the Civ. Pro. Code, as shown by ss. 239 and 242, is manifestly that a Court to which a decree is sent for execution by another under the same Government and the same law of procedure, shall not take on itself the trial of the question whether the Court which passed the decree had jurisdiction to make it or not. In cases of doubt, the Court where execution is sought may adjourn the execution in order to enable the party interested to make an application to the Court, which passed the decree or to the appellate Courts superior there-to if necessary. **CHOGALAL v. TRUEMAN**, 7 B. 481. [F., 30 B. 101 = 7 Bom. L.R. 659; R., 6 Bom. L.R. 342.]

(75)—*Court to which decree has been sent for execution, extent of powers of*—It is not for a Court, to which a decree capable of execution is sent by another, to enter on a criticism of it and to refuse execution, because it is of opinion that there are questions between the parties which could not be entertained and decided in execution and that too much has been left for the executing Court to do. **A.P. RAJESAV CHANDRARAO v. NANARAO KRISHNA JAGHIRDAR**, 11 B. 528.

(76)—*Execution of transferred decree—Competency of executing Court to question propriety of transfer order—Causes shown against execution of transferred decree—Procedure by executing Court—Civ. Pro. Code*, s. 239.—The Court, executing a decree transferred to it by a Court in another district, cannot question the correctness or propriety of the order transmitting such decree. [Rel. on, 156 P.L.R. 1905; R., 21 B. 456.] If sufficient cause is shown against the execution of a transferred decree, the executing Court should proceed under s. 239 of the Civ. Pro. Code, of 1877 and stay execution for a reasonable time so as to enable the debtor to apply to the original Court. **BEERCHUNDER MANIKYA v. MAYMANA BIBEE**, 5 C. 736.

(77)—*Mofussil Small Cause Courts Act XI of 1865*, s. 20—*Decree of Small Causes Court sent for execution to subordinate Court—Latter not competent to question validity of decree—Remedy of judgment-debtor—Civ. Pro. Code*, 1882, s. 239.—Where the plaintiff obtained a decree against the defendant in a Small Cause Court, and having presented to the subordinate Court a copy of the judgment and a certificate under s. 20 of Act XI of 1865, has applied to this latter Court to issue execution upon the dwelling house and the other immoveable property belonging to the judgment-debtor, and the judgment-debtor applied to be allowed to pay the judgment-debt by instalments, alleging that he was an agriculturist, and that he was unable to pay it in a lump sum, and the plaintiff denied these allegations, *held* that the



**Execution of Decree—continued.****—17.—Transfer of decree for execution  
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Subordinate Judge was not competent to question the validity of the Small Cause Court decree, his duty being confined to enforcing it on the "presentation of a copy of it and certificate" as provided by s. 20 of Act XI of 1865; and that he could not take any notice of the status of the defendant as an agriculturist. [R., 30 B. 101=7 Bom. L.R. 659.] Under the above said circumstances, the only course left to the defendant was to apply to the Small Cause Court for a review of its judgment, for which purpose the Subordinate Judge might stay the execution of the decree, as provided by s. 239 of the Civ. Proc. Code, 1882. **KASTURSHET JAVERSHET v. RAMA KANHOJI**, 10 B. 68.

(78)—*Decree referred for execution—Jurisdiction of Court to decide question of limitation.*—A Court to which a decree is referred by another Court for execution is competent to enquire into the power of the Court to entertain the application of the decree-holder to execute the decree and to decide whether the decree-holder's right to execute the decree is barred by time. **BUZUR BEEBEE v. MARY JACKSON**, 5 W.R. Mis., 14. [F., 7 W.R. 19.]

(79)—*Judgment erroneous—Decree not containing such erroneous part—Duty of executing Court to follow decree.*—If the Court's judgment indicates an intention which would be not authorized by the law, and which was not embodied in the decree, the executing Court has more reason to be bound by the decree than the judgment. **MOTTEE LALL SINGH v. PETAM KOER**, 20 W.R. 308.

(80)—*Transfer of decree for execution to different Court—Case struck off for default—Proper Court to apply to for fresh execution.*—Where, on the application of a decree-holder, a decree is transferred by the Court which originally passed it to another Court to be executed by it, but the latter Court happens to strike it off the file for default, the jurisdiction in the matter of the execution of the decree transferred to the latter Court ceases. Under such circumstances, the proper Court to apply to for the fresh issue of the execution would be that of the Judge who had passed the decree originally and not the Court to which he had once transferred it for execution. **RAJAH BHOOP SINGH BAHADOOR v. SUNKUR DUTT JHA**, 6 W.R. Mis., 47 [Overruled, 9 C.L.J. 443=13 C.W.N. 533=12 Ind. Cas. 57.]

(81)—*Limitation Act (XV of 1877), sch. II, art. 179—Decree—Transfer—Application for execution by transferee in Court to which decree transferred, it made to "proper Court" and "in accordance with law"—Amended certificate subsequently produced from original Court, effect of—Court to which decree transferred, if may entertain successive applications for execution.*—Where, after a decree was transferred for execution to another Court, the interest of the

**Execution of Decree—continued.****—17.—Transfer of decree for execution  
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judgment-creditor became vested by operation of law in another person, and the latter applied for execution in the usual form to the Court to which the decree was transferred, without previously obtaining a certificate from the Court which made the decree authorising him to proceed with the execution, but subsequently produced such a certificate. *Held*, that, once the amended certificate was obtained from the Court which made the decree, it would relate back, not merely to the time of the application, but to the time when by operation of law the rights under the decree had become vested in the applicant, and it became competent to the Court to proceed with the execution at once on the basis of the original application. That the application was, therefore, made to "the proper Court" and "in accordance with law" within the meaning of art. 179 of sch. II of Act XV of 1877. (27 A. 619, 12 A. 64, D.) The language of art. 179 ought not to be strained in favour of the judgment-debtor who has not paid his just debt. (1 C.W.N. 626, F.) Till the Court to which a decree has been sent for execution has made its return to the Court which made the decree, it has jurisdiction to entertain successive application for execution. (6 W.R. Mis., 47, 1 B.L.R., F B., 91, R.) The mere fact that execution proceedings have been struck off does not indicate the final determination of the execution-proceedings in that Court. (20 W.R. 133=12 B.L.R. 411, 9 M.I.A. 328, Rel. on.) *Quære*:—Whether the ruling in 28 C. 488, that an application by the transferee of a decree for execution after substitution of his name can be entertained only by the Court which passed the decree, and that the Court to which the decree has been transferred has no jurisdiction to entertain it, is consistent with the decision in 22 C. 558. **MANORATH DAS v. AMBIKA KANT BOSE**, 13 C.W.N. 533=9 C.L.J. 443=1 Ind. Cas. 57.

(82)—*Decree transmitted to another Court for execution—Execution for costs other than included in decree.*—A Court to which a decree is transferred for execution is not justified in making the execution of such decree for any costs other than those included in it. **NIL KOMULROY v. ROHINEE DOSSIA**, 13 W.R. 313.

(83)—*Court executing decree of another Court, power of, to inquire, into adjustment—Act VIII of 1859, s. 387—Act XXIII of 1861, s. 11.*—Act VIII of 1859 regulated the proceedings in execution of a decree in a suit pending when it was passed and not the old law. S. 387 of Act VIII of 1859 had no reference to such proceedings. By s. 11 of Act XXIII of 1861 a Court executing the decree of another Court cannot determine questions concerning the alleged payment of moneys in satisfaction of the decree. **INNIS v. THE DELHI BANK**, 51 P.R. 1870.

(84)—*Civ. Pro. Code, 1882, s. 257-A—Money decree—Agreement for payment by instalments—*



**Execution of Decree—continued.****—17.—Transfer of decree for execution  
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*Sanction to be by Court passing the decree, and not by Court executing it.*—An agreement under s. 257 A, Civ. Pro. Code, for the payment of a money-decree by instalments, can be sanctioned only by the Court which passed the decree and not by that to which the decree has been transferred for execution. **GANDHARAP SINGH v. SHEODARSHAN SINGH, 12 A. 371 = A.W.N. 1890, 197.** [F., 26 P.R. 1894; R., A.W.N. 1895, 149.]

(85)—*Act VIII of 1859, s. 284—Execution of decree—Procedure.*—When a decree of one Court has been transmitted under s. 284 *et seq* of Act VIII of 1859, to another Court for execution, and when that Court has struck off for default the first proceedings in execution of the judgment-creditor, the Court to which the decree has been transmitted has jurisdiction to allow the proceedings to be revived. **BAGRAM v. J.P. WISE, 1 B.L.R. F.B., 91 = 10 W.R. 46, F.B.** [F., 20 A. 129 = A.W.N. 1897, 218; *Rel on*, 13 C.W.N. 533 = 9 C.L.J. 443 = 1 Ind. Cas. 57; *Cons.*, 3 C. 512; R., 4 O.C. 333.]

(86)—*Jurisdiction of executing Court.*—The jurisdiction of a Court, to which a decree has been transferred for execution, is limited to carrying out such execution and such Court cannot transfer it for execution to another Court. **SHIB NARAIN SHAHA v. BEPIN BEHARY BISWAS, 3 C. 512 = 1 C.L.R. 539.** (1 B.L.R., F.B., 91, *Cons.*)

(87)—*Power of Court to which decree transmitted—Act VIII of 1859, ss. 285 and 286.*—The Court, to which a copy of the decree has been transmitted for execution under s. 286 of Act VIII of 1859, must itself execute it and not delegate another Court to do the same. If such authority were required, it could be granted only by the Court, on which it was originally to execute it. **BHAG SINGH v. BISHAMBER DAS, 129 P.R. 1879.**

(88)—*Civ. Pro. Code, 1859, s. 287—Copy of decree or order transferred by one District Judge to another—Latter not to transfer to third Judge—Complete execution in Court to which decree transferred, failure to secure—Procedure.*—A copy of a decree or of an order for execution, transmitted by the Judge of one district to that of another for the purpose specified in Act VIII of 1859, s. 287, cannot be transmitted to a third district by the Judge of the second district. If complete execution cannot be had in the second district, the decree-holder should have his decree re-transmitted to the Court, whose duty it is to execute it, and there obtain a fresh certificate to any other district where execution is practicable. **DHUNPUT SINGH BAHADOOR v. WOOMA SUNKUREE GOOPTA, 21 W.R. 337.**

(89)—*Order of Court for execution of decree—Transmission of decree to another Court for execution after passing of order—Power of latter Court to consider whether execution is barred—Civ. Pro. Code, 1882, s. 223.*—Where Court A

**Execution of Decree—continued.****—17.—Transfer of decree for execution  
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transmits a decree for execution to Court B, the former Court having previously made an order for execution of the decree, Court B has no power to determine whether execution is barred by limitation. The order for execution made by the Court which transmits the decree is binding on the parties until reversed on appeal. But, where the transmitting Court merely sends the decree and the certificate of non-satisfaction, the Court to which the decree is transmitted has the power to determine whether execution of the decree is barred. **HUSEIN AHMAD KAKA v. SAJU MAHOMED SAHIB, 15 B. 28.** [R., 6 Bom. L.R. 657, 29 B. 29; D., 12 Bom. L.R. 844.]

(90)—*Act VIII of 1859, s. 284—Transmission of decree for execution to another Court—Decision of question of limitation by.*—The Court to which a decree has been transmitted for execution has jurisdiction to decide whether the application preferred to it for execution of the decree was barred by limitation or not. **CHOTI LAL v. MANICK CHAND, 7 N.W.P. 115.** (10 W.R., F.B., 10, F.)

(91)—*Transfer of decree for execution—Power of executing Court to determine plea of limitation.*—Where a decree is sent to another Court for execution, the latter Court has jurisdiction to determine whether execution is or is not barred by limitation. **BYKUNTNATH MULLICK v. JOY-GOPAL CHATTERJEE, 7 W.R. 19.**

(92)—*Act VIII of 1859, ss. 282-294—Execution—Limitation—Transfer of decree—Jurisdiction.*—When a decree is, under s. 284 and the following sections of Act VIII of 1859, transmitted from one Court to another Court for execution, the Court to which the decree is transmitted has jurisdiction to determine whether or not execution of the decree is barred under Act XIV of 1859. **LEAKE v. DANIEL, B.L.R., Sup. Vol. 970 = 10 W.R., F.B., 10.** [R., 11 W.R. 430, 7 N.W.P. 115; *Appr.*, 5 C. 897; R., 17 C. 491, 23 C. 39; *Cons.*, 8 C. 916; D., 15 B. 28.]

(93)—*Act XI of 1865, s. 20—Certificate of non satisfaction from Court of Small Causes—Decree transferred to Munsiff's Court of same place—Objection on ground of limitation—Competency of Munsif to adjudicate on limitation.*—The holder of a decree, after several unsuccessful attempts to execute the same applied for and obtained a certificate of non-satisfaction under s. 20, Act XI of 1865, from the Court of Small Causes at Arrah. The decree was transferred for execution to the Munsiff's Court at Arrah. Before the Munsiff, the judgment-debtor objected to the execution of the decree on the ground of limitation. The plea was overruled by the Munsif. The judgment-debtor appealed to the District Judge, who, reversing the lower Court's decision, held that the decree was barred by limitation. The High Court set aside



**Execution of Decree—continued.****—17.—Transfer of decree for execution  
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the District Judge's decision on the ground that neither of the lower Courts had jurisdiction to entertain the objection of limitation. The decree-holder again applied for execution in the Arrah Munsif's Court and the Munsiff again entered into the question of limitation and refused the application on that ground. The contention was that the Munsiff had no power to entertain this objection again, the matter having been finally set at rest by the previous decision. It appeared that the Court of Small Causes at Arrah had been abolished and its jurisdiction, so far as the execution case was concerned, had been transferred to the Munsiff's Court at Arrah and that the Munsiff decided the objection of limitation, not as the Judge to whose Court the decree was transferred for execution but as the successor in power of the abolished Court of Small Causes. *Held*, that the Munsiff had jurisdiction to decide the objection. **SOOMUT DOSS v. BHOOLUM LALL**, 24 W.R. 151=13 B.L.R. App. 27.

(94)—*Transfer of decree to another Court for execution—Jurisdiction of original Court.*—The fact that a decree has been transferred to another Court for execution will not deprive the Court, which transferred the decree, of jurisdiction to decide, upon an application to it, whether or not execution of the decree has been barred by limitation. **SRIHARY MUNDUL v. MURARI CHOWDHRY**, 13 C. 257. [R., 17 A. 431.]

(95)—*Execution of decree in another district—Application by third party—Jurisdiction.*—A decree sent for execution to another district cannot be recalled on the application of a third party. **INDRA CHAND DUGAR v. GOPAL CHANDRA SHETIA**, 3 B.L.R., A.C., 181=11 W.R. 557.

(96)—*Small Cause suit—Transfer of execution proceedings from one Court to another—Civ. Pro. Code, 1882, ss. 25, 647—Act VI of 1892, s. 4.*—S. 25, Civ. Pro. Code, 1882, or that section read with s. 647, gives the power to District Courts to transfer execution proceedings in a Small Cause Court to the Court of a subordinate Judge. The ruling in 5 B. 680 that these sections apply to execution proceedings in Small Cause Courts is in no way affected by the explanation to s. 4 of Act VI of 1892. **KRISHNA VELJI MARWADI v. BHAI MANSA-RAM**, 18 B. 61=P.J. 1823, 258. [F., 22 B. 778; R., 18 B. 458, 19 B. 276, 1 O.C. 117.]

(97)—*Civ. Pro. Code (Act X of 1877), ss. 25, 647—Mofussil Courts of Small Causes—Execution of decree—Power of District Court to withdraw applications for execution.*—Ss. 25 and 647, Civ. Pro. Code, 1877, are both applicable to Courts of Small Causes in the mofussil, and the former section is extended by the latter to execution proceedings in such Courts. A District Judge has, therefore, power under s. 25

**Execution of Decree—continued.****—17.—Transfer of decree for execution  
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of Act X of 1877, to withdraw an application for execution of a decree from a subordinate Court, and to dispose of that application himself, or to transfer it to another subordinate Court competent to deal with the same. **BALAJI v. RANCHODDAS**, 5 B. 680. [Not F., 15 C. 177; F.; 22 B. 778; Cons., 18 B. 61; R., 16 C. 457.]

(98)—*Small Cause Court, mofussil—Act XI of 1865, s. 20—Execution of decree—Transfer of decree to another Court.*—Under s. 20 of Act XI of 1865, a Court of Small Causes may transfer a decree for execution to another Court, not only when there has been a sale of such moveables of the debtor as the judgment-creditor had been able to discover, and the proceeds of such sale have not been sufficient to satisfy the decree, but also when no sale has taken place at all, and the decree remains unsatisfied by reasons of there being no moveable property of the judgment-debtor which can be found within the jurisdiction capable of being sold. *In re* **CHANDRA KANTA BISWAS**, 3 C.L.R. 558.

(99)—*Act XI of 1865, Courts of Small Causes constituted under—Act XIV of 1869, procedure in cases tried by Judges invested with Small Cause jurisdiction under, subject to the Civ. Pro. Code, without the variations in Act XI of 1865—Transfer of decrees for execution from Small Cause to Original Side of same Court, Civ. Pro. Code (Act XIV of 1882), s. 223.*—The Courts of subordinate Judges invested with special Small Cause jurisdiction under s. 28 of Act XI of 1869 do not thereby become "Courts of Small Cause" constituted under Act XI of 1865. They merely exercise a similar jurisdiction, and it cannot be said that the variations of procedure prescribed expressly for Courts constituted under Act XI of 1865 are applicable to any Courts constituted under a different Act. Consequently, the Court of a subordinate Judge acting under s. 28 of Act XIV of 1869 is governed, as regards procedure, purely by the provisions of the Civ. Pro. Code, without the variations provided by Act XI of 1865. Under art. (d) of s. 223 of the Civ. Pro. Code, the Court which has passed the decree in its Small Cause jurisdiction may transfer it for execution to the other branch of the same Court. For such purpose, the two sides of the Subordinate Judge's Court may be regarded as different powers since they exercise different powers. **BHAGVAN DAYALJI v. BALU**, 8 B. 230. [F., 9 B. 237; R., 12 B. 31, 18 B. 61, 23 B. 382, 31 B. 314=9 Bom. L.R. 327.]

(100)—*Execution of decree—Small Cause Court—Jurisdiction—Transfer of decree for execution—Act X of 1877, s. 268—Act XI of 1865, s. 20.*—Except in the manner allowed by s. 20, Act XI of 1865, the Judge of Small Cause Court cannot now send a decree of his own Court for execution by another Court, nor can he issue an order under s. 238, Act X of 1877, out of his own



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jurisdiction. *MOONSHEE HOOSAIN ALLY v. ASHOTOSH GANGOOLY*, 3 C.L.R. 30 [F., A.W.N. 1884, 69, 30 C. 713.]

(101)—*Act XI of 1865 — Civ. Pro. Code*, ss. 286, 287—*Decree of Small Cause Court—Execution by another Court—Transmission of decree, documents required.*—Process of execution against the person or personal property of a judgment-debtor may be issued on the decree of a Court of Small Causes by a Court in another district. Before issuing such process of execution, the Court receiving the decree is bound to see that the provisions of ss. 286 and 287 of the Code have been strictly complied with. The documents required to be transmitted for the purpose of obtaining execution are a copy of the decree and a certificate of the sum remaining due under it, together with a copy of any order for execution that may have been passed. *P. VENKATASUBIA v. SIVARAMAPPA*, 4 M.H.C. 331.

(102)—*Civ. Pro. Code, 1859, s. 287—Decree of Bombay Small Cause Court—Reference to Subordinate Judge to execute decree—Subordinate Judge whether can proceed against immoveable property.*—The Court of Small Causes at Bombay has power to execute its decree only against the moveable property of the judgment-debtor but, when such decree is transferred for execution to a Court to which the Civ. Pro. Code applies, the latter Court can, under s. 287 of the Code, enforce it against the immoveable property also. *In re JAGJIVAN NANABHAI*, 1 B. 82.

(103)—*Execution of decree—Transfer of decree from Small Cause Court to Judge's Court—Order of Judge—Appeal.*—A decree transmitted to a Court for execution is to be regarded as the decree of that Court for the purpose of execution. Orders passed by a District Judge in execution of a decree transmitted to his Court from a Court of Small Causes, are appealable. *MOBARUCK ALI v. SOOMEE RUNGA CHAREE*, 3 N.W.P. 168. [R., 20 W.R. 478; D., 21 W.R. 292 = 13 B.L.R. App., 28.]

(104)—*Old debt mentioned in mortgage-deed—Clause undertaking to pay off the same before taking property back—No charge created with regard to such debt—Redemption conditional on payment of both debts—Adverse order against claimant—Omission to sue within one year—Effect—Civ. Pro. Code, 1882, ss. 280, 283.*—In this mortgage-deed for Rs. 64 advanced at the date of the mortgage, mention was made of an old debt of Rs. 100 due on a previous separate bond and the mortgagor undertook to pay it together with the Rs. 64 when he took back the mortgaged land. Such undertaking did not make the old debt a charge on the property, the instrument containing no words to that effect, it had the effect only of making the equity of redemption conditional on payment of

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both the debts. [F., 18 M. 368; Appr., 20 B. 346; R., 22 B. 520, 4 C.L.J. 334, 9 C.W.N. 789, 8 O.C. 132, 11 O.C. 248; D., 28 B. 349 = 6 Bom. L.R. 313, 8 O.C. 227.] In this case, plaintiffs, the decree-holders, had rightly contended that, as the defendant had not taken proceedings to establish his right within a year, notwithstanding an order made against him in a previous summary proceeding, he was now estopped from insisting that he held a mortgage to the extent of Rs. 164. The defendant's previous application was virtually one praying that the Court should allow the equity of redemption to be attached and sold, only on discharge of the mortgage for Rs. 164 and the Court by its order *pro tanto* rejected the application, giving effect to it only to the extent of the principal under the mortgage, namely Rs. 64, and any further right of the defendant should have been established by suit brought within a year from the order. *YASHWANT SHENVI v. VITHOBA SHETI*, 12 B. 231. [R., 22 B. 640; D., 16 B. 1, 1 A.L.J. 531.]

Court to which decree transferred for execution whether can question propriety of transfer order—See CIV. PRO. CODE, 1908, ss. 38, 39, 41, O. XXI, rr. 4, 5. 21 (1), (2), 21 B. 455.

Execution of decree—Transfer to Collector—Appeal to High Court from Collector's orders in execution—See COLLECTOR, 5 A. 314, F.B. = A.W.N. 1883, 59.

See HIGH COURT, JURISDICTION OF—CALCUTTA, 1 Hyde, 136.

See JURISDICTION—QUESTION OF JURISDICTION, 11 B. 153, 11 B. 160, note = P.J. 1875, 218.

See JURISDICTION OF CIVIL COURTS, 11 B. 478.

See LIS PENDENS, 10 B. 400.

**—18.—Miscellaneous.**

(1)—*Lost record—Record burnt—Decree, Execution of—Limitation Act (XV of 1877), sch. II, art. 179, cls. (1) and (4)—Reconstruction of lost record—Inherent power—Step-in-aid of execution.*—A Court has inherent power to re-construct its records, when they have been lost or destroyed. An application for execution of a decree need not be accompanied by a copy of the decree. When, therefore, the decree has been lost or destroyed, it is competent to the decree-holder to apply for execution and to obtain relief upon proof of the contents of the decree by secondary evidence. An application to a Court to re-construct a lost decree is not a step-in-aid of execution, as it is needless for the decree-holder to have the decree restored before he applies for execution, which must be done within three years from the date when the judgment was pronounced. *Quære.*—Whether, when a record has been destroyed, the decree-holder is entitled



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

to bring a fresh suit, or whether he must apply for execution of the lost decree and prove its contents by secondary evidence. *RAJ GIR SAHAYA v. ISWARDHARI SINGH*, 11 C.L.J. 243 = 5 Ind. Cas. 660.

(2)—*Order in execution proceedings, effect of as res judicata—Limitation Act, s. 19, application of, to execution proceedings—Civ. Pro. Code, s. 230.—Held*, that orders in execution proceedings are binding on the parties in all subsequent proceedings in that suit on principles analogous to those of *res judicata*. *Held*, further, that the effect of the previous order must be confined to the point actually decided. *Held*, also, that the provisions of s. 19 of the Limitation Act cannot affect the absolute prohibition, against the granting of an application after twelve years from certain dates, imposed by s. 230, Civ. Pro. Code. *BHIKHARI v. GAURI SHANKAR*, 11 O. C. 220. (11 B. 537, 14 B. 206, 18 C. 631, 11 O.C. 57, R.)

(3)—*Execution of decree—Execution against defendant against whom no relief granted.—A decree cannot be executed against a person who, though originally named as a defendant in the suit, was not named in the decree as one of those against whom the decree was given. BOOBUN MOYEE DEBIA CHOWDRAIN v. BROJONATH ROY*, 7 W.R. 62.

(4)—*Attachment—Liability of execution—Creditor—Act VIII of 1859, ss. 92, 214, 246.—If a decree-holder, having obtained a warrant for the attachment of the goods of A, points out to the officer of the Court the goods of B as those of A, and causes their attachment and removal, he is a wrong-doer who has procured the commission of a trespass, and is responsible, though he acts innocently or mistakenly. If a Court, having before it all the facts, were to adjudicate as to the right of a defendant to particular moveables, and to order the attachment of specified property, the order would be the act of the Court; and if the decree-holder had acted *bona fide* in bringing all the facts before the Court, he would not be liable. MUS-SAMAT SURJAN BIBI v. SHEIKH SARIALAKA*, 3 B.L.R. A.C., 413 = 12 W.R. 329. (7 W.R. 355, D.) [Appr., 5 N.W.P. 211; R., 8 B.H.C. A.C., 177, 9 B.H.C. 92, 11 B.H.C. 46, 3 B. 74, 28 C. 540 = 6 C.W.N. 175, 129 P.R. 1908, 4 N.L.R. 49.]

(5)—*Transfer of a decree passed by Civil Court for execution to a Rent Court—Civ. Pro. Code (Act V of 1908), ss. 38, 39 and O. XXI.—Held*, that there is nothing in the language of ss. 38 and 39 or of the Rules in Order XXI of Act V of 1908, which indicates an intention on the part of the Legislature that a Court should not transfer a decree for execution except to another Court of the same kind as itself. A decree passed by the Civil Court can therefore be transferred for execution to a Rent Court and *vice versa*. *INDAR PERSHAD v. FATEH CHAND*, 18 O.C. 119 = 6 Ind. Cas. 994.

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

(6)—*Execution of decree—Decree to be executed where there has been appeal.—Where there has been an appeal from any decree, the decree to be executed is that of the appellate Court and not that of the Court of first instance. (4 A. 377, A.W.N. 1882, 126, R.) Where there has been an appeal to the District Judge from the subordinate Judge's decree for costs, and although the latter had been affirmed by the appellate Court only after an application for execution of the decree of the Court of first instance was made, it was held that the decree-holder should put in an application for the execution of the decree of the appellate Court, as the former decree ceased to be executable after the appellate decree was passed. BHAWANI GHULAM v. DEORAJ KUARI*, A.W.N. 1884, 183.

(7)—*Execution of decree—Power of Court to refuse.—Where no appeal has been preferred against a decree and the time therefor has expired, a Court cannot refuse execution. ISHAN CHUNDER ROY v. ASHANOOLLAH KHAN*, 10 C. 817. [R., 15 B. 307.]

(8)—*Ambiguous or defective decree—Decree interpreted with reference to the pleadings in the suit.—Where a Court has to execute a decree which is badly drawn up and ambiguous, it is permissible to refer to the pleadings in the suit in which the decree was passed, in order to ascertain its precise meaning. NISAR HUSAIN v. ALLAH BAKHSI*, A.W.N. 1908, 257 = 5 A.L.J. 742. (A.W.N. 1890, 75, 13 A. 343, 18 A. 344, R.)

(9)—*Duty of person selling property of which he afterwards becomes owner—Applicability to Court-sales.—The doctrine, that, where a party sells property, of which he is not, but afterwards becomes the owner, he is bound to make good the sale out of his subsequently acquired interest, has no application to the case of a sale, which is made through the Court, at the instance of an execution creditor and is, therefore, compulsory. ALUKMONEE DABEE v. BANEE MADHUB CHUCKERBUTTY*, 4 C. 677 = 3 C.L.R. 473.

(10)—*Execution of decree—Priority of attachment—Effect.—Where a judgment-creditor attached land in satisfaction of his debt, but allowed the sale to be postponed to enable the judgment-debtor to raise the money by way of mortgage, and whilst the attachment was pending, the property was sold at the instance of another creditor, held that the former judgment-creditor was entitled to proceed against other property belonging to the judgment-debtor. KALI PERSHAD DUTT v. RAJAH MAHOMED JOWAHUR JUMMA KHAN*, 10 B.L. R. App. 9.

(11)—*Execution of decree—Double sale of same property—Decree carrying lien, priority of—Special decision.—In execution of a money-decree, A's taluk was sold to B. C purchased it in execution of another decree which gave the*



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

benefit of a mortgage. D, as purchaser of share of C's rights, sued E for rent. E pleaded that he had paid the rent to B, who intervened, asserting his title as purchaser and alleging actual possession. The Judge decreed that the decree in execution of which C purchased, gave him precedence over B. On special appeal, the defendants pleaded that this decree had been practically set aside by the High Court having held that the decree, under which C was a purchaser was a money decree bearing no lien. *Held* that, as the High Court decision above referred to, was passed in another suit between different parties which concerned other lands sold under the decree under which C purchased, it could not prejudice the plaintiff and that the Judge's decree was valid and must be executed. **MAHOMED DANISH v. MAHOMED KOEM, 25 W.R. 111.**

(12)—*Execution sale—Reversal of decree on appeal—Right to recover the land sold and not simply the sale proceeds.*—Where the land of the judgment-debtor is sold in execution of a decree, and on appeal the decree is reversed, the judgment-debtor is entitled to recover the land itself and not merely the proceeds of the sale thereof. **SADASIVA v. SABAPATHY, 5 M. 106. [R., 80 P.R. 1903=19 P.L.R. 1904, A.W. N. 1897, 28, 31 C. 499.]**

(13)—*Decree dismissing a suit—Affirmance of decree by High Court—Application to set aside ex parte decree—Decree, setting aside ex parte decree, not appealed against.*—Where a suit for possession of land was dismissed by the Court of first instance and, on appeal, the decree of the first Court was set aside in the absence of the defendant, and a decree was given in favour of the plaintiff, but, on appeal to the High Court, the latter set aside the decree of the lower appellate Court, and restored that of the first Court, and meanwhile an application under s. 108, Civ. Pro. Code, 1882, to re-hear the appeal was successful, and a decree was drawn up in favour of the plaintiff, in the presence of both the parties which was never appealed against, the Court could not interfere with the execution of that decree, as it had become final, no appeal having been preferred against it. **MAINUDDIN TULUKDAR v. RAMMONI DAS, 9 C.L.J. 460=4 Ind. Cas. 167.**

(14)—*Attachment in execution—Release order—Effect.*—Where an order releasing an attachment of property is not appealed against, it becomes final and conclusive as between the parties and no subsequent application for attachment will lie. **FAKIR BAKSH v. MAYADAHARI, 4 P.R. 1886. (105 P.R. 1882. R.)**

(15)—*Interlocutory decision, how far binding on appellate Court.*—The decision of a Court in execution proceedings that an execution application was not time-barred though binding upon the parties in a subsequent execution proceeding pertaining to the same decree unless reversed, is not binding upon a

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Court of Appeal in an appeal from a final order in the same proceedings, simply because the interlocutory order was not immediately appealed from. **SARDAR v. FATTEH CHAND, 89 P.R. 1894. (8 C. 51, R.)**

(16)—*Purchase by decree-holder—Appeal—Decree reversed—Title of auction-purchaser, decree-holder.*—A decree-holder, who purchases at an auction sale under his decree, purchases subject to the result of an appeal. **SAIDUNNISSA v. MANGU LAL, A W.N. 1897, 28. (10 A. 166, 5 M. 106, R.)**

(17)—*Plaintiff obtaining decree for part of his claim—Appeal as regards part dismissed—Execution of decree—Right to prosecute appeal.*—A plaintiff, who has obtained a decree for part of his claim and has appealed as regards the part dismissed, is not debarred from prosecuting the appeal because he has begun to execute the said decree. **RAGHU MAL v. BANDU, 31 P.R. 1907, F.B.=64 P.W.R. 1907=1 P.L.R. 1908. (82 P.R. 1868, Overruled.) [R., 16 P.R. 1907.]**

(18)—*Sale in execution of decree of inferior Court by order of Court of higher grade—Second appeal where decree of lower Court executed by a higher Court—Civ. Pro. Code, ss. 244 and 285.*—The respondent obtained a decree against the appellants in the Court of the Munsiff in execution of which certain property of the appellants was attached. The Munsiff submitted the usual sale statement to Government in order that the sale of property which was ancestral, might be sanctioned under s. 20 of the Oudh Laws Act. The sale was sanctioned, but, before the sanction reached the Munsiff's Court, the property was attached by the order of the subordinate Judge in execution of a decree obtained in his Court by a third party. The subordinate Judge purporting to act under s. 285 of the Code of Civil Procedure sent for the file of the execution proceedings from the Munsiff's Court and caused the property to be put up for sale in execution of the Munsiff's decree. *Held* that, having regard to the provisions of s. 285 of the Code of Civil Procedure, the order of the subordinate Judge was illegal; he ought to have sold the property in execution of the decree passed by himself and ought not to have executed the decree passed by the Munsiff. *Held*, further, that the proceedings before the subordinate Judge were under s. 244 of the Code and a second appeal was admissible. **KALKA PRASAD v. SAIYED AKBAR ALI, 11 O.C. 41.**

(19)—*Appeal to Privy Council—Execution of decree.*—An appeal will lie from an order passed by the High Court in the miscellaneous department in a case of execution of decree, in which the amount or value involved exceeds Rs. 10,000 as well as in any other case in which the Court shall admit an appeal when the amount or value is below Rs. 10,000. **MUSAMMAT VELAETY BEGUM v. RUGGHONATH PERSAD, B.L.R. Sup. Vol. 747, F.B.=8 W.R. 147. [R., 1 C.L.R. 354.]**



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

(20)—*Act XXIII of 1861, s. 11—Act VIII of 1859, ss. 270, 271—Appeal.*—An appeal does not lie under s. 11, Act XXIII of 1861, from an order made by the Judge under ss. 270, 271, Act VIII of 1859, with regard to the claim of several rival decree-holders, in respect of the proceeds of property sold in execution of a decree. *MISRI KOOR v. MAHARAJA MAHESHWAR BUKSH SINGH. B.L.R., Sup. Vol. 13=Marsh 527=W.R., F.B., 116. [R., B.L.R., Sup. Vol., 109.]*

(21)—*Stay of execution—Impossibility of restoring parties in statu quo—Appeal.*—The fact that it would be impossible to restore the parties in statu quo may or may not be a ground for granting a stay or execution of a decree; but it does not render the order refusing the stay a "judgment." No appeal lies from such order. *KODIVA SAHIB v. SYED RAHIMATALLA SAHIB, 3 M.L.T. 307. (24 M. 358, F.)*

(22)—*Execution proceedings—Order for the sale of property—Appeal.*—An order under s. 244 of the Civ. Pro. Code (of 1877), directing sale of property for the satisfaction of the amount found due, in execution proceedings, for mesne profits, is not appealable, such order not falling under s. 588. *PALUCKDHARY ROY v. RADHA PURSHAD SINGH, 5 C. 50. (2 C. 553, R.) [Reversed, 8 C. 28, P.C.]*

(23)—*Execution of order in Council—High Court's interpretation—Judicial Committee's opinion as to intention of order expressed, pending appeal from decision of High Court.*—Where the High Court wrongly interpreted an order in Council when it executed it, the Judicial Committee expressed its opinion as to the intention of the order, pending an appeal from the decision of the High Court. *In the matter of the petition of YARLAGADDA DURGA PRASADA NAYADU, 27 M. 153, P.C.=31 I.A. 64=8 Sar. 621.*

(24)—*Execution of decree by others than decree-holders—Remedy.*—Where the Judge allows a person, not that actual decree-holder to execute the decree, that person not having been made a party to the suit, held that the actual decree-holder has no right of appeal against the summary order of the Judge in favour of the said person, but that he should apply to the Judge for a review of his order. *OBHOY CHURN GHOSE v. ALLAD MONEE DASSIA, 1 W.R. Mis. 23.*

(25)—*Decree admitted to be fully satisfied—Application for further execution and admissible—Proper course for decree-holder is review.*—A decree-holder is not entitled to put in an application for further execution of his decree after, in execution of a previous application, the full amount stated in that application, had been paid and the decree admitted to be fully satisfied and so entered by an order of the Court. The proper course, if there had been any mistake, would be for the decree-holder to come in for a review. *SHEIKH KAPILUDDIN AHMED v. SHEIK KAMRUDDIN AHMAD, 5 Ind. Cas. 148. (5 C.W.N. 627, D.)*

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

(26)—*Civ. Pro. Code, ss. 223, et seq.—Jurisdiction of Collector in execution of a decree transferred to him for execution—Review.*—A decree of the Court of the Munsif at Janpur was sent for execution by that Court to the District Court of Azamgarh, and from the District Court to the Collector of Azamgarh. The Collector, under the impression that certain process fees had not been paid by the decree-holder, struck off the execution proceedings and certified to the District Court of Azamgarh what he had done, and the District Court in due course sent a certificate of failure to execute to the Court of the Munsif of Jaunpur. Subsequently, it came to the knowledge of the Collector that the process fees had been deposited before he had passed his order striking off the proceedings in execution, and he proceeded to review his order and took up the execution proceedings again at the stage in which they were before his order was made. *Held*, that the order of the review so made was not *ultra vires*, and was a proper order under the circumstances of the case. *DEBI DAT SINGH v. KHUDA BAKSH, A.W.N. 1899, 17.*

(27)—*Crim. Pro. Code (V of 1898), S. 476—Sanction—Judicial proceeding—Execution proceeding—Resistance to.*—In execution of a decree for money, attempt was made by the officers of the Court to attach and seize the moveables of the judgment-debtor. Resistance was thereupon offered by persons present on the spot. The Court held an enquiry, and under s. 476 of the Crim. Pro. Code, directed the prosecution of the persons who had offered resistance. *Held*, that an execution proceeding is a judicial proceeding, and the resistance having taken place and having been brought to the notice of the Court in the course of such proceeding, the order under s. 476 was made with jurisdiction. *DAKHINESWAR MISRA v. HARRIS CHANDRA CHATTERJEE, 10 C.L.J. 450=4 Ind. Cas. 368. (10 C.W.N. 55, F.; 32 C. 367=1 C.L.J. 161, 35 C. 133, D. & Doubtled.) [R., 14 C.W.N. 799, S.B.]*

(28)—*Crim. Pro. Code (Act V of 1898), s. 476—Execution proceeding, resisting process in—Report to Munsif—Order for prosecution by his successor in office—"Court," meaning of—Execution proceeding if "Judicial proceeding"—Order under s. 476 to be promptly made.*—The word "Court" in s. 476, Crim. Pro. Code, is to be understood as bearing its natural meaning with the sense of continuity this implies, notwithstanding any change of officers. An execution proceeding is a "judicial proceeding" within the meaning of s. 476 of the Code, the definition in s. 4, cl. (m) being clearly not exhaustive. Action under s. 476, Crim. Pro. Code, should, as far as possible, be prompt and expeditious. *SHAIKH BAHADUR v. SHAIKH ERADUTULLA MALLICK, 14 C.W.N. 799=12 C.L.J. 45=6 Ind. Cas. 801=11 Cr. L.J. 407=37 C. 642.*



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

(29)—*Execution of mortgage decree—Judicial proceeding—Stay of sale—District Judge, letter from*—Proceedings in execution of a mortgage-decree were pending in the Court of a subordinate Judge. The District Judge appointed a common manager of the estate of the judgment-debtors, and wrote a letter to the subordinate Judge asking him to postpone the sale for eight months. The subordinate Judge stayed the sale accordingly. *Held*, that the course adopted was entirely irregular. The proceedings before the subordinate Judge were judicial proceedings and could be stayed only upon a proper application presented in Court in due course. *Held*, also, that, if good grounds were made out for the stay of sale, the Court would make the order only upon terms, and would take care to protect the decree-holder from loss and direct payment of costs to him. **KALI CHARAN NANDY v. DEBENDRA NATH KAR, 10 C.L.J. 456=4 Ind. Cas. 373.**

(30)—*Transfer of Property Act (IV of 1882), ss. 88, 89—Application for order absolute for sale, may be made to Court executing decree.*—An application for an order absolute for sale under s. 89 of the Act, is a proceeding in execution, and subject to the rules of procedure governing such matters. (12 A. 69. *Appl.*) Such an application may be made to the Court executing the decree, and it is not necessary that it should be made to the Court which passed it. Where a decree practically complied with the requirements of s. 88 of the Act, an application for execution thereof is one within the meaning of s. 89, and is governed by the same rules. **CUDH BEHARI LAL v. NAGESHAR LAL, 13 A. 278, F.B.=A.W.N. 1891, 83.** [*Diss.*, 21 C. 818, 25 C. 133; *Not F.*, 10 C.L.J. 91; *Dis. & Doubt.*, 27 A. 501=2 A.L.J. 180=A.W.N. 1905, 70; *F.*, 20 A. 302, 24 A. 179; *Appr.*, 23 B. 644; *Appl.*, 1 O.C. 49, 20 A. 357, 23 M. 521, 23 A. 88; *R.*, A.W.N. 1892, 5, 9 C.P.L.R. 5, A.W.N. 1896, 100, 19 A. 520, 5 O.C. 251, 12 C.P.L.R. 82, 25 M. 244, F.B., 24 A. 542, 6 O.C. 114, 16 C.P.L.R. 111, 27 A. 625=2 A.L.J. 371=A.W.N. 1905, 136, 28 A. 193=A.W.N. 1905, 241=2 A.L.J. 640, 33 C. 867=4 C.L.J. 141, 30 A. 248=5 A.L.J. 272=A.W.N. 1908, 103.]

(31)—*Bona fides of application in question—Opportunity of explanation.*—A person, to be concluded by the contention that his application to execute is not *bona fide*, should be allowed to explain all his acts clearly and fully. **SEETANATH MUNDAL v. ANUND CHUNDER ROY, 15 W.R. 5.**

(32)—*Omission to prosecute execution proceedings—Application for rehearing pending—Bona fides, want of.*—A decree-holder's failure to prosecute execution proceedings pending an application for rehearing was held to show no evidence of want of *bona fides*. **TITOORAM BOSE v. TARINEE CHURN GHOSE, 15 W.R. 127.**

(33)—*Execution of decrees—Procedure before Act VIII of 1859.*—Only execution under Act

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VIII of 1859 were contemplated by High Court's ruling that a Judge must execute his own decrees. **NIL KOMUL GHOSE v. NOBIN CHUNDER BOSE, 9 W.R. 463.**

(34)—*Execution against Sergeant's Civil pay—Military pay remitted—Refund.*—Execution being issued against a Sergeant's Civil pay, if a part of his military pay is erroneously remitted, it should be refunded to his superior. **M. A. COHEN v. MCCARTHY, 14 W.R. 441.**

(35)—*Act VIII of 1859, s. 110—Execution of decree—Act XXIII of 1861, s. 38.*—The provisions of s. 110 of the Procedure Code (Act VIII of 1859) may properly be applied under s. 38, Act XXIII of 1861, to proceedings in execution of decree. **RAJPAL v. CHCORAMUN, 4 N.W.H. 10.** [*F.*, 5 N.W.P. 164.]

(36)—*Arrest in execution of decree exemption of woman of rank from.*—Woman of rank are exempted from arrest in execution of decrees. **ROOKINEE SOONDUREE DEBEE v. HEERAMOTEE DEBEE, 2 W.R. Mls. 33.**

(37)—*Execution of decree—Demand of security from decree-holder, when Court can properly make—Act VIII of 1859, s. 209, scope of.*—In this case, the lower Court had dismissed the decree-holder's execution application because he had failed to comply with the Court's directions requiring him to furnish security before proceeding in execution. The High Court held that, under the circumstances of the case, the decree-holder should have been permitted to execute his decree without security. It was contended for the debtor, that he had a suit for a large sum of money against the decree-holder which had been dismissed by the High Court and in which he had appealed to the Privy Council and, under s. 209 of Act VIII of 1859, he had a right to ask the Court to stay execution of the decree until a final decision was passed upon his case by the Privy Council; but the High Court was of opinion that under the circumstances the above section was not applicable. **LUCHMEEPUT v. MIR MAHOMED LUKEE CHOWDHRY, 3 W.R. Mls. 20.**

(38)—*Execution by Civil Court not ipso facto legal—Persons not parties to decree or exempted from it, not liable to be proceeded against—Tenure, how far liable for its own arrears.*—It was urged on special appeal in this case: First, that cl. 6, s. 23, Act X of 1859, contemplates suit only for illegal ouster, and as plaintiff's ouster was by process of Court,—i.e., under orders of the Civil Court, there was no illegal ouster, and consequently plaintiff's action was not maintainable. Second, that every tenure is hypothecated for its own arrears so that every tenant of such tenure is liable to ejectment on failure to pay any rents due on the tenure and that thus the plaintiff was liable to be ejected from the tenure of the defaulter as he had not paid the arrears, and, consequently, there was the absence of any such illegal ejectment as could warrant the lower Courts giving the plaintiff a decree for possession. Both of the above



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

grounds were held by the High Court to be untenable. On the first, the High Court observed that the fact of there being action under process of a Civil Court does not make such action *ipso facto* legal. Such an action would be illegal where it has been taken against persons who are not parties to the decree or, as was the case with the plaintiff here, are distinctly exempted from the operation of the decree with possession reserved in express terms. On the second plea, the Court remarked that it is only when tenures are sold for their own arrears that there is a hypothecation and a liability of the tenure itself, in other hands than the defaulter's; for the arrears, and, that even then each case must be decided by its own circumstances. **UMURT LALL BHOSE v. SOO-RUBEE DOSSEE, 2 W.R. Act X, Rul. 86.**

(39)—*Execution of decree—Irregularity—Sale—Suit by judgment-debtor to set aside sale—Civ. Pro. Code, 1859, s. 257.*—An irregularity in execution proceedings, which did not prejudice the judgment-debtor, does not vitiate a sale. Where execution was taken out on an earlier decree an appeal (which was afterwards reversed) and continued even after a final appellate decree was passed, *held*, the irregularity was one which did not prejudice the judgment-debtor. *Held* that a suit by the judgment-debtor to set aside a sale under the above circumstances, on the ground of nullity, was not maintainable with reference to Act VIII of 1859, s. 257. **GHAZI v. KADIR BAKSH, 1 A. 212, F.B.**

(40)—*Formalities to be observed preliminary to sale, non-compliance with—Effect—S. 311, Civ. Pro. Code—Error in the warrant of attachment, effect of—Application to set aside sale on the ground of irregularity—Limitation—Art. 166, Limitation Act.*—If the formalities laid down in the Code of Civil Procedure as preliminary to a valid sale have not been complied with, the sale is not *de facto* void. So, the error (*e.g.*, recording a wrong number of a plot) in the warrant of attachment constitutes merely a material irregularity, which can be the subject of objection to the sale under s. 311, and does not render the sale void *ipso facto* and thereby oust the provisions of s. 311. An application to set aside the sale on the ground of irregularity must be treated as one under s. 311, and will be barred by limitation under art. 166, Limitation Act, if the application is not made within 30 days from the date of sale. **MADHO MAL v. JAWAHIR SINGH, 40 P.R. 1910=63 P.W.R. 1910=6 Ind. Cas. 713=211 P.L.R. 1910.**

(41)—*Execution of mortgage-decree—Proclamation for sale, portion of property not mentioned in—Right of a creditor to attack it in—practice—Application for sale in—Duty of a Judge ordering sale.*—A obtained a mortgage-decree against B on mortgage of a house with the surrounding compound and trees thereon, but, in execution of that decree, the house was proclaimed for sale, no mention of the compound and trees being made in the proclamation of sale. After the sale was complete,

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

another creditor C, in execution of his money-decree against B applied for attachment and sale of the compound and trees, when, the purchaser at Court-auction objected that he had purchased them at Court-sale, and the attachment was therefore removed. In a suit then brought by C for declaration that such property was the property of his judgment-debtor B, *held*, that, if the site and trees had not been sold, the mortgage-decree over them obtained by A would be still subsisting, and C would not be entitled to attach them as his debtor's property. *Held*, also, where an application for sale of property is made, the Judge ought to examine the application and the decree, and give explicit instructions to the bailiff to ensure that bidders should know exactly what they were buying. **PO THEIN v. MAUNG TU, 5 L. B.R. 18=2 Ind. Cas. 362.**

(42)—*Fraudulent execution of decree after adjustment out of Court—Adjustment not certified under s. 258 of the Civ. Pro. Code—Proof of payment otherwise than by certificate.*—In a suit to set aside a fraudulent sale (in execution of a decree) after satisfaction of the decree by payment out of Court, which, however, has not been recorded in accordance with s. 258 of the Civ. Pro. Code, it is nevertheless competent for the plaintiff to prove the payment of the decretal money otherwise than by a certificate under s. 258. **PAT DAS v. SHARUP CHAND MALA, 14 C. 376. [Diss., 21 C. 437, 20 A. 254=A. W.N. 1898, 37; Commented upon, 15 O. 557; R., 13 A. 339, 13 O.W.N. 710.]**

(43)—*Execution—Joint decree-holders—Application by one for execution in respect of moiety.*—One of two joint decree-holders applied for execution of the decree in respect of a moiety. The judgment-debtor contended that the whole amount had been paid out of Court to the other decree-holder. *Held*, that the objection was invalid. But the Court remanded the case for deciding the question whether the whole amount was paid out of Court. **BAN-SIDHAR v. KISHEN LAL, A.W.N. 1883, 262.**

(44)—*Compromise varying decree—Enforcement in execution—Regular suit.*—A compromise arrived at in execution proceedings varying the decree may be enforced by the executing Court in execution, without requiring the judgment-debtor to resort to a regular suit. **BHAI CHARANJIT SINGH v. KASHI RAM, 16 P.R. 1876.**

(45)—*Compromise—Contract superseding decree.*—Where the arrangement made between a decree-holder and a judgment-debtor for the satisfaction of the decree contains nothing materially at variance with the decree, but is consistent with it, and is made obviously with the object of securing and facilitating its execution, there is no new contract in supersession of the decree, and the decree itself can, under such circumstances, be executed. **GANGA v. MURLI DHAR, 4 A. 240=A.W.N. 1882, 24. (3 A. 585, D.) [F., 6 A. 228.]**



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

(46)—*Amount of mesne profits left undetermined—Compromise between parties as to mesne profits—Decree in accordance with compromise, executability of.*—Where the amount of mesne profits was left undetermined by the decree and the parties entered into a compromise that the decree as to mesne profits should be executed against a particular plot of land and a decree was passed in accordance with the compromise. *Held*, that the decree cannot be executed in any manner other than that specified in the *razinama*, unless it is shown that the method of execution specified in the *razinama* has become impossible. When an issue is left undetermined, it is competent for the parties to adjust that part of the suit by a lawful compromise. *VYTHINATHA AIYAR v. VYTHINATHA AIYAR*, 6 M.L.T. 187=33 M. 78. (13 A. 53, 25 A. 385, 14 C. 50, R.)

(47)—*Agreement to pay amount of decree—Funds in hands of third party, payment undertaken to be made from—Onus of existence of funds with third party.*—The widow and the daughter of the judgment-debtor, the petitioners in this case, gave an *ikrar* to the decree-holder by which they agreed to pay the money due under the decree, from certain sums alleged to have been remitted by a *hundi* to a third person. The *hundi*, however, could not be traced and it appeared there was no money belonging to the judgment-debtor in the hands of the third person as alleged by the petitioners. *Held*, that it was for the petitioners to indicate how the *hundi* was to be got at, and they could not be allowed to keep the decree-holder at arm's length by referring him, for payment, to a party with whom there were no funds, or, to bills which might not be in existence or not in their power. The decree-holder accepted the *ikrar* on the understanding that the money was in the hands of a third person, which was not the case. It was therefore competent for him to first proceed against the money covered by the *hundi*, as the decree directed, and failing that source, he might proceed against other assets in the hands of the petitioners. *MUSST. RUKHEEAH KHANUM v. HAZEE MAHOMED HASHIM*, 2 W.R. Mis. 3.

(48)—*Judgment creditor coming to terms with his judgment-debtor—Effect—Auction-purchaser applying to have order setting aside sale rescinded must show that the order had been improperly obtained.*—If a judgment-creditor, comes to terms with his judgment-debtor, it is, as against the auction-purchaser, equivalent to a receipt in full of the decretal amount by the judgment-creditor. Where a sale is set aside by the order of the Court, it lies on the auction-purchaser when applying to have that order rescinded, to show that the order had been improperly obtained, *e.g.*, by showing that, at the time of the order, the judgment-creditor had not been satisfied. *MA SEIN BUWIN v. MAHOMED HASSIM*, 14 Bur. L.R. 176. (23 B. 723, 1 C.W.N. 703, R.)

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

(49)—*Civ. Pro. Code, 1882, s. 257-A—Agreement between decree-holder and person other than judgment-debtor—Execution of decree postponed—Court's sanction for agreement not obtained—Agreement if enforceable.*—An agreement between a decree-holder and a person other than the judgment-debtor, whereby such person, in consideration of the postponement of execution of the decree against the judgment-debtor, undertakes to pay to the decree-holder a certain sum of money, does not fall within the purview of s. 257-A of the Civ. Pro. Code, 1882, and is therefore enforceable, although made without the Court's sanction. *KESU v. GENU*, 23 B. 502. [*Diss.*, 3 O.C. 165; *Appl.*, 35 C. 870=12 O.W.N. 674=7 C.L.J. 542; *R.*, 6 Bom. L.R. 344=28 B. 383, 5 Ind. Cas. 814=16 P.R. 1910=18 P.W.R. 1910, 8 M.L.T. 326.]

(50)—*Execution of decree—Agreement to give time to judgment-debtor—Civ. Pro. Code, ss. 257-A, 258.*—The parties to a money decree executed and filed in Court a *sulehnamah* whereby the judgment-debtor agreed to pay a certain sum of money by a certain date, and the decree-holder agreed to relinquish the balance of the decretal amount; and it was stipulated that in case of default in payment by the date fixed, the decree-holder should be entitled to recover the whole amount due under the decree. Subsequently the decree-holder having applied for execution of the decree, the judgment-debtor pleaded payment in accordance with the *sulehnamah*. No payment had been certified to the Court. *Held*, that the *sulehnamah* was an agreement to give time within the meaning of s. 257-A of the Civ. Pro. Code, and that alleged payment, not having been certified under s. 258, could not be recognised by the Court executing the decree. *MADHO SINGH v. RAM PRASAD*, A.W.N. 1890, 68.

(51)—*Execution of decree—Release of debt—Consideration—Certification of adjustment of decree.*—A decree-holder, sometime after the realization of a portion of the decree amount by attachment and sale of the judgment-debtor's property, gave to the judgment-debtor without consideration and purely from motives of compassion, a letter in which he stated that he released him from the balance of the decree-debt. But this adjustment was not certified to the Court. The decree-holder again applied for the execution of the decree without mentioning the said adjustment. *Held*, that the letter did not operate as a release to the defendant. The mere fact that the plaintiff admitted that he told the defendant that he would not execute the rest of the decree was not the certification of an adjustment of the decree, the only mode in which an adjustment of the decree could be made being one pointed out by s. 206, Act VIII of 1859. *BHUBAN MOHAN BANERJI v. SADU CHARAN SIKKAR*, 6 B.L.R. 339=15 W.R. O.C. 5.



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

(52) — *Decree — Execution — Adjustment of decree—Civ. Pro. Code, 1882, s. 258—Death of judgment-debtor — Certificate by decree-holder before appointment of executor.*—Where a judgment-debtor authorised his pleader N to transfer certain properties belonging to him to the decree-holder in satisfaction of the decretal debt, and N, in pursuance of the power so given him, did so, and the decree-holder certified to the Court that the decree had been satisfied, after the death of the judgment-debtor and before the appointment of an executor, *held* that the property validly passed to the decree-holder and that the transfer could not be questioned on objections which referred merely to the mode in which N may have made the transfer, or the mode in which the decree-holder certified satisfaction. The satisfaction of the decree was not the less complete and binding because its certification may have been made to the Court before an executor had been appointed. **GOBIND SAHAI v. MANSA RAM, A.W.N. 1885, 45.**

(53) — *Ameen giving more land to decree-holder — Judgment-debtor, Objection by—Effect.*—Where an ameen gave the decree-holder more land than he was entitled to *held* that any objection by the judgment-debtor on this matter, should be inquired into by the Judge. **ISSUR CHUNDER AHIRRE v. SYAMKHAN CHOWDHRY, 11 W.R. 93.**

(54) — *Property wrongfully attached in execution of decree—Decree-holder who wrongly attaches liable for damage.*—By the law and practice of the Courts in India, a wrongful attachment is the direct act of the decree-holder and not of the officer of the Court. (3 B. 74, F.) The decree-holder, who wrongfully attaches the property of a stranger, is a trespasser and wrong-doer, and is responsible for all damages. **BHUGWAN DASS v. MAUNG LAW SHING, U.B.R. 1897, 1901, Vol. II, 429. [R., U.B.R. 1905, 2nd Qr., C.P.C. 18.]**

(55) — *Act XXIII of 1861, s. 11—Barred suit — Excess payment made by mistake in execution of decree.—Jurisdiction to entertain such suit.*—*Per Stuart, C. J.*—A suit will lie to recover an excess payment made by mistake in execution of a decree, and is not barred by s. 11 of Act XXIII of 1861, the question in such a suit being a matter outside the decree and not relating to its execution. *Per Pearson, J.—contra*—Such a suit, being one as for damages within the meaning of s. 6 of Act XI of 1865, is cognizable by a Small Cause Court, and not by a Civil Court. **AGRA SAVINGS BANK, LTD. v. SRI RAM MITTER, 1 A. 388=2 Ind. Jur. 28. [Diss., 2 A. 61, F.B.; Cons., 5 A. 94=A.W.N. 1882, 188.]**

(56) — *Civ. Pro. Code, s. 244 — Execution of decree—Application for refund of money wrongfully taken in execution—"Parties to the suit in which the decree was passed."*—In execution of a simple money decree, the decree-holders attached certain money which had been paid into Court to the credit of the judgment-debtors

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

on account of a decree held by them in another matter. Subsequently to such attachment, the decree, under which it was made, was declared null and void as against the representative of one of the judgment-debtors; but the money was nevertheless withdrawn from Court by the decree-holders. *Held*, that the remedy of the representative of the judgment-debtor, in whose favour the decree had been declared null and void, was by application under s. 244 of the Code of Civil Procedure and not by separate suit, it being immaterial upon what date the attaching creditor withdrew the money, so long as it was withdrawn, as in fact it was, in execution of that particular decree. **MUHAMMAD AHSAN KHAN v. HARAKH CHAND, A.W.N. 1904, 55.**

(57) — *Execution sale—Movable property—judgment-debtor not having saleable interest—Setting aside of sale—Purchaser deprived of property—Purchase-money paid by purchaser—Recoverability from decree-holder.*—When moveable property is sold in execution of a decree, and it is subsequently found that the judgment-debtor had no saleable interest in the property, and the purchaser is thereupon deprived of the property, the purchaser is not, in the absence of fraud, entitled to recover the price paid from the decree-holder. **MAUNG TUN v. MA NGAN, 5 L.B.R. 58, F.B.=3 Ind. Cas. 672. (1 Bur. L.T. 72, 3 C. 806, 17 M. 228, 5 I.A. 116, 4 B.L.R., F.B., 11, F; 5 A. 577, 6 C.W.N. 836, 2 A. 780, 9 W.R. 118, 14 W.R. 120, 9 C. 506, 9 A. 167, 2 I.A. 131, R.)**

(58) — *Act XXIII of 1861, s. 11—Execution of decree for land—Suit to recover property wrongfully taken.*—If a party executing a decree for land, takes possession, by his own act and not by the act of the officer of Court, of more land than the decree gives him, a suit to recover possession of property thus wrongfully taken is maintainable. **MODHUN MOHUN SINGH v. KANYEE DOSS CHUCKERBUTTY, 12 B.L.R. 201. [F., 7 O.C. 213, 6 C.L.J. 527; R., 22 C. 488, 23 M. 55.]**

(59) — *Act XXIII of 1861, s. 11—Execution of decree—Property wrongfully taken—Jurisdiction.*—Possession of certain lands having been given to a decree-holder in execution, the judgment-debtor appeared before the Court which had jurisdiction to execute the decree, and complained that illegal possession had been taken of land not covered by the decree. The Court determined that the decree did cover the land and rejected the complaint. The judgment-debtor then brought the present suit to recover possession of the excess land which had been made over to the decree-holder. *Held*, that the question was one which arose in the former suit between the parties and which related to the execution of the decree in that suit, and must, therefore, under s. 11, Act XXIII of 1861, have been determined by the Court executing the decree, and could not be



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

gone into in this separate suit. JOGENDRA NARAIN COOMAR v. RANEE SURNOMOYEE, 12 B.L.R. 203, Note=14 W.R. 39. [R., 12 B.L.R. 201, 12 B. 449, 6 C.L.J. 527.]

(60)—*Act XXIII of 1861, s. 11—Execution of decree.*—The questions relating to the possession by a decree-holder of land not included in the decree, are separate from those relating to the execution, and may be made the subject of a separate suit. RANEE SUROT SOONDRI DABEE v. ONWAR PERSAD NARAIN ROY, 12 B.L.R. 207, Note=12 W.R. 85. [F., 6 C.L.J. 527; R., 12 B.L.R. 203, Note=14 W.R. 39, 12 B.L.R. 201.]

(61)—*Vendor and purchaser—Decree against vendor—Balance of consideration due—Remedy of vendor—Separate suit.*—A vendee executed a decree against his vendor after having undertaken to enter satisfaction of it in a deed of conveyance, on which a balance of consideration money was due. Held, that the vendor might have a remedy by a separate suit. CHUKROO SINGH v. JOWAHIR SINGH, 19 W.R. 152.

(62)—*Absolute terms—Subsequent modification—Application in execution—Fresh suit.*—No modification of a decree can be allowed in execution thereof on grounds not recognised in the decree itself as giving a right to such modification, and the same rule applies whether the modification is claimed in applying for or in resisting execution. Where a decree for maintenance contains no provisions for modification of its terms with reference to post decretal changes, the modifications cannot be made on an application in execution proceedings. The only remedy for it is a fresh suit. RANMAL-SANGJI v. KUNDANKUVAR, 4 Bom. L.R. 531 = 26 B. 707.

(63)—*Act XXIII of 1861, s. 11—Execution of decree—Trespass—Jurisdiction.*—Where a decree merely ordered that an embankment should be lowered to its proper height and the Nazir in addition caused breeches or holds to be cut in the embankment so lowered, because he thought them necessary for the protection of the bund from the flow of water over its surface held that this was not done in execution of the decree. ROY RASH BEHARY LAL v. BIBEE WAJAN, 12 B.L.R. 208, Note=11 W.R. 51. [F., 6 C.L.J. 527; R., 12 B.L.R. 201; D., 12 B.L.R. 203, Note=14 W.R. 39.]

(64)—*Property not comprised in decree, decree-holder taking possession of, by independent action and not through Court executing decree—Jurisdiction of Civil Court—Code of Civil Procedure, s. 244.*—Where the decree-holder has obtained possession of land through the Court executing the decree and not by his own act, the question whether such lands are covered by the decree raises a question as to the execution of the decree, and the Court can, under s. 244 of Civ. Pro. Code, determine that question, and, if it determines it in favour of the judgment-debtor, can restore possession of

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

the lands to him. But if the decree-holder has obtained possession of the lands by his own act and not through the Court executing the decree, the question as to whether the lands are covered by the decree is not one relating to the execution of the decree, and the Court executing the decree has no jurisdiction under s. 244 to determine such question. In an application purporting to be made under s. 244, Civ. Pro. Code, the judgment-debtor alleged that the decree-holder, who had obtained a decree for possession of a certain share in some houses and shops, in the course of execution proceedings taken for the delivery of possession, dispossessed him of some property not comprised in the decree and prayed that the property should be restored to him. The subordinate Judge found that the decree-holder obtained possession of that property by his own act and not through the Court executing the decree and that the property was not comprised in the decree, and directed that it should be restored to the judgment-debtor. Held, that possession of the property in dispute having been obtained simply and solely through the acts of the decree-holder, the Court executing the decree had no jurisdiction to determine whether the property was comprised in the decree or not, and that consequently it had no jurisdiction under s. 244 to entertain the judgment-debtor's application. ABDUL WAHID KHAN v. MIRZA MUHAMMAD BAKAR ALI KHAN, 7 O.C. 218.

(65)—*Payment beyond what decree orders—Agreement to the contrary—Legality of payment.*—Notwithstanding a judgment-debtor's agreement with the decree-holder to the contrary, a judgment-debtor cannot be ordered in execution to pay beyond what is stated in the decree. KANHYA LALL PANDIT v. THE COURT OF WARDS, 16 W.R. 275=14 B.L.R. 291, Note.

(66)—*Attachment of decree—Failure of attaching creditor to execute the attached decree—Attached decree barred by limitation—Right of decree-holder to claim damages from attaching creditor—Damages.*—A decree obtained by plaintiff against one K was attached by defendant, who held a decree against plaintiff. The defendant, did not execute the decree attached and allowed it to become barred. In the suit by plaintiff for damages against defendant, the latter contended, *inter alia* that plaintiff was not entitled to damages as he could have executed the decree himself. Held, that the attachment of plaintiff's decree by defendant did not prevent plaintiff from executing it, and that plaintiff was not entitled to recover any damages from defendant. ARAPAYIL PATTU THI UMMA v. THACHARKAVIL UMI KOYA, 5 Ind. Cas. 56=7 M.L.T. 262. (13 M.L.J. 265, 21 M. 417, 24 C. 778, 1 C.W.N. 676. R.)

(67)—*Attachment of property not belonging to judgment-debtor—Suit for damages against attaching creditor—Measure of damages.*—Where certain unthreshed rice belonging to the



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

plaintiff was wrongfully attached by the defendants as belonging to the judgment-debtor and it was stolen by thieves while in the custody of the Nazir, the defendants were liable in damages to the plaintiffs, the measure of damages being the value of the rice on the date of attachment. When the wrongful seizure was made at the special instance of the defendants, the plaintiff's cause of action was complete (11 B.H.C.R. 46) and was independent of the subsequent occurrence. The theft may have rendered the defendants unable to restore the rice *in specie*, but cannot purge, and was no satisfaction of the previous trespass which rendered the defendants liable for the full value of the rice. *GOMA MAHAD PATIL v. GOKALDAS KHIMJI*, 3 B. 74. [R., 7 B. 427, U.B.R. 1897—1901, Vol. II, 429, 6 Bom. L.R. 704, U.B.R. 1905, 2nd Qr., C.P.C., 283, 129 P.R. 1908, 4 N.L.R. 49; D., 129 P.R. 1908.]

(68)—*Bona fide purchaser from the auction purchaser, himself a party to the suit—Reversal of the decree—Right of the judgment debtor to recover the property sold—Error of Court about the effect of a compromise—Decree obtained through fraud and misrepresentation—Duty of a purchaser to refer to a decree under which the property was sold.*—A stranger, purchasing certain property from an auction-purchaser, in execution of a decree, which he had himself obtained against the judgment-debtor on a compromise, is entitled to rely upon the plea, that he is a *bona fide* purchaser for value without notice, and the judgment-debtor is not entitled to the property, on a subsequent reversal of the decree. (10 A. 166, P.C., R.; 13 M. L.J. 231, F.) The judgment-debtor has only an equity to set aside the proceedings which were the result of fraud and misrepresentation and that equity cannot be allowed to prevail against *bona fide* purchasers for value without notice. Where the Court has jurisdiction over the subject-matter of a suit, any error, on the part of the Court, as to the effect of a compromise, entered into between the parties would not render the decree void. Even assuming that the decree-holder in obtaining the decree had been guilty of misrepresentation or fraud, the proceedings are only voidable, and a *bona fide* purchaser from him is entitled to rely on his title as such. It is by no means clear, that it was the duty of a stranger, the *bona fide* purchaser for value, when aware, that the vendor's title was under a Court sale, to refer to the decree, on which the sale was held. *ISMAIL ROWTHER v. RAJAH ROWTHER*, 17 M.L.J. 165 = 2 M.L.T. 186 = 30 M. 295.

(69)—*Sale in—Rights of auction-purchaser—Distinction between decree-holder purchaser and other purchasers.*—Where no fraud is alleged, a sale in execution cannot be set aside as regards an auction-purchaser, whether the order of the Court, under which it took place, was legal or not; even if the decree in execution of which the sale took place, was a collusive one,

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

the rights of the auction-purchaser would not be affected if he was no party to the fraud, and there would be no ground for setting aside the sale. (12 W.R. 48, F.) Distinction drawn between decree-holder purchasers and other purchasers. *MAUG AUNG BAN v. MAUNG SHWE PE*, 1 L.B.R. 22. (10 W.R. 154, 11 C. 362, 10 A. 166, R.)

(70)—*Act XXIII of 1861, s. 11—Applicability.*—S. 11 of Act XXIII of 1861 was inapplicable to a case in which the purchaser at an execution-sale was no party to the original suit. *DWARKANATH SAMOYEE v. PROTAP CHUNDER DUTT*, 20 W.R. 233.

(71)—*Sale in—Title of purchaser—Stranger whose property is sold behind his back without authority—Suit to set sale aside—Limitation Act, sch. II, art. 12 (a).*—If any portion of the property put up for sale is not in fact the property of the judgment-debtor, the sale does not affect the rights of the real owner of that portion in any way. The confirmation of a sale under s. 312 is only "as regards the parties to the suit and the purchaser." No title is guaranteed to the purchaser at an execution sale beyond that he shall have the rights and interests in the property which belong to the judgment-debtor, or, in other words, that the judgment-debtor shall not recover the land. (4 B.L.R., F.B., 11, F.) A stranger, whose property is sold behind his back without any authority, does not need to have the sale set aside at all; and even if he does seek to have it set aside, the reasoning in the case 11 B. 119, leading to the conclusion that art. 12 (a) of the second schedule to the Limitation Act above referred to does not apply, is correct. *AHMED ALLY v. MAUNG SHWE THIN*, 1 L.B.R. 53. (18 M. 478, F.)

(72)—*Attachment disputed by non-party in execution—Objection overruled—Appeal to Judge—Judge reversing Munsiff's decision—Validity of Judge's decree.*—A person, not a party to the suit, contested an attachment made in execution-proceedings, but his objections were overruled. He there applied as if by way of appeal to the Judge, who reversed the Munsiff's decision. Held, that the Judge's order was made without jurisdiction. *MIRZA SAYEFOOLLAH KHAN v. TIRTHANUND THAKOOR*, 21 W.R. 10.

(73)—*Hindu Law (Mitakshara)—Joint family—Agent incurring debt—Execution-sale of entire joint estate—Managing members sued—Other members not made parties to decree against managing members—Effect—Execution proceedings—Substance of the transaction to be looked at.*—Where the borrowers, though not the managing members of a joint Hindu family were its accredited agents in the management of a money-lending business which was carried on for the benefit of the family, held, (1) that they had authority to pledge the family properties for a debt contracted in the ordinary course of the business (1 C. 470, R.); and (2)



*Execution of Decree—continued.**— 18.—Miscellaneous—continued.*

(2) that a sale, in execution of a decree obtained against such members on a debt contracted by them in the course, and for the purposes, of the trade, bound the interests of all the members of the family, though the latter were not parties to the suit in which such a decree was obtained, because the Court has, in such cases, to look at the substance of the transaction rather than the form of the suit. (5 C. 845, 5 C.L.R. 477, P.C., 13 C. 21, P.C. 15 C. 70, P.C., 3 A. 191, 3 A. 443, 4 A. 486, 5 C. 792, 9 C. 495, 5 B. 38, 14 B. 597, R.) [Cons., 10 C.P.L.R. 67, 16 C.P.L.R. 19; R., 21 B. 205, 29 C. 583; Diss., 9 C.W.N. 879; D., 3 Bom. L.R. 97.] In execution proceedings, the Courts will look at the substance of the transaction and will not be disposed to set aside an execution upon more technical grounds, when they find it is substantially right. *SHEO PERSHAD SINGH v. SAHER LAL*, 20 C. 453. (5 C.L.R. 477, P.C., F.)

(74)—*Execution of decree—Proclamation of sale—Mention of encumbrance—Adjudication of right—Civ. Pro. Code, s. 287.*—Where property was sold in Court auction subject to an encumbrance, mentioned in the proclamation of sale, and the judgment-debtor contended that the sale should be set aside as the encumbrance though created by a deed duly executed, conveyed on right, *held* that it was not necessary for the Court executing the decree to adjudicate upon the validity of the incumbrance, and its action in notifying the said incumbrance was proper under the circumstances of the case. *MAJIDUNISSA v. JANKI*, A.W.N. 1888, 151.

(75)—*Duty of judgment-creditor to disclose encumbrances in his own favour.*—When a judgment debtor brings the property of the judgment-debtor to sale, he is bound to disclose all the encumbrances in his favour and to state whether such encumbrances were created before or after the attachment. If he fails to do so, he cannot afterwards sue the auction-purchaser to establish the encumbrances in his favour, provided the auction-purchaser has paid full price without a knowledge of the existence of encumbrances in the judgment-creditor's favour. *RANI RATAN KUAR v. RATIN LAL SETH MAHESARI*, 2 N.L.R. 106. (12 B. 678, 22 B. 686, 15 M. 412, 3 C.P.L.R. 15, 14 C.P.L.R. 17, 21 A. 369, 1 C. 337, R.)

(76)—*Attachment—Investigation into alleged incumbrance.*—A creditor in execution of a decree attached some property as that of his judgment-debtor, to which some persons objected on the ground that the property was mortgaged to them, the creditor contending that the mortgage set up was a colorable transaction. The subordinate Judge held that he had no jurisdiction to enquire into the nature of the transactions, and though he was of opinion that there was no valid mortgage lien yet passed an order which could only have been given on the understanding that he was satisfied that there was a

*Execution of Decree—continued.**— 18.—Miscellaneous—continued.*

valid mortgage lien: *Held*, reversing the order, that the subordinate Judge be directed to pass an order after satisfying himself whether there was a valid mortgage lien. *CHAGANLAL v. MOTI*, 2 Bom. L.R. 476.

(77)—*Execution of decree—Mortgage—Decree for sale upon a mortgage—Non-payment of amount of prior incumbrances within time limited—Application for decree absolute—Application rejected—Subsequent extension of time by High Court.*—A plaintiff in a suit for sale on a mortgage obtained a decree conditioned on his redeeming, within a fixed time, certain prior incumbrances. The decree-holder, without having so redeemed the prior incumbrances, applied for an order absolute for sale of a certain village included in the decree, on the ground that the prior mortgages did not attach to that village. This application was rejected. Subsequently on appeal, the High Court extended the time for payment. *Held* that, under these circumstances, the executing Court ought to re-admit the application of the decree-holder for an order absolute and to deal with it on the merits. *NASAB ALI KHAN v. NAGESHAR SINGH*, A.W.N. 1900, 95.

(78)—*Confirmation of sale—Proceedings in execution.*—The formal confirmation of a sale in execution of a decree is not a proceeding in execution of the decree. *JUGGUT MOHINEE BIBEE v. RAM CHAND GHOSE*, 9 W.R. 100. [F., 13 W.R. 38]

(79)—*Postponement of sale—Fresh proclamation necessary—Omission—Effect—Procedure.*—If an execution sale is postponed, it is necessary that a fresh proclamation must issue. A failure to do so is a material irregularity. Where an auction purchaser purchased and got possession of a piece of property at a sale in execution, which was subsequently set aside on the above ground, *held* that the refund of the purchase-money should be made a condition precedent to the purchaser giving up possession of the property and that the Nazir would not be entitled to any commission. *NARANJAN DAS v. RAM RAKHA*, 45 P.R. 1886. (45 P.R. 1886, note, R., 183 P.R. 1883, F.) See, also, *GHULAM SHAH v. GANPAT RAI*, 45 P.R. 1886, note. [R., 45 P.R. 1886.]

(80)—*Confirmation of sale—Lapse of 30 days—Sale for a low value—Effect—Property not liable to attachment.*—An order confirming a sale in execution of a decree should not be passed before the lapse of 30 days from the date of sale. Sale at a low price is not *per se* a ground for setting aside a sale, though, if there were any irregularity in publishing or conducting it must be presumed that the applicant had sustained substantial injury from such irregularity. The fact that the property sold was not liable to attachment is no reason for setting aside a sale, though it would be a ground for a fresh suit to recover the property or to claim compensation. *ATAR SINGH v. LAJPAT RAI*, 19 P.R. 1894.



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

(81)—*Irregularity in sale—Procedure—Sale before time—Material irregularity.*—Proof of the occurrence of material irregularities resulting in substantial injury to the petitioner, will make it incumbent on the Court to enquire into such allegations. Selling the property before the time fixed in the proclamation is clearly a material irregularity. **RAM RATTAN v. MANJA**, 96 P.R. 1885.

(82)—*Order of first Court affirming sale—Confirmation by appellate Court, refusal of High Court to interfere with.*—The petitioner in this case asked the High Court to interfere with an order passed by the Judge, under the powers conferred by s. 35 of Act XXIII of 1861 alleging that that order had been passed without jurisdiction. The High Court was of opinion that it was too late for the petitioner to take objection to the Judge's order passed long ago and acted upon by the petitioner. He had acted in conformity with that order and brought objections to a certain sale held by the Sudder Ameen and had appealed from the order of the Sudder Ameen, affirming the sale, to the Judge, who confirmed that order on the ground that the order of the Judge in question had been passed more than a year and a half ago and had been acted upon by the petitioner as described above. The High Court refused to interfere with that order. **SYUD VALAT HOSSEIN v. MUSSAMUT SAGRAH**, 6 W.R. Mls. 96.

(83)—*Execution of decree—Suit for confirmation of execution-sale confirmed by Collector, but set aside by Commissioner—Civ. Pro. Code, ss. 311 and 312.*—Where the decree of a Civil Court was transferred to the Collector for execution, and an auction sale, held thereunder and confirmed by the Collector, was set aside by the Commissioner: *Held*, that a suit would lie in a Civil Court to confirm the sale. **UGAR NATH TIWARI v. BHONATH TIWARI**, A.W.N. 1891, 41. (9 A. 602, F.) [Appr., 20 A. 379, F.B.]

(84)—*Mortgage-decree—Sale of property not comprised in decree—Confirmation of sale and mutation of names without objection by judgment-debtors—Subsequent sale by the latter to a third person of property not included in decree—Sale, private—Suit by private purchaser against purchaser at Court-sale, for possession, maintainability of.*—The owner of a certain share in a village had mortgaged one-half of it. The mortgagee brought a suit on foot of the mortgage and obtained a decree for sale of the mortgaged share. The Collector, to whom the decree was transferred for execution, owing to some mistake or over-sight, sold the entire share belonging to the mortgagor. The sale was confirmed in the presence of both the parties to the suit. Following upon the sale, the usual *dakhil-kharij* proceedings took place and no objection was raised to the mutation of names by the judgment-debtors, the representatives of the mortgagor. Sometime after, the heirs of the mortgagor, notwithstanding the sale and with full knowledge of all the circumstances, sold the

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

other half not mortgaged to the present plaintiff. The plaintiff brought a suit for recovery of the half share sold to him from the purchaser of the whole share in execution of the decree. *Held*, that if the plaintiff had made, on the occasion of his purchase, the slightest inquiry, he would have ascertained the facts connected with the sale held in execution of the decree. So, the plaintiff cannot be regarded as a *bona fide* purchaser without notice. The money paid by the purchaser at the Court-sale went in satisfaction of the decree and the judgment-debtors, had the full benefit of it. It would be manifestly inequitable to allow the judgment-debtors, who stood by and allowed the purchase of the property to be made by an innocent purchaser, to set up the invalidity of the sale and to deprive the purchaser of the benefit of his purchase. Nor has the plaintiff offered to return the proportionate part of the purchase money attributable to the property sought to be recovered. He who seeks equity must do equity. So the suit should be dismissed. **BALDEO PRASAD v. FAKHR-UD-DIN**, 27 A. 62, F. B. = 1 A.L.J. 402.

(85)—*Attachment in execution—Dismissal of execution application—Effect—Irregularity in proceedings—Bona fide purchaser at Court-sale—Execution of attached decree.*—Where an attachment had been effected in execution of a decree, and subsequently the execution application was dismissed on the ground that no further steps had been taken, the question, whether the attachment ceases at the date of the order of dismissal or continues to subsist, is a matter to be decided with reference to the circumstances of each case. Any irregularity in the proceedings which led to Court-sale cannot be relied on as a ground for setting aside the sale, after it has been confirmed and a certificate issued to the purchaser who purchases *bona fide* at such sale. [R., 19 M. 219.] A decree-holder who attaches a decree is competent to execute it. **RANGASAMI CHETTI v. PERIA SAMI MUDALI**, 17 M. 58 = 3 M.L.J. 211.

(86)—*Execution of separate decrees—Sale of the same property on the same date thereunder—Separate sales, not an irregularity—Auction sale—Sale not confirmed—Suit by auction-purchaser for refund of purchase money.*—Where the same property is ordered to be sold on the same date, by separate orders in execution of two decrees, it may be sold once for all in execution of both the decrees; and it is not an irregularity to sell it separately. Where, under the above circumstances, the first sale is confirmed and a certificate of sale granted to the purchaser under it, and the second sale also is confirmed in spite of the objections of the second auction-purchaser, the latter is entitled to sue for refund of the purchase-money, paid by him. His suit is not open to the objection of *caveat emptor*, for, what was sold to him is not that, which was advertised for sale, viz., the right, title, and interest of the judgment-debtor as it existed before the first sale. Nor



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

is it open to the objection that the confirmation of sale to him, under s. 257, in spite of his objections having become final by his failure to appeal against it, he could not seek his remedy by suit; for, his objection to the confirmation of sale was not one contemplated by s. 256 of the Civ. Pro. Code, to which alone the provisions of s. 257 apply, but it was one going to the root of the sale itself as being a nullity. *THE COURT OF WARDS v. GAYA PRASAD*, 2 A. 107.

(87)—*Sale in execution—Suit for confirmation of sale—Parties.*—To a suit for confirmation of an auction sale in execution of a decree, the judgment-debtor and two rival decree-holders were made parties defendants. The judgment-debtor confessed judgment, but notwithstanding this the suit was dismissed as against all the defendants. The plaintiff appealed, but without making the judgment debtor a party to his appeal, and eventually his claim was decreed as against the other two defendants. Meanwhile, however, the property, the subject-matter of the suit had been sold in execution of another decree against the same judgment-debtor. *Held*, on suit by the first auction-purchaser against the second to recover possession of the property purchased, that he could not succeed, the latter having purchased at a time when the auction sale to the former had been set aside and was not restored as against the judgment-debtor. *GIRJA DAYAL v. DEBI PRASAD*, A.W.N. 1906, 40=3 A.L.J. 91.

(88)—*Attachment effected—No final order passed—Subsequent application for sale—Continuation of former proceedings—Judgment-debtor's obstruction to execution of decree—No proof of fraud—Operation of provisions of s. 230, Civ. Pro. Code, 1882.*—Where, after an attachment had been made in execution of a decree, the petition for execution was not finally disposed of, a subsequent application for sale of the property attached cannot be regarded as a fresh application, but must be treated as a continuation of the first execution petition. But, if the subsequent application contains a prayer for the attachment and sale of other properties also of the judgment-debtor, so much of the petition will be treated as a fresh application for execution of the decree. [R., 30 M. 413=17 M.L.J. 334=2 M.L.T. 365, 31 M. 71=18 M.L.J. 46, 8 M.L.T. 367.] In the absence of legal evidence on record that the execution of a decree was at any time prevented by the judgment-debtor's fraud, the misconduct or obstruction of the judgment-debtor to the effectual execution of the decree cannot prevent the bar of s. 230, Civ. Pro. Code. *VENKATAPPIAH v. JAGANNADHA RAO*, 12 M.L.J. 24.

(89)—*Purchaser of a portion of the property charged with the payment of a decree, right's of—Liability of other properties charged, when a portion of the property sold subject to the entire charge—Proclamation of sale, entries in, effect of—Question to be decided in each case,*

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

*what the Court executing the decree intended to sell.*—The appellant, having purchased a decree obtained by one A.H. under which it was declared that the amount found due was to be a charge upon several properties, tried to execute it against some of the properties charged with the payment of the decree. He had also purchased one of such properties in execution of a decree held by a third person. At the time of sale, it was notified that the property to be sold was subject to the charge created by the decree in favour of A.H. The appellant exempted the property purchased by him and sought to recover the amount of his charge created by the decree in favour of A.H. by sale of the rest of the property. The application was resisted on the ground, that, inasmuch as the appellant was, as representative of A.H., the decree-holder and also the judgment-debtor as purchaser of part of the property subject to the charge created by the decree in favour of A.H., the application for execution could not proceed; and that inasmuch as the decree in favour of A.H. had been entered in the proclamation of sale as a charge upon the property purchased by the appellant, and the proclamation did not disclose the fact that several other properties were charged along with the property to be sold, the appellant must be taken to have purchased on the understanding that the property purchased by him was subject to the entire charge. *Held*, that the appellant, being interested in a small portion only of the property subject to the charge created by the decree in favour of A.H., was entitled to proceed against the properties charged, other than the one purchased by him, for so much as he may be entitled to recover from such of the properties. *Held*, also, that the property purchased by the appellant could not be considered to have been sold subject to the entire charge created by the decree in favour of A.H., and that there was no justification for holding that the other properties charged with the payment of the decree in favour of A.H. had been released from their liability. *ABDUL WAHID KHAN v. NAWAB BAQAR ALI KHAN*, 10 O.C. 280. (27 A. 97, 7 C. 648, 4 O.C. 34, R.)

(90)—*Sale of ancestral property—Civ. Pro. Code, s. 320—Rules framed by Local Government—Application under Rule 17 (XIII-A).*—One of several co-owners of ancestral property which had been sold by the Collector under the rules framed by the Local Government under s. 320 of the Code of Civil Procedure applied under Rule 17 (XII) to have the sale set aside upon the ground of material irregularities in the conduct of the sale causing substantial loss. Another of such co-owners, whilst the first application was pending, applied under Rule 17 (XIII-A) to have the sale set aside, making at the same time the necessary payments into Court required by the Rule. *Held* that, upon the presentation of the latter application under Rule 17 (XIII-A), the Collector was bound to set aside the sale, and was in



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

no way precluded from so doing by the existence of the former application under Rule 17 (XII). **TULSI RAM v. IZZAT ALI, A.W.N. 1908, 77=8 A.L.J. 253=30 A. 192. (23 C. 686, 29 C. 1, R.**

(91)—*Rules framed by local Government under s. 320, Civ. Pro. Code, 1882—Execution by Civil Court—Setting aside of sale—"Substantial injury"—Civ. Pro. Code, 1882, s. 311.*—A sale of immovable property by a Civil Court in execution of a decree, which should, under rules framed by the local Government under s. 320, Civ. Pro. Code, 1882, have been transferred to the Collector for execution, is liable to be set aside under s. 311, the sale having been vitiated by a "material irregularity" causing "substantial injury" to the judgment-debtor. A person in whose favour specially favourable modes of execution and satisfaction of decree have been provided by the Legislature, must be held to have suffered "substantial injury" by reason of an usurpation of jurisdiction over the execution proceedings on the part of a Court exercising powers in execution of a less favourable character. **ANWARI BEGAM v. LACHMIN, A.W.N. 1888, 319.**

(92)—*Execution of decree, lease granted in—Jurisdiction of Court executing the decree—Lease, grant of fresh, or extension of period of—Collector, power of, in granting lease—Decree, satisfaction of.*—In execution of a Civil Court decree, the Collector gave a 12 years' lease of the property of the judgment-debtor, subject to the payment of particular sum which was to go towards the satisfaction of the decree. Subsequently a portion of the property passed out of the possession of the lessee, and the Court, in accordance with the recommendation of the Collector, sanctioned the extension of the lease to a further period of 10 years. *Held*, that, after the lease had been given, the decree must be considered to have been satisfied, and the Court executing the decree became *functus officio* and had no jurisdiction to authorize the grant of a fresh lease or to extend the term of the original lease. **MADHO PRASAD v. MAH-TAB CHAND, 8 Ind. Cas. 410.**

(93)—*Money deposited in Collectorate—Liability to be sold in satisfaction of decree—Civ. Pro. Code, 1859, s. 242.*—A share of money deposited in a Collectorate cannot be sold in satisfaction of a decree, but must be made over to the decree-holder. **MOHABEER PERSHAD v. RAM NARAIN SINGH, 11 W.R. 30.**

(94)—*Execution of decree—"Withdrawal" of application for execution—Permission to take fresh proceedings in execution Rule in Sarju Prasad v. Sita Ram—Civ. Pro. Code, ss. 373, 647—Finality of orders passed in execution proceedings.*—Upon application made in October, 1887, for the execution of a decree for enforcement of hypothecation, sale in execution was fixed to take place on the 15th December. On the 14th December, the decree-holder applied that the

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

proceedings might be struck off, as an immediate sale of the attached property was not required, but that the attachment might be maintained. The Court passed an order granting this application. In March, 1888, the decree-holder made another application for execution, which was granted, and the property was brought to sale. The sale, however, was set aside for irregularity. Upon further notifications for sale being directed, the judgment-debtor objected that, with reference to the proceedings of the 14th December, 1887, further execution of the decree was barred by s. 373 read with s. 647 of the Code, under the rule in *Sarju Prasad v. Sitaram*, 10 A. 71. *Held* that this contention was erroneous, as the decree-holder's application and the order of the 14th December, 1887, thereon, showed that there had been no withdrawal by the decree-holder, within the meaning of s. 373, but only a temporary postponement of the execution proceedings with permission to maintain the attachment; and that the rule in *Sarju Prasad v. Sita Ram*, 10 A. 71, did not apply. The permission contemplated by s. 373 is not necessarily an express permission. *Quære*:—Whether the proceedings taken subsequent to the order of the 14th December, 1887 had become final so as to bar the judgment-debtor's objections with reference to *Mungul Pershad Dischit v. Grija Kant Lahiri*, 8 C. 51, *Ram Kripal v. Rup Kuari*, 6 A. 269, and *Beni Ram v. Nanhu Mal*, 7 A. 102. **BADRI NATH MISR v. RAM RUP SINGH, A.W.N. 1890, 9. [Appr., 13 A. 564.]**

(95)—*Decree, Sale of, pending an application for execution—Subsequent withdrawal of application for execution by decree-holder—Warranty not to interfere with capability of execution of decree sold.*—Where a decree-holder sold his rights under the decree, pending the decision of an application made by him for execution, with a warranty that he would not interfere with the power of the vendee to realise the decretal amount, and subsequently to the sale withdrew that application, by reason of which withdrawal the decree became time-barred; *held*, that so far as the decree itself was concerned, that was dead and the vendee had no remedy; but that the vendee could recover the purchase-money of the decree by an action on his contract. **RUP RAM v. MAKHAN LAL, A.W.N. 1890, 169.**

(96)—*Arbitration—Award—Decree in terms of Award—Amendment of decree—Decree on award, Nature of.*—The parties to a suit referred the matter in dispute between them to arbitration, and the award given in pursuance of such reference was brought into Court by the plaintiff with an application that a decree, should be passed in his favour in accordance with the terms of the award as set out in his application. On this application, the only order passed by the Court was that the award should be filed. Subsequently, the defendant applied for amendment of the so-called decree based



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

upon the award. The Court thereupon appended to its former order a copy of the award, adding the words "as detailed below," and it further added a detail of the costs incurred by each party. On its being sought to execute as a decree upon the award, the order amended as above described, it was held that this was no decree on an award, such as is contemplated by the Code of Civil Procedure and was incapable of execution. *BADRI DAS v. SOHAN LAL*, A.W.N. 1894, 28.

(97)—*Setting off costs awarded to decree-holder against sum payable by him to judgment debtors in execution of decree.*—The respondent obtained a decree for possession of certain immoveable property on payment to the appellants of a sum of Rs. 37-8-0, within two months. The decree also awarded to him Rs. 57-2-4 on account of costs. The respondent presented an application for execution in which he recited the facts as above stated and prayed that the sum of Rs. 37-8-0 might be set off against the sum of Rs. 57-2-4, and that he might be placed in possession and be allowed to recover the balance due to him afterwards. The appellants objected that, as the decree did not direct that the costs payable by them should be set off against the sum payable by the respondent, the latter was not entitled to possession until he paid into Court the sum of Rs. 37-8-0. *Held* that the respondent was entitled to set off the amount awarded to him as costs against the sum payable by him to the appellants. *RAM NIDH v. TULSHI RAM*, 6 O.C. 23.

(98)—*Joint decree for costs — Right of one-joint decree-holder devolving on judgment-debtor — Partial execution of decree.*—Where, in appeal, the suit of a plaintiff against two defendants was dismissed with costs in favour of the defendants jointly, and where subsequently one of the joint decree-holders died and his rights under the decree devolved upon the judgment-debtor: *Held*, that it was competent to the surviving decree-holder to execute the decree for half the costs against the judgment-debtor. *SIRTAJ KUAR v. NARENDRA BAHADUR PAL*, A.W.N. 1894, 15. (5 A. 27, R.)

(99)—*Costs in course of execution proceedings — Separate application for realisation — Application for execution against both judgment-debtors — Application in accordance with law — Limitation Act (XV of 1887), sch. II, art. 179, cl. (4).*—When costs have been directed to be paid in the course of execution proceedings, separate execution may be taken out for realisation of these costs, apart from any application to realise whatever is due under the original decree. (5 A. 236, F.) Where the only defect in an application for execution was, in so far as it was one for realisation of the costs of the previous execution proceedings, that the decree-holder prayed for realisation thereof, not from one judgment-debtor, as he should have done, but from both the judgment-debtors. *Held*, that that did not vitiate the application, for it would have been competent to the Court to

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

direct execution to issue against both the judgment-debtors for recovery of the balance of the decree, and against one judgment-debtor for realisation of the costs of the previous execution proceedings. *SUKHA SINDU SANYAL v. JOGESWAR BATTACHARJEE*, 5 Ind. Cas. 480. (12 A. 64, 2 A.L.J. 376, 27 A. 619, D.)

(100)—*Execution of decree for enforcement of mortgage—Objection based on fraudulent sale-deed, not to be allowed—Right of decree-holder to succeed on the basis of his decree—Order as to costs by Court having jurisdiction, separate suit not maintainable in respect of such costs.*—On the execution of a decree that had been obtained by the present plaintiff for the enforcement of his lien on a house under a mortgage of his, the present defendant had raised an objection based on his having purchased the house from the same mortgagors. The objection was allowed and hence the present suit by the plaintiff. The alleged sale deed to the defendant having been found to be fraudulent and collusive, it was held that, though he was no party to the decree obtained against the mortgagor, the basis of the defendant's claim to the property having been found to be a nullity, owing to the fraudulent nature of his sale-deed, the plaintiff was entitled to succeed on the basis of his decree, which had not been in any way impeached. (8 C. 452, F.) The plaintiff in the above suit had also claimed therein, the costs incurred by him in the execution department, on the objection that had been made by the defendant. Reversing the decrees of the Courts below, it was held that the plaintiff was not entitled to claim such costs, in the present suit, from the defendant, because, where a Court had jurisdiction for certain proceeding and had ordered or refused cost in such proceedings, no separate action could be maintained by the parties with respect to such costs. *KADIR BAKSH v. SALIG RAM*, 9 A. 474=A. W.N. 1887, 95. [R., U.B.R. 1897-1901, Vol. II, 426, 15 C.P.L.R. 129, U.B.R. 1904, 1st Qr., Civ. Pro. Code, p. 4, U.B.R. 1905, 2nd Qr., Civ. Pro. Code, p. 18, A.W.N. 1908, 18=5 A.L.J. 140.]

(101)—*Execution of decree—Attachment of immoveable property—Civ. Pro. Code, s. 274 —Service of order on judgment-debtor not necessary—Alienation of property after attachment—Civ. Pro. Code, s. 276.*—Under s. 274 of the Civ. Pro. Code, it is not necessary that notice should be served on the judgment-debtor personally. When the order of attachment has been promulgated under the section, s. 276 comes into play, and makes void any transfer within its terms, pending the attachment as against all claims enforceable under the attachment. *BABU LAL v. NARAIN DAS*, A. W.N. 1889, 832.

(102)—*Summary decree—Service of notice of sale.*—When a decree-holder sells under a summary decree which had been originally obtained *ex parte* and was upwards of ten years old at the date when he sought to enforce it, which and of



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

- it is found as a fact that the plaintiff, now suing to set aside the decree, had no notice until the proceedings for a sale of his property at that date, it is incumbent on the defendant and to prove the service of the necessary process by the clearest evidence. **CHUNDER CHURN HOLDER v. WOMESH CHUNDER DEB**, 1 W.R. 232.

(103)—*Sale in execution—Notice of application for execution—Civ. Pro. Code, 1887, ss. 248, 311.*—Where execution proceedings are proceeded with without issuing the notice to the judgment-debtor under s. 248 of the Civ. Pro. Code, in cases where such notice is necessary, such omission affects the whole proceedings including any sale which may take place. A sale made under such circumstances can be properly set aside by the Court executing the decree. (6 C. 103, F.) *Quære.*—Whether such omission is an irregularity in “publishing or conducting” the sale, within the meaning of s. 311 of the Civ. Pro. Code. **IMAM-UN-NISSA BIBI v. LIAKAT HUSAN**, 3 A. 424. [Doubted, 28 A. 193=2 A. L.J. 640=A.W.N. 1905, 241; F., 21 C. 19, 10 A. 506, 12 A. 440, F.B., 21 B. 424, F.B.]

(104)—*Practice—Application for execution of decree—Notice to judgment-debtor under s. 248, Civ. Pro. Code, 1882—Failure of both parties to attend on appointed day—Dismissal of application.*—Where, on an application for the execution of a decree, a notice was ordered to be issued to the judgment-debtor under s. 248 of the Civ. Pro. Code, 1882, and a day was fixed for the return of the notice, and on the day so fixed neither of the parties appeared, held that the application can be dismissed. **TUKARAM v. KHANDU**, 20 B. 541.

(105)—*Decree-holder putting property to sale without disclosing his lien, effect of—Purchaser without notice, liability for the undisclosed lien—Civ. Pro. Code, ss. 237 and 287.*—Held, that a person who has caused the property of his judgment-debtor to be sold in execution cannot afterwards set up any claim of his own against that property unless he shows that the purchaser purchased with notice of it. **BALDEO v. AUSAN SING**, 11 O.C. 206. (22 B. 686, 10 C. 609, 15 M. 412, 5 C.W.N. 497, 20 B. 290, 16 A. 478, F.B., 314, 12 B. 678, R.)

(106)—*Civ. Pro. Code (Act XIV of 1882), s. 244—Validity of decree cannot be questioned in execution—Necessity of notice in proclamation as to claim of invalidity.*—The validity of a mortgage-decree cannot be enquired into in execution proceedings for the sale of the mortgaged premises, but the Court is bound to fully notify in the proclamation of sale that a claim has been put forward based on the invalidity of the decree, and that any one purchasing would be subject to any subsequent decree declaring the decree against the mortgaged premises invalid. **MA KYI v. U MAUNG GYI**, 8 Ind. Cas. 610.

(107)—*Execution of decree by assignee—Discretion of Court.*—The discretion given to

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

Judges as to allowing execution of decrees by assignees is a discretion which must be exercised reasonably, and, unless there is a reasonable cause for refusing the assignee to issue out execution in his own name, the Judge ought not to exercise his discretion in that way and refuse to allow execution to proceed in the assignee's name. And the mere existence of an order that an enquiry shall take place to ascertain whether anything is or is not due from the decree-holder to the judgment-debtor is no reason whatever for such refusal. **KRISHNA MOHINEE DOSSEE v. KEDARNATH CHUCKER-BUTTY**, 15 C. 446. [R., 31 B. 462=9 Bom. L. R. 728.]

(108)—*Application for attachment of debts said to be due to judgment-debtor—Denial of debts and alleged debtors—Procedure.*—Where a Court is asked in execution of a decree to attach debts alleged by the decree-holder to be due by third person to the judgment-debtor, it is no business of the Court to determine in the first instance whether the debts are really due or not, or to refuse execution if the parties alleged to be debtors to the judgment-debtor deny that they are so. But after attachment, the Court may either sell the debts after giving notice to the intending purchasers that, that the existence of some of them denied by the alleged debtors, or may appoint a receiver to realize the debts by bringing suits against the debtors. **THE MAHARAJA OF BENARES v. PATRAJ KUNWAR**, A.W.N. 1905, 277=28 A. 262=1 A.L.J. 362.

(109)—*Objections to execution by judgment-debtor—When to be raised.*—All the objections which a judgment-debtor has to make to a judgment-creditor's application for execution, should be made simultaneously. **GUNESH DUTT SINGH v. MUNGAY RAM CHOWDHRY**, 21 W.R. 288.

(110)—*Execution of decree—Previous decision in respect of cross-decrees—Objection as to cross-decrees not again entertainable.*—A held a decree against H. This H and one G had cross-decrees. A took out execution and attached, among other properties belonging to his judgment-debtor H, the decree held by her against G. G objected, claiming a right to settle by a set-off and his objection was admitted by the lower Court. On appeal, however, the High Court had ruled that, notwithstanding the existence of cross-decrees between G and H, the decree-holder A had the right to attach the decree held by H against G. The question with reference to the cross-decrees having been settled as above, the lower Court should have confined itself to carrying out the previous orders of the High Court and ought not to have entertained such objection raised either by G or H's representatives. **RAM COOMAR GHOSE v. HURRO SOONDUREE DEBIA**, 2 W.R. Mis. 9.

(111)—*Execution of decree—Objection taken in Court executing decree—Act IV of 1882 (Transfer of Property Act), ss. 88, 89.*—Where, in the



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

case of a decree, for recovery of money by enforcement of lien against hypothecated property, which did not strictly comply with the requirements of s. 88 of the Transfer of Property Act (IV of 1882), applications for execution had on previous occasions been made and not objected to, but, on a subsequent application being made the objection was taken that no order for absolute sale, as contemplated by s. 89 of the Transfer of Property Act, had been obtained by the decree holder. *Held*, that the decree being clear in its terms and capable of execution, such an objection could not be taken at that stage in the Court executing the decree, but should have been made in the form of an appeal from the decree. **DANI RAM v. HURDEO DAS, A.W.N. 1890, 223.**

(112)—*Objection to execution—Disallowance of objection—Suit for declaration that property is not liable to be sold in execution—Civ. Pro. Code, s. 283—Burden of proof.*—Suit under s. 283 of the Code of Civil Procedure, where the objection to execution had been that the property sought to be sold in execution has been given to the plaintiff in lieu of dower; *held* that the burden of proof lay upon the plaintiff to show that the deed, under which she claimed, was a good and valid deed, and not a merely fictitious and colourable transaction, as had been found in the course of the proceedings in execution. **AFZAL BEGAM v. MUHAMMAD OBAIDATULLAH KHAN, A.W.N. 1899, 220. (8 A. 178, A.W.W. 1887, 71, R.) [R., 5 A.L.J. 358; F., 30 A. 321=A.W.N. 1908, 125=5 A.L.J. 601.]**

(113)—*Execution of decree—Act IV of 1882 (T.P. Act), s. 88—Order absolute for sale not necessary where execution has already been ordered and partial satisfaction of decree obtained.*—Where a decree had been obtained for the recovery of money due by sale of immovable property, the decree being framed in accordance with the provisions of s. 88 of the T.P. Act (IV of 1882), and where, although no application had been made to make the decree absolute, the decree-holder had nevertheless applied from time to time for execution and moneys had been paid by the judgment-debtor in part satisfaction. *Held* that it could not be objected at a subsequent stage of the execution proceedings that the decree-holder had not obtained an order absolute for sale. **THE UNCOVENANTED SERVICE BANK, LIMITED v. NAND KISHORE, A.W.N. 1891, 106. (A.W.N. 1891, 83, F.)**

(114)—*Order absolute for sale—Objection to execution of decree—Civ. Pro. Code, s. 244—Transfer of Property Act, s. 89.*—The respondent obtained a decree against the appellant for sale under the Transfer of Property Act, and subsequently applied for an order absolute for the sale of the mortgaged property. The appellant filed objections purporting to be made under s. 244, Civ. Pro. Code. The Court dismissed the appellant's application on the ground that it was premature, no application for execution of

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

the decree having been made by the respondent. *Held*, that an application under s. 89 of the Transfer of Property Act, for an order absolute for sale was an application for execution of the decree, and that, therefore, the appellant's application was not premature. **ALLAH RAKHI v. RANJIT KHAN, 4 O.C. 123. [R., 6 O.C. 114.]**

(115)—*Decree for sale of moveable and immoveable property—Mortgage—Order absolute—Transfer of Property Act (IV of 1882), ss. 86, 87, 88 and 89.*—The decree-holder sued upon a deed of mortgage, by which some immoveable property and an elephant were hypothecated, and obtained a decree for sale of the same in default of payment. The decree was drawn up under s. 88, Act IV of 1882. The decree-holder took out execution against the judgment-debtor, applying for attachment and sale of the elephant. The judgment-debtor objected that the decree had not been made absolute, and until that had been done the decree could not be executed. *Held*, that the provisions of ss. 86 to 89, Act IV of 1882, applied only to mortgages of immoveable property, and that there was nothing to prevent execution, as to the moveable property upon the decree as it stood (which contained an express stipulation that it must be made absolute after the time fixed) before sale could be made. **SARDAR KARAN SINGH v. DWARKA SINGH, 4 O.C. 301.**

(116)—*Simple money-decree—Application to execute, in execution of decree for sale of mortgaged property—Transfer of Property Act, s. 88.*—The appellant sued certain mortgagors on their mortgages, and, before judgment, attached a simple money-decree which the latter had obtained against the respondents. They obtained a decree under s. 88 of the Transfer of Property Act for the sale of the mortgaged property. In the execution of that decree, they filed an application to execute the simple money-decree against the respondents. *Held*, that the decree of the appellants provided only for the sale of the mortgaged property and could not be executed in any other way. **ALLAHABAD BANK LD. v. R. PARTAB BAHADUR SINGH, 5 O.C. 108.**

(117)—*Attachment of property in execution of supposed decree for balance of mortgage-debt—Transfer of Property Act, ss. 88, 90—Mortgage—Civ. Pro. Code, s. 248.*—The respondent obtained against the appellant a decree for sale under s. 88, Transfer of Property Act, but the sale proceeds were not sufficient to discharge the mortgage-debt. No decree was ever passed in favour of the respondent under s. 90 of the Transfer of Property Act, but applications were made for issue of notices under s. 248 of the Code of Civil Procedure and property was attached in execution of a supposed decree for the balance of the mortgage-debt. *Held*, that, as the respondent had not obtained a decree under s. 90



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

of the Transfer of Property Act, he could not attach and sell the property as if he had obtained such a decree. *MATA GHULAM SINGH v. KANDHAI BAKHSI*, 6 O.C. 59. (2 C.W.N. 254, diss.) [Diss, 8 O.C. 251.]

(118)—*Non-registration of decree—No reason for non-execution.*—Case where it was held that the non-registration of a decree was not a reason why the decree should not be executed. *GOSSAIN MUNRAJ POOREE v. DEEN DYAL LALL*, 20 W.R. 19.

(119)—*Dower, Decree for—Sale of immovable property situated outside jurisdiction of Court passing decree—Decree directing sale of immovable property—Jurisdiction.*—The decree-holder obtained a decree from the Court of the District Judge of Lucknow for her dower-debt against the judgment-debtor. On appeal, the decree passed by the Judicial Commissioner directed that the judgment-debtor should have the option to pay the amount decreed within a certain time, and, in the event of his not availing himself of such option, then, on the application of the decree-holder, certain immovable properties should be sold in satisfaction of the decree for dower. Directions regarding the sale of the immovable properties and the division of the sale proceeds then followed. The judgment-debtor did not avail himself of the option given to him by the decree; and the decree-holder attached immovable property in Cawnpore to obtain satisfaction of her decree. *Held*, that the subordinate Judge of Lucknow had power to sell the properties attached, notwithstanding that they were not situated within the local limits of his jurisdiction. (19 C. 13, *F.*) The decree of the Judicial Commissioner specifically directed the sale of the immovable property in question for the satisfaction of dower-debt decreed. It was only in this manner that the dower-debt could be recovered by the decree-holder in execution of the decree. The provision regarding sale was not a mere direction, specifying a method in which the decree might be satisfied, leaving it open to the decree-holder to adopt another mode of execution. *MUZAFFAR HUSAIN v. ABIDA BEGAM*, 1 O.C., Supp. Vol., 58.

(120)—*Plea of want of jurisdiction, whether can be raised for first time in execution.*—Where a defendant appearing in a suit, did not object to the want of jurisdiction, he must be taken to submit to the jurisdiction, and any decree, which may be pronounced against him, cannot, when it is sought to be executed, be objected to by him, on the ground that the Court which made it had no jurisdiction to try the suit. *Ex parte MANOHAR BHIVRAV*, 2 B.H.C. 374. [R., 2 B. 120, 20 B. 86.]

(121)—*Application for execution of decree, passed by a Court, made to another Court, to which local jurisdiction in respect to the subject-matter of the suit has been transferred—Civ. Pro. Code, s. 649—Transfer of decree for execution—Jurisdiction, local, transfer of.*—*Held*,

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

further, that, under the provisions of s. 649 of the Civ. Pro. Code, if, after a Court has passed a decree, the local jurisdiction in respect to the subject-matter of the suit, is transferred by order of Government to some other Court, the application for execution of the decree may be made either to the Court which passed the decree, or to the Court to which the local jurisdiction has been transferred. *MAKRAND v. RAM CHARAN*, 9 O.C. 281. (25 C. 315, 28 C. 238, R.) [R., 10 O.C. 263.]

(122)—*Execution of decree—'Lis pendens'—Transfer of decree for execution—Proceedings in place where decree was passed pending proceedings in place where decree transferred—Civ. Pro. Code, ss. 12, 647.*—A decree was passed at Cawnpore against a judgment-debtor who had property both in the Cawnpore and the Lucknow districts. The decree-holder applied both for attachment of the property in the Cawnpore district and also for a certificate to enable him to execute the decree in the Lucknow district through another Court; and the certificate was granted as prayed, and certain property was attached at Lucknow. While that property was still under attachment, the decree-holder caused other property to be attached at Cawnpore, whereupon a third party objected to such attachment on the ground that the property attached did not belong to the judgment-debtor, but was *wakf*, of which the objector had the custody. No objection to the attachment of any property was raised at any time by the judgment-debtor. *Held*, that the execution proceedings at Cawnpore were not barred by s. 12 read with s. 647 of the Civ. Pro. Code by reason of the grant of certificate for execution of the decree at Lucknow. *GAYA PRASAD v. GANGA NARAIN*, A.W.N. 1889, 203. (14 M.I. A. 529, R.)

(123)—*Additional Subordinate Judge—Abolition of Court—Bengal, N.W.P. and Assam Civil Courts Act (XII of 1887), s. 17—Execution—Application for.*—A decree was made by the Court of an additional subordinate Judge. Subsequently another additional subordinate Judge was appointed. *Held*, that application for execution of the decree passed by the former additional subordinate Judge must be made to the permanent subordinate Judge. *TARA CHAND MARWARI v. RAM NATH SINGH*, 4 C. L.J. 473.

(124)—*Talukdar's estate.*—The income of a talukdari estate could not be sold in execution of a decree in the absence of the sanction of Government. *NARAN v. CHUDASAMA*, 1 Bom. L.R. 212.

(125)—*Sale—Execution—Sanction—Deputy Commissioner—Duty—Procedure—S. 326, Civ. Pro. Code, 1877.*—On receiving an application from a Court executing a decree for sanction to sell land, the Deputy Commissioner should report in the proper column the measures he has taken to give effect to the provision of s. 326, Civ. Pro. Code, 1877. This statement



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

should be forwarded to the Commissioner, who in his turn, should send it on to the Chief Court for sanction. **BHAGWAN DAS v. BAGA, 96 P. R. 1882.**

(126)—*Sale of house in execution—Commissioner and Chief Court, Sanction of—Notification of 3rd October, 1877, No. 3859.*—Neither the Chief Court's nor the Commissioner's sanction is essential to sales of house property in execution of a decree, under notification No. 3859, dated 3rd October, 1877. **NIRMAL DAS v. MUHAMMAD YAR, 6 P. R. 1882. [R., 5 P. R. 1888.]**

(127)—*Delivery of possession—Possession—Delivery in execution.*—The delivery, in execution of symbolical possession, as between parties to the suit, amounts to an actual transfer of possession from one party to the other. **HIRACHAND v. BALA, 1 Bom L. R. 48.**

(128)—*Possession—Symbolical possession—Limitation.*—As between the judgment-creditor or his assigns on one side, and the judgment-debtor or his heirs on the other, symbolical possession under the execution of a decree is as good as actual possession to give the purchaser or his assigns the right to bring his suit for possession within twelve years from that date. **MAHADEO v. PARASHRAM, 2 Bom. L. R. 1087.**

(129)—*Claim to attached property—Questions for determination—Possession—Constructive possession—Civ. Pro. Code, ss. 278, 280, 281.*—In an investigation under s. 278 as to moveable property, what the Court has to determine is merely the question of possession, and the Court cannot go into the question of title. If the Court finds the claimant to be in possession, the only other question that can be considered is whether that possession is really on account of or in trust for the judgment-debtor. (4 C. 402, R.; 27 M. 67, 29 C. 543, 2 L. B. R. 152. F.) The words "possessed" and "possession" in ss. 279 and 280 are not used in a restricted sense as relating to mere tangible or physical possession. They include constructive possession or possession in law. **PO KYA v. LUTCHMINAPPAIAN CHETTY, 4 L. B. R. 289. (27 M. 67, F.)**

(130)—*Civ. Pro. Code, s. 276—Suit to enforce a claim not enforceable under the decree.*—A decree-holder in execution of a decree for money attached certain immoveable property of his judgment-debtor. Owing however, to want of prosecution of the execution proceedings, his application for execution was struck off and with that the attachment was removed. The judgment-debtor subsequently mortgaged the property, which had been attached, to a third party, who, having obtained a decree on his mortgage brought the property to sale and purchased it himself. Pending the mortgagees' suit, the judgment-debtor made a usufructuary mortgage of the same property in favour of the

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

decree-holder. *Held*, on a suit for recovery of possession brought by the usufructuary mortgagee decree-holder who had been ousted by the simple mortgagee, that the rights of the decree-holder under his usufructuary mortgage were subject to the defendant's rights under his prior simple mortgage, and this even though the attachment had subsisted, his claim under the usufructuary mortgage not being a claim enforceable under the decree within the meaning of s. 276 of the Code of Civil Procedure. **NARAIN DAS v. SHEOAMBAR, A. W. N. 1897, 37. [Appr., 20 A. 431]**

(131)—*Procedure—Dispossession—Proof of title—Act VIII of 1859, s. 230.*—In a case under s. 230, Act VIII of 1859, the Court is not restricted to try the question of possession merely, but, if satisfied that there was a probable ground for the application of the applicant (plaintiff), should also go into the question of title between the applicant and the decree-holder (defendant). Although the Court in such a case has the power to go into the question of title, a person who has been dispossessed of land or fisheries in execution of a decree against a third person not a party to the case is not bound to prove anything more than that he was really and *bona fide* in possession and dispossessed in execution of the decree; and though the decree-holder can put the plaintiff to proof of his title he cannot insist upon direct proof of title from the plaintiff who may rely upon his possession. The decree-holder may also go into evidence of title himself. **RADHA PYRAI DEBI CHOWDHRAIN v. NABIN CHANDRA CHOWDHRY, 5 B. L. R. 708=13 W. R., F. B., 80. [F., 15 W. R. 327, 18 W. R. 395; Appr., 14 W. R. 140, 20 W. R. 114; Appl., 6 B. 215; R., 22 W. R. 123, 5 C. 278; Expl., 14 W. R. 358.]**

(132)—*Mortgage by one of several joint managers of property—Purchase of mortgaged property in execution of decree on mortgage—Dispossession of other managers by venue—Application for restoration of possession—Civ. Pro. Code, 1882, s. 335.*—In execution of a mortgage-decree passed against A, one of three joint managers who had obtained the management of the property from its owner, the mortgaged property was brought to sale and the purchaser obtained possession through Court. B, one of the other two managers, alleging that he had been in possession and had been wrongfully dispossessed, applied to the Court under s. 335, Civ. Pro. Code, 1882, to be restored to possession. *Held*, that the mortgagee from A acquired no title to the property under his mortgage against the owner of the property, and B who was in actual possession as manager (whether there were others who were equally entitled to share in the management or not) had a right to resist the purchaser taking possession, and, having been dispossessed, had a claim to have possession restored to him under s. 335 of the Civ. Pro. Code. **GOVIND BALWANT SHIVNEKAR v. LAKSHMAN BIN NANA TELI, 18 B. 522.**



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

(133)—*Mortgage by father—Mortgagee dispossessed by sons—Claim—Title—Act VIII of 1859, ss. 229, 230.*—B, a Hindu father, executed a *zuripeshgi* lease of his share in certain joint family property to K, who was put in possession thereof. R and S, the sons of B, brought a suit against their father to obtain a declaration of their right to hold their separate shares by partition of the family property. K intervened in that suit under s. 230 of Act VIII of 1859, setting up his mortgage and praying that his incumbrance might be recognized and maintained. The Court declined to go into the question of this mortgage, confined itself to the question between the plaintiffs and their father, and gave judgment for a certain share by partition, but thought proper to accompany that decree by a declaration that the plaintiff should get possession only of the property held, and in the same manner as held, by the father. In execution, the plaintiffs were put into actual possession of the whole of their share and K was dispossessed. Then K, under s. 230, applied to be repossessed to possession on the ground that he held the same under a good and valid mortgage from B. The sons disputed the validity of the mortgage. The Court below refused to enter into the question of right between the parties. *Held*, that the lower Court ought to have gone fully into the question of title, and decided all questions between the parties. **BABOO JADUNATH SINGH v. KALIPRASAD, 6 B.L.R. App., 55 = 14 W.R. 338.**

(134)—*Execution of decree — Decree for delivery of possession of land after clearing it of trees—Duty of Court executing such decree.*—Where a decree for possession of land directed that possession should be delivered after uprooting the trees standing on the land and clearing the land of them, it was *held* that the Court executing such decree should enforce it by deputing an officer of the Court to carry out the directions contained in it, whether that officer be the Amin, the Nazir, or any other officer. **AZIZ-UR-RAHMAN v. FAZL-UR-RAHMAN, A.W.N. 1904, 106.**

(135)—*Execution—Sharers of decree-holders—Right of judgment-debtor to object.*—It is not for the judgment-debtor to object to the share which one or more decree-holders may claim. **MAHARAJAH SUTESH CHUNDER ROY v. SARODA PERSHAD MOOKERJEE, 5 W.R., Mis. 58.**

(136)—*Execution—Joint decree-holders—Assignment by one—Execution of whole decree by assignee.*—A judgment-debtor cannot resist enforcement of the whole decree against him by one of two joint decree-holders for the benefit of both. An assignee of a decree from one of two joint decree-holders is entitled to execute the whole decree for the benefit of himself and the other joint decree-holder. **RUP SINGH v. DEOKINANDAN, A.W.N. 1883, 262.**

(137)—*Appropriation of debt due to two persons towards a debt due against one of them alone—*

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

*Amendment of plaint.*—*Held*, that, in execution of a decree obtained against one person alone, a decree-holder is not entitled to have a debt due to that person and another jointly realised and applied towards the discharge of his decree. Where a plaintiff sued on a promissory note in favour of himself and others who were added as defendants, on the plea that he alone was not entitled to the amount claimed, the plaintiff was allowed to amend his plaint so as to claim jointly for himself and the added defendants. **BIJAI BAHADUR SINGH v. JANG BAHADUR SINGH, 11 O.C. 225.**

(138)—*Decree against two or more persons jointly and severally—Decree-holder entitled to proceed against any one for whole debt.*—Where a decree renders the defendants jointly and severally liable for the whole debt, the plaintiffs are at liberty to proceed against any one or more of them for the whole debt. It is no defence in such a case for one defendant to say that he has paid his share. He is liable to pay the whole debt to the plaintiffs and he may proceed against his co-defendants for contribution according to their liabilities *inter se*. **LIMMAJI PATRUDU v. YERUKOLA RAMASAMI, 6 M.L.J. 191.**

(139)—*Decree against several persons—Attachment of decree by one of the judgment-debtors in execution of his own decree—Attachment does not vest ownership—Attached decree capable of execution against co-judgment-debtors—Code of Civil Procedure (Act XIV of 1882), ss. 232, 273—Distinction between attachment and assignment of decree.*—The rule that, when a decree is assigned, one of several judgment-debtors cannot take out execution, is founded, on the ground that, by purchasing the decree, the assignee of it has discharged it and the decree no longer subsists, and his only right is to claim contribution from the other judgment-debtors. In the case of a decree which has been attached the person, who has caused it to be attached, has not acquired the ownership of the decree, and the person who attaches it is competent to do what the original decree-holder may have done. Hence, where a person attaches a decree against himself and several others, in execution of a decree obtained by him against his decree-holder, *held*, that he is competent to take out execution of the attached decree against his co-judgment-debtor. **KALYAN SINGH v. DAMBER SINGH, 6 A.L.J. 564 = 2 Ind Cas. 626.**

(140)—*Decree against member of joint Hindu family—Attachment during debtor's lifetime—Rateable distribution—Civ. Pro. Code, s. 295.*—Plaintiffs who were holders of a decree for money against one of two brothers forming a joint Hindu family, obtained an attachment of certain family properties which attachment, in the result, had effect on the undivided share of his judgment-debtor in the property. Some of the defendants who held similar decrees against the judgment-debtor, but who did not attach his share of the family property in his lifetime



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

applied for rateable distribution of the proceeds of the sale brought about under the plaintiff's attachment, but such attachment not enuring for the benefit of the defendants, the non-attaching decree-holders, these latter were held to be not entitled to the rateable distribution sought for by them. S. 295 of the Civ. Pro. Code gives the right of sharing rateably in the proceeds of a sale only to those decree-holders who could have themselves attached and sold the property. It was not meant to enable a decree-holder to indirectly get the benefits of an execution which he could not himself have enforced directly. Where the decree-holders are persons who could have themselves attached and sold the property, then, and only then may the attachment and sale by one of them be regarded as enuring for the benefit of all. **BITCHAL DAS v. NAND KISHORE**, 23 A. 106. (16 B. 391, D.; 6 I.A. 88, 4 I.A. 247, 4 B. 429, 7 A. 702, 21 B. 797, R.) [R., 8 O.C. 86, 6 P.R. 1903, 14 C.W.N. 396=11 C.L.J. 69=3 Ind. Cas. 105.]

(141)—*Execution of decree—"Assets realized by sale or otherwise in execution of a decree"—Money realized under ultra vires attachment—Rateable distribution—Civ. Pro. Code, 1882, s. 295.*—Where money is paid by a judgment-debtor into Court under an order of attachment, which was *ultra vires*, it will not be assets realized by sale or otherwise in execution of a decree within the meaning of s. 295, Civ. Pro. Code. The payment is a voluntary one made in order to avoid execution or from a desire to pay a debt due, and cannot be rateably distributed. **GOPAL SAHAI v. SHEO KARN DAS**, 6 P.R. 1903. (35 P.R. 1900, 23 A. 106, 40 P.R. 1895, 13 C. 225, 6 B. 588, 21 C. 809, 8 A. 67, R.).

(142)—*Decree against father—Hindu joint family—Liability of ancestral property.*—Case where the question, how far the ancestral property of a Mitakshara joint Hindu family would be liable in execution of a decree against a father alone, was discussed. **AMAR SINGH v. AZIZ-UD-DIN**, 33 P.R. 1892. [R., 53 P.R. 1901=62 P.L.R. 1901.]

(143)—*Execution of decree against one of several partners—Only judgment-debtor's interest in partnership attachable—Procedure to be followed in execution.*—The right of a third party to attach the interest to a partner in his partnership has been admitted in India as it has been in England (Lindley on Partnership, 351, et seq.) An execution creditor holding a decree against a partner may attach and sell, in execution, the interest of the latter in the partnership. **NIZAMUDDIN v. TOOR KHAN**, U B.R., 1897—1901 Vol. II, 431. (20 C. 693, 4 B. 222, 13 M. 447, F.)

(144)—*Partition suit—Decree in defendant's favour—Application for execution by defendant—Liability to pay Court-fee.*—The defendants, in a partition suit, having claimed their shares in the properties, the subject-matter of the suit,

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

there was a decree in their favour, defining their shares. Later on, some of the defendants applied for execution of the decree in their favour and prayed that the decree might be sent to the Collector, for execution. The Court passed an order to the effect that the decree would be sent to the Collector on the necessary Court-fees being paid. *Held*, the order was wrong. The decree itself not having imposed any such terms, the Court executing a decree had no power to demand payment of Court-fees as a condition precedent to execution. Further, it is the plaintiff alone that is liable to Court-fees; here, as the defendants claimed execution of the decree in their favour, they could not be asked to pay an additional Court-fee on the plaintiff. It is the right of every litigant to call on the Court to take such action as may be requisite to secure the execution of a decree containing a direction in their favour. **NAWAB MIR SADORUDIN v. NAWAB NURUDIN**, 29 B. 79=6 Bom. L.R. 834.

(145)—*Execution of decree—Golabagh partition.*—The defendant No. 2, in execution of a decree against defendant No. 1, for a share in certain lands, got almost all the good lands, and on the plaintiff's attaching the same property in execution of a money decree of an earlier date, intervened to prevent the attachment of the lands given to him. *Held*, that the plaintiff's suit for declaration that his judgment-debtors were entitled to their share of the property by a *golabagh* partition (that is by an equal partition of good and bad lands) must be decreed. **SOORJAN BIBEE v. HYDER ALI**, 11 W.R. 268.

(146)—*Execution proceedings—Partition of mortgaged property—Co-sharer, if a necessary party.*—A co-sharer having obtained a portion of the mortgaged properties on a partition after the execution of a mortgage-deed by the other co-sharers hypothecating their undivided shares in the said properties, and having been made a party to the mortgage-suit, is a necessary party to the proceedings in execution. The fact of such co-sharer not being made a party to the proceedings in execution has not the effect of making the sale of his property,—*held* in execution of a decree obtained in his presence on the mortgage-deed,—a nullity. Although the sale is not a nullity, it is liable to be set aside on a proper application made in the manner prescribed by law. **GOLAM AHAD CHOWDHRY v. JUDHISTER CHUNDRA SHAHA**, 30 C. 142=7 C.W.N. 305. (27 C. 242, R.)

(147)—*Partition decree.*—A minor sued for partition and obtained a decree which ordered that he should receive a certain amount of income every year during his minority and that when he become a major he should recover his share of the land. The minor then died and his widow presented a *darkhast* to execute the decree. *Held*, (1) that the effect of the decree was clearly to make the minor a divided member



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

of the family; (2) that the heirs of the minor could, in the execution proceedings, recover the arrears of the allowance up to the death of the minor; (3) that his heirs could not claim in the execution proceedings either the share or the subsequent allowance as awarded in the decree, which would be recoverable only by a separate suit. **LAXMAN v. NARAYAN**, 1 Bom. L.R. 777=24 B. 182.

(148)—*Mitakshara joint family—Execution of decree against father—Interest passing to auction-purchaser.*—Where, in execution of a decree against the father, in a joint Mitakshara family, what was seized and sold was the right, title and interest of the father, the purchaser could not get more than the father's interest in the property and would be entitled to have it ascertained in partition. **THE COLLECTOR OF MONGHYR v. HURDAI NARAIN SHAHAI**, 5 C. 423=5 C.L.R. 112. (On appeal, 2 I.A. 26.) [R., 14 C. 572=14 I.A. 77.]

(149)—*Miscellaneous petition—Regular suit.*—A regularly-executed decree cannot be over-ridden or annulled by a miscellaneous petition. A judgment-debtor wishing to proceed against the decree-holders must do so in a regular suit. **RAJA LEELANUND SINGH v. BANEE MADHUB SINGH**, W.R. 1864, Mis., 31.

(150)—*Decree, execution of—Execution, if may be directed against a person not a party to the decree—Benami.*—A person, who is neither a party to the decree nor a representative of the judgment-debtors, cannot be made liable for the decretal amount, on the ground that the judgment-debtors were *benamidars* for him. **JADU NATH BOSE v. SRI MATI PREM-MONI DAS**, 14 C.W.N. 774=6 Ind. Cas. 414.

(151)—*Act VIII of 1859, ss. 259, 260, 261 to 266—Execution—Benami purchase.*—*Benami* purchases are common in India and effect is given to them by the Courts according to the real intention of the parties. The Legislature has not, by any general measure declared such transactions to be illegal; and, therefore, they must still be recognized and effect given to them by the Courts, except so far as positive enactment stands in the way, and directs a contrary course. There is nothing in s. 260, Act VIII of 1859, either taken by itself or in connection with ss. 259 and 261 to 266 from which an inference can be drawn of an intention to prohibit *benami* transactions. *Semble*: S. 260 is confined to a suit brought against a certified purchaser, and does not embrace a suit brought against a party in possession. A purchaser of the equity of redemption sold in execution of a decree, who had obtained a certificate as purchaser under s. 259 of the Civ. Pro. Code, Act VIII of 1859, brought a suit for redemption and possession against the usufructuary mortgagee under a deed of *zur-i-peshgee* (usufructuary mortgage). *Held* (reversing the decree of the High Court), that Act VIII of 1859 was simply a Code of Procedure not affecting existing law, and that the fact of

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

the plaintiff's title being certified as purchaser was not conclusive by s. 260 of that Act, to debar the defendant who was in possession from pleading that he was the real purchaser, and that the purchase was made *benami* for him by the certified purchaser (as *benami* transactions are not prohibited by s. 260, or *per se* illegal), so as to preclude inquiry into the real title. **MUSSAMMAT BAHUNS KOONWUR v. LALLA BUHOREE LALL**, 10 B.L.R. 159, P.C.=18 W. R. 157=14 M.I.A. 496. [F., 1 A 296, 9 C.L. R. 295, 13 C. 199, 26 C. 950, 28 C. 370; Appr., 22 W.R. 394; R., 19 W.R. 223, 22 W.R. 194, 23 W.R. 358, P.C.=2 I.A. 154; 25 W.R. 493, 2 B. 399, 5 M. 54, 11 M. 234, 296, 21 C. 375, 23 C. 699, 22 B. 672, 2 C.W.N. 433, 21 A. 29, 196, 21 A. 238=A.W.N. 1899, 42, 7 O.O. 229, 23 A. 175=A.W.N. 1904, 44, 28 P.L.R. 1904=4 P.R. 1904, 8 O.C. 306, 28 M. 526=15 M.L.J. 419, 31 B. 61=8 Bom. L.R. 873, 29 M. 473=16 M.L.J. 505=1 M.L.T. 234, 7 A.L.J. 893=7 Ind. Cas. 409, 7 A.L.J. 1091=6 Ind. Cas. 374, 12 Bom. L.R. 1050=8 Ind. Cas. 752.]

(152)—*Sale in—Restitution or compensation on reversal of decree—Civ. Pro. Code, 1882, ss. 317, 583—Claim against purchaser at Court sale—Benami purchase—Fraudulent purchase.*—A judgment-debtor is entitled to recover compensation for what was taken from him in execution of a decree which has been subsequently reversed. (11 A. 838, R.; 10 M.I.A. 206, F.) Where a defendant fails to pay money decreed and his lands are taken and sold in execution of the decree and the sale is confirmed before the decree is reversed, he is entitled to recover compensation for what was taken from him. But no claim for compensation can be maintained against the purchaser, unless the defendant can prove that the purchaser was merely a nominal purchaser at the Court sale and that the transaction was fraudulent. A *benami* transaction is not necessarily fraudulent. But as a judgment-creditor may not purchase at a Court sale held in execution of his decree without obtaining the Court's permission, his purchasing in the name of another person without such permission would be fraudulent. **OBHAI CHARAN DE v. RAM CHUNDER DE**, L.B.R. 1893—1900, 16. (11 C. 287, 5 A. 573, R.)

(153)—*Execution of decree—Restitution—Civ. Pro. Code, ss. 244, 583.*—The Delhi and London Bank, having obtained on the 9th June, 1885, a decree which enabled them to execute a prior decree, viz., decree No. 108 of the 26th June, 1878, attached a subsequent decree of the 1st March, 1886, viz., decree No. 52. The Bank realized certain moneys. Decree No. 52 was subsequently set aside by the High Court, and the defendants in decree No. 52 who were no parties to decree No. 108, applied for restitution of the moneys realized by the Bank, on the ground that the moneys had been realised in pursuance of an order which was for execution of decree No. 52 and that decree No. 108 was time-barred when the



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

order for execution was made. *Held*, that as the Bank got an order to execute that decree, which order was still subsisting, and had not been appealed against and could not be appealed against now, the question whether the decree was time-barred or not was immaterial. *Held*, also, that it was immaterial whether the order for execution was for decree No. 52, also. It was sufficient for the Bank if they could defend themselves against the application under the order in respect of decree No. 108, which order was not appealed against, and under which the Bank realized the money in question, and to which the applicants were not parties, that s. 583, Civ. Pro. Code, could not apply to the case, because that decree was not appealed against, and as the order in execution entitling the Bank to execute the decree No. 108 had become final, the present application could not be treated as an application under s. 244, Civ. Pro. Code, and therefore, the applicants were not entitled to question the order. *SHIB LAL v. PEARE LALL*, A.W.N. 1889, 163.

(154)—*Formal irregularities of procedure—Property of third persons—Estate of a deceased debtor—Representation by one member of the family—Mortgage—Mortgagee obtaining the money decree and buying equity of redemption in execution.*—Sales in execution of decrees cannot be treated as void or be avoided on the ground of any mere formal irregularities of procedure in obtaining the decrees or in the execution of them. The Court has no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons the decrees and sale purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. The Courts in India should properly exercise a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family, and in refusing to disturb judicial sales on the mere ground that some members of the family, who are minors, are not made parties to the proceedings, if it appears that there is a debt justly due from the deceased, and no prejudice is shown to the absent minors. But these are usually cases where the person named as defendant is *de facto* manager of a Hindu family property, or has the assets out of which the decree is to be satisfied under his control. *KHAIRAJ MAL v. DAIM*, 7 Bom. L.R. 1.

(155)—*Civ. Pro. Code, s. 244.*—The provisions of s. 244, Civ. Pro. Code, 1882, enable the mortgagee to require the Court executing the decree to take account of the altered circumstances, when application is made for the execution of the decree. *RAMUNNI v. SHANKU*, 10 M. 867.

(156)—*Objection to execution on ground that judgment-debtor's representatives not brought on record—Such representatives parties to servant proceedings—Estoppel.*—Where on the death of the judgment-debtor his legal representatives intervened of their own accord and successfully

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

opposed on technical grounds the execution of the decree, they were estopped from contending subsequently that an order ought to have been obtained by the decree-holder from the Court which passed the decree allowing execution against them as the representatives of the deceased judgment-debtor. The executing Court has power to bring in the legal representatives of a deceased judgment-debtor, though it may not be the Court which passed the decree. *VENKATAPPIAH v. JAGANNADHA RAO*, 12 M. L.J. 24.

(157)—*Decree for rent—Assignee, representatives of, if competent to carry on execution proceedings—Execution proceedings, initiated by original decree-holders—Conveyance authorizing the assignee to carry on all execution proceedings, effect of—Code of Civil Procedure (Act V of 1908), O. XXII, rule 12—Representatives of assignee, if competent to prefer appeal against order made in execution proceedings—Fresh proceedings, initiation by representatives, if necessary—Code of Civil Procedure (Act XIV of 1882), s. 232—Limitation Act (XV of 1877), s. 22—Limitation—Bengal Tenancy Act (VIII of 1882), s. 108 (h)—Landlord's interest, vesting of, in the assignee.*—On the death of an execution creditor of a judgment-debtor, the proceedings do not lapse, and the provisions relating to substitution upon the death, marriage, or insolvency of parties, do not apply to proceedings in execution between the decree-holder and the judgment-debtor. During the pendency of an appeal in execution proceedings, on the death of the appellant, it is open to his legal representatives to apply for leave to prosecute the appeal. (3 B. 221, 6 A. 255, 18 B. 224, 2 C. 327=4 I.A. 66, R.) There is no provision in the Code of Civil Procedure (Act XIV of 1882), which renders necessary the actual substitution of the name of an assignee or legal representatives for the validity of the proceedings in execution; all that s. 232 provides is that the assignee should apply for execution of the decree and that his name should be brought on the record. (19 W. R. 255, 4 N.W.P. 90, 15 W.R. 283, 9 B. 179, 36 C. 543=9 C.L.J. 271, R.) S. 22 of the Limitation Act (XV of 1877), applies only to suits and does not govern execution proceedings. (34 C. 612=5 C.L.J. 486, D. and expl.) S. 148. (h), Bengal Tenancy Act, does not speak of the assignor's interest, but of the landlord's interest. By the purchase at a sale in execution of a decree for rent due on *patni*, and by the subsequent service of notice under s. 167 of the Bengal Tenancy Act, the purchaser supersedes the rights of both the *patnidar* and *dur-patnidar* and becomes entitled to realize rent directly from the tenants and is their landlord, and it cannot be maintained that the landlord's interest has not become vested in the purchaser. (1 C.W.N. 694, D. and expl.) When a landlord obtains a decree for rent and applies for execution of that decree, and during the pendency of the execution proceedings, the interest of the



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

landlord, by operation of law, vests in the superior landlord who thereby becomes the direct landlord of the tenants, and the interest of the landlord in the decree for rents is transferred to the superior landlord, who is authorized to carry on the execution already initiated, in the name of either the assignor or the assignee; s. 148 (h) does not debar the superior landlord from executing the decree for rent, in the same manner as the landlord decree-holder might have done. (1 C.L.J. 500, 7 C.L.J. 425, 33 C. 566=3 C.L.J. 470, R.) The Court is bound to allow execution at the instance of the recorded decree-holder, unless intimation has been given in the regular way prescribed by law for the admission of another person who obtains leave to carry on execution as an assignee. (15 W.R. 271, 18 C. 639, R.) The Court may, however, if satisfied that the decree has really been assigned, direct that the proceeds realized are not to be taken out by the recorded decree-holder, but retained for the benefit of the assignee. *MONMOTHO NATH MITTER v. RAKHAL CHANDRA TEWARY*, 10 C.L.J. 396=8 Ind. Cas. 324=14 C.W.N. 732.

(159)—*Mortgage-decree—Sale without the legal representatives of a deceased defendant being brought on the record—Validity.*—Where the legal representatives of a deceased defendant were not brought on record when they had the right to redeem a prior mortgage under the decree, a sale held in execution of the mortgage-decree is bad. *KANAKASABAPATHY CHETTY v. VENKATARAMA IYER*, 7 M.L.T. 270=5 Ind. Cas. 339.

(159)—*Hindu Law—Mitakshara—Survivorship—Decree against father—Execution against son—Civ. Pro. Code (Act XIV of 1882), s. 244.*—A Mitakshara son, who has succeeded by right of survivorship, may be brought upon the record of the proceedings in execution of a decree against his deceased father, and execution can be carried on against the properties in his hands, coming by descent or survivorship unless he can successfully raise the plea of illegality or immorality. *RATISHWAR SINGH v. GULAB CHAND*, 6 Ind. Cas. 582.

(160)—*Suit against widow as representing deceased husband's estate—Liability of estate in execution.*—Where a decree in a case was a decree against the husband's estate, and it was obtained against the widow as representing her deceased husband's estate, the decree would bind the estate, whether the widow or a son adopted by such widow was the proper representative. And the proper course, where the decree was obtained against the widow, and objection was made by the adopted son (who was no party to the suit) to the attachment of the properties, would be to make the adopted son a party to the proceedings, in order that he may show reasons, if any, against the sale, and not release the properties from attachment. *SOTISH CHUNDER LAHIRY v. NILCOMUL*

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

*LAHIRY*, 11 C. 45. (Marsh, 614, 7 C. 357, F.) [Expl., 9 B. 429; D., 11 M. 408; R., 20 B. 338, 21 B. 539, 2 C.W.N. 251.]

(161)—*Decree against life-holder—Execution against estate—Representation by agreement of parties.*—A decree, passed against a life-tenant in possession of the estate which after her death, passed to the heiress of the person who under an agreement with the life-tenant was entitled to take possession of the estate after the life-tenant may, be executed against such heiress, provided that the life-tenant had acted, in the litigation which entered in the decree, for the benefit of the estate. *DINAMONI CHAUDHRANI v. ELAHADUT KHAN*, 8 C.W.N. 843.

(162)—*Decree dissolving partnership and ordering defendant to pay plaintiff a definite sum of money—Death of defendant before execution—Right of plaintiff to execute against widow and undivided brother of defendant—Civ. Pro. Code, s. 234.*—A suit was brought against the first defendant and two other partners for dissolution of partnership and for winding it up, and a decree was passed dissolving the partnership and ordering the first defendant to pay a definite sum of money to the plaintiff. Before the decree was executed by the plaintiff, the first defendant died, and the plaintiff sought to execute the decree under s. 234, Civ. Pro. Code, against the widow and the undivided brother of the first defendant. *Held*, that the decree which was sought to be executed was purely a decree *in personam* against the first defendant, and not a decree against any property represented by him or one winding up the affairs of the partnership, and that, therefore, the decree could not be executed against the brother by attaching and bringing to sale joint family property which had come to him by survivorship, whether it was ordinary family property, or property acquired for the family by the partnership trade. *VEERAPPA CHETTIAR v. RAMASAWMI AIYAR*, 27 M. 106. (5 M. 232, 5 M. 234, 10 M. 283, F.)

(163)—*Decree against predecessor—Liability of Jaghir in execution.*—A Jaghir is not liable to attachment and sale in execution of a decree against the predecessor, as assets in the hands of a jaghirdar approved by Government. *NILMONI SINGH DEO v. BAKRANATH SINGH* 9 C. 187, P.C.=9 I.A. 104=4 Sar. 335. (On appeal from 5 C. 339). [R., 10 C. 677, 9 B. 198, 5 Bom. L.R. 983, 5 C.L.J. 583=34 C. 753.]

(164)—*Deceased widow inheriting a part and buying the other part from another heir who subsequently obtained a decree against the estate of the deceased—Right to execute the decree against the part so purchased—Res judicata.*—I died leaving a widow and other heirs. The widow succeeded to a quarter and purchased a quarter of her husband's property. A decree was then passed against the widow for the debts of her husband for which the assets were



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

to be liable. The decree-holder attached the share purchased by the widow. She died without making any objection. *Held*, that her heirs could raise the objection that that share was not liable to sale, and that the not raising of the objection by the widow did not preclude her heirs from raising the same objection. The matter had not been the subject of a decision and was not barred as *res judicata*, although the judgment-debtor was bound to resist execution on all possible grounds. **MUHAMMAD ISMAIL v. WAZIR ALI, 4 A.L.J. 400 = A.W.N. 1907, 163.** [*R.*, 5 Ind. Cas. 210 = 7 A.L.J. 401.]

(165)—*Execution of decree—Representative of judgment-debtor—Right of appeal—Limitation.*—A party who is brought into proceedings in execution as the representative of a deceased judgment-debtor is not debarred from the benefit of an appeal against any order by which he is affected in that capacity. **BISHTU NARAYAN BANDOPADHYA v. GANGA NARAYAN BISWAS, 3 B.L.R. A.C. 40 = 11 W.R. 368.** [*Diss.*, 15 W.R. 283; *R.*, 12 C. 610; *Expl*, 13 W.R. 224 = 4 B.L.R., A.C., 200.]

(166)—*Judgment-creditor of decree-holder—When can ask execution of decree.*—The judgment-creditor of a decree-holder cannot, under the Code of Civil Procedure, 1859, petition the Court to execute his judgment-debtor's decree as if he himself were the decree-holder, where the procedure he has adopted is not due to the cause stated in the Code in s. 243 or to assignment. **REAZUT HOSSEIN KHAN alias KUMMUN KHAN v. JUGGUNNATH SINGH, 21 W.R. 419.**

(167)—*Death of decree-holder—Right of person who has obtained succession certificate to decretal debt.*—A person, who has obtained a certificate of succession in respect to a decretal debt due to a deceased decree-holder, is entitled to receive from the Court the amount realized by execution. He cannot be ordered by the execution Court to furnish security to refund the amount realized, if required to do so on the ground that an application is pending in the Court to cancel or withdraw the certificate. **HIRA LAL v. PINDI SAHAI, 126 P.L.R. 1904.**

(168)—*By a decree-holder mortgagee—Meaning of "Legally recoverable" in s. 90, Transfer of Property Act—Presumption.*—A decree-holder mortgagee, who has purchased the mortgaged premises after obtaining leave to bid at the sale, is in the same position as an independent purchaser and is only bound to give credit to the mortgagor for the actual amount of his bid. (16 C. 132, 19 C. 4, 18 A. 31, *R.*) If the validity of the execution sale is not challenged in the manner prescribed by law, the judgment-debtor cannot raise the objection when the decree-holder applies for a personal decree for the balance under s. 90 of the Transfer of Property Act. **PARBATI CHARAN**

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

**ROY v. GOBINDA CHANDRA KUNDU, 4 C.L.J. 246.** (1 A.L.J. 486, *R.*) [*F.*, 9 C.L.J. 5 = 13 C.W.N. 138 = 1 Ind. Cas. 442; *R.*, 4 C.L.J. 510, 6 C.L.J. 639.]

(169)—*Partition of joint estate—Hypothecation by one co-heir of his share—Decree—Execution—Rights of decree-holder—Estoppel.*—The suit property belonged to four persons. The defendant was hypothecated from one co-sharer of a portion of the joint estate. A decree was obtained by the defendant on the hypothecation bond and, in execution thereof, attached 20 *biswas* and *mauza karai* (the whole estate as the portion hypothecated to him). The plaintiff (one of the other three co-heirs) made an objection to the attachment under s. 278, Civ. Pro. Code, 1882, which was disallowed. Thereupon, he instituted the present suit paying for a declaration of his right to the property and for its protection from sale. It was found by the lower Courts that the suit property had been partitioned between the four co-sharers under a deed of agreement executed on 10th March, 1877 (previously to the institution of the suit) and that 20 *biswas* of *mauza karai* had been allotted as the exclusive share of the co-sharer who hypothecated the same to the defendant. *Held*, dismissing the suit, that the defendant stood in the shoes of one of the parties to the original partition and that it did not lie in the mouth of the plaintiff to object to it, though third parties injured by it might be competent to do so. **PHULCHUND v. ABDUL MAJID, A.W.N. 1885, 53.**

(170)—*Civ. Pro. Code, 1882, s. 244 (=s. 47, new Code) — Question to be determined in execution—Claim by legal representative to property as his own, independently of deceased judgment-debtor.*—Where a judgment-debtor dies after a decree passed against him, and his legal representatives are brought into execution proceedings to represent him in respect of the decree, questions which they raise, as to property which they say does not belong to his assets in their hands and as such was incapable of being taken in execution, are questions in execution, which must be determined in the execution department and not by a separate suit (s. 241). (*Tyrrrell, J., contra*). **SETH CHAND MAL v. DURGA DEI, 12 A. 332, F.B. = A.W.N. 1890, 137.** [*F.*, 6 C.P.L.R. 4, 21 A. 323, 23 A. 263 = A.W.N. 1901, 75, 28 A. 51 = A.W.N. 1905, 180; *R.*, 13 A. 290, 17 M. 399, 20 B. 385, 19 A. 543. 1 O.C., Suppl. Vol., II, 1 O.C. Sup. Vol., 60, 16 C.P.L.R. 19, 28 B. 125, 34 C. 642, F.B. = 11 C.W.N. 593 = 5 C.L.J. 491; *D.*, 19 A. 480, 21 A. 277.]

(171)—*Transfer to another Court—Power of Court to which decree has been transferred, to grant permission to continue execution proceedings begun upon the application of a decree-holder since deceased—Civ. Pro. Code, s. 232.*—*Held*, that the Court to which a decree has been transferred cannot give permission under



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s. 232 of the Civ. Pro. Code, to continue execution proceedings begun upon the application of a decree-holder, since deceased. Such permission can be granted only by the Court which passed the decree. *NAZHAT UD-DAWLA ABBAS HASSAN KHAN v. PRINCE WALA KADAR HUSAIN ALI MIRZA*, 11 O.C. 112. (27 C. 488, R.)

(172)—*Legal representative of deceased decree holder, suit to determine question as to who is—Stay of execution—Decree declaring who is legal representative of decree-holder, Appeal from—Civ. Pro. Code, 1882, s. 244.*—On the death of the decree-holder, while his application for execution of his decree against the appellants and the respondents was pending, a dispute arose between the respondent A and the other parties to the suit, in which the decree was passed as to whether she was the legal representative of the deceased. The Court executing the decree stayed execution thereof, while that question was determined by a regular suit. A then instituted a suit against the other parties to the suit in which the decree was passed and obtained a decree against them, declaring that she was the legal representative of the deceased decree-holder. Subsequently, she applied for the execution of the decree. The appellants thereupon applied to the Court executing the decree to stay the execution of the decree, on the ground that an appeal had been preferred against the decree obtained by A, and that the question as to whether she was the legal representative of the decree-holder had not yet been determined by a separate suit within the meaning of the last paragraph of s. 244, Civ. Pro. Code. The Court rejected the application. *Held*, that the language of the last paragraph of s. 244, Civ. Pro. Code, did not indicate that the determination of the question contemplated was a determination not merely by the Court of first instance, but also, where appeals are preferred, a determination by the appellate Courts. *Held*, therefore, that the question whether A was the legal representative of the decree-holder had been determined by a separate suit. *Held*, further, that the Court, having referred the parties to a regular suit, had power to proceed with the execution, as soon as the question as to who was the legal representative of the deceased decree-holder had been determined in that suit. *MUKIMUNNISA v. AZIZ-UNNISA*, 5 O.C. 133.

(173)—*Execution of decree against representative of deceased judgment-debtor—Joint family property—Code of Civil Procedure, s. 234.*—The appellant obtained a money decree against the father of the respondent. After the death of the judgment-debtor, the appellant attached certain property in the hands of the respondent alleging that it had been joint family property in the life-time of the judgment-debtor and was, therefore, liable to attachment in execution of the decree. *Held*, that the joint property of a Hindu joint family

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cannot be considered in whole or in part as property of the father which has come to the hands of the sons as legal representatives within the meaning of s. 234, Civ. Pro. Code, and that, therefore, the question of the liability of the joint family property in the present case could not be decided in execution proceedings. *RAZAWAND v. PRAG DIN*, 6 O.C. 271. [*Disappr.*, 11 O.C. 334.]

(174)—*Judgment obtained by infant, enforceable in his favour.*—Plaintiff alleged that she came of age in 1871, and the first Court found that she was of age, that she had attained 18 years of age at the time of the hearing. Defendant objected before the lower appellate Court that the plaintiff, being an infant, could not sue. The High Court, held that, possibly, if the plaintiff was under age, the proceedings might have been stayed until a guardian was appointed under s. 3 or 4 of Act XL of 1858 or security for costs given, and that there was no reason why a judgment obtained in any suit by an infant should not be enforceable in favour of the infant. *MAHOMED HATUM v. MUSSUMAT JUMEERA BIBEE*, 6 W.R. 183.

(175)—*Minors—Decree—Death of the debtor—Suit against the debtor's widow—Sons not parties to execution proceedings—Sale in execution—Purchaser at the Court sale—Subsequent suit by minors to redeem the property—Rights and liabilities of the sons.*—G having died in debt, his widow mortgaged some property to the defendant to secure some of his debts. Shortly after this, a creditor of G brought a suit against G's widow to recover another debt of G; and a money decree was passed in that suit. In execution of his decree the equity of redemption in some of the lands was sold to the defendant at a Court sale. The plaintiffs, G's sons, brought a suit to redeem the property, contending that they were G's heirs, that their mother the widow, who alone was sued, (plaintiffs being then minors), had no interest, and that, consequently, their interests were in no way bound by the execution proceedings: *Held*, (1) that it appeared that no plea was left un-urged which might have been advanced had the infants' names appeared on the records, and that there was a substantial representation of them by the widow; (2) that the execution proceedings should be accepted as valid unless the plaintiffs could show that they were not bound thereby, either on the ground that their father's debt, the foundation of the decree, was of such a nature that no liability arising from it could attach to the family property, or that the entirety, of the family property was in fact not sold. In determining the effect of an execution sale, the Courts look to the substance of the whole matter and have declined to hold themselves fettered by any incorrect description or by any informality in procedure which can have had no practical influence on the result. *DEVJI v. SAMBHU*, 1 Bom. L.R. 827=24 B. 135.



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(176)—*Against minor, when no guardian ad litem appointed in suit—Objections by minor to validity of decree in execution proceedings—Code of Civil Procedure, s. 244.*—The respondent obtained a decree against the appellant, who was described as a minor under the guardianship of one F. The respondent applied for execution of the decree, and the appellant through her next friend lodged an objection to the execution upon the ground that no guardian *ad litem* had been appointed for her in the suit and therefore the decree was binding upon her. *Held*, that the appellant was not entitled in the execution department to challenge the validity of the decree, upon the ground that no guardian *ad litem* had been appointed for her in the suit. **QAMAR JAHAN BEGAM v. ABADI BEGAM, 7 O. C. 199.**

(177)—*Execution proceedings—Suit—Sale by mortgagee of property not mortgaged, validity of, where to be questioned—Civ. Pro. Code (XIV of 1882, s. 443—Guardian and Wards Act (XL of 1858, s. 3—Appointment of guardian ad litem other than the certificated guardian.*—Where a puisne mortgagee, who was not made a party to the suit of the prior mortgagee, instead of proceeding against the property sold in execution of the decree of the prior mortgagee, proceeded against other properties of the mortgagor and sold them: *Held*, that it was a matter to be complained of and (if wrong) remedied in execution proceedings and not by a separate suit. If a person, who was not a certificated guardian of the minor, was appointed a guardian *ad litem* at a time when Act XL of 1858 was in force: *Held*, that the passing over of the certificated guardian was not more than an irregularity and would not of itself vitiate either the decree passed or a sale consequent upon such decree. **JOGESHWAR NARAIN v. LALA MOORALIDHAR, 7 C. L. J. 270. (29 A. 290, R.)**

(178)—*Execution—Interest.*—No interest can be awarded in execution. **JANOKEE NATH MOOKERJEE v. JOY KISHEN MOOKERJEE, 15 W. R. 4. (6 W. R. F. B., 109, R.)**

(179)—*Future interest — Decree silent.*—Where a decree is silent as to future interest, it cannot be recovered in execution-proceedings, but may be by separate suit. **SETH GOKUL DASS GOPAL DASS v. MURLI, 3 C. 602, P. C. = 5 I. A. 78 = 2 C. L. R. 156 = 3 Sar. 802. [Appl., 9 C. 112.]**

(180)—*Decree reversed—Application for restitution—Claim for interest—Notice containing no specification of claim for interest—Appeal against the order, maintainability of—Res-judicata.*—In an application for restitution of money paid under a decree since reversed, the appellant claimed interest at the rate of 12 per cent. Notice of the application was sent to the respondents but it did not specify that the application was for restitution or contain any intimation of the claim for interest. On the respondents remaining *ex parte* the Court allowed the

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

claim for interest and ordered execution by way of arrest, but no action was taken as the process fee was not paid. When a second application was made, the respondents made an objection as to the grant of interest at 12 per cent., which was overruled. On appeal, the District Judge reduced the interest to 6 per cent. *Held*, (1) that the order of the executing Court awarding interest was appealable, as it was not a conclusion as to part of a matter arising between the parties before, it but a final determination of the only dispute that had to be decided between them (14 M. L. J. 359. D); (2) that the order did not operate as *res judicata* so as to prevent the respondent from subsequently applying for reduction of the rate of interest and (3) that the rate of interest awarded by the District Judge was the proper rate. **NARAYANA PATTAR v. GOPALAKRISHNA PATTAR, 15 M. L. J. 247 = 28 M. 355. [F., 30 M. 255 = 17 M. L. J. 201 = 2 M. L. T. 167; R., 7 Ind. Cas. 55 = 12 C. L. J. 312, 8 Ind. Cas. 22.]**

(181)—*Sale—Purchase-money, right of decree-holder to take when accrues — Interest right of decree-holder to get, up to when—Poundage fee — Expense of sale.*—Although the sale-proceeds could not be available for the satisfaction of the decree, and the mortgagee decree-holder would not be entitled to handle the cash up to the date when the sale was confirmed, yet, if, as a matter of fact, he withdrew the money before that time, then he was entitled to interest only up to the date when the full purchase-money was paid. The rules of the High Court clearly contemplate that the poundage fees are to be taken as costs of the execution to be recovered from the judgment-debtor, and where a surety bound himself to make good the sum by which the sale proceeds of the property fell short of the decretal amount. *Held*, that the surety bound himself to make good any sum which the sale proceeds, after defraying the expenses of the sale including the poundage fees, fell short of the amount decreed. **MUSSAMAT SUNDARI v. HARI PROSAD SINGH, 5 Ind. Cas. 139.**

(182)—*Surety after decree passed — Decree not executable against surety.*—A decree, for the performance of which a person becomes, after the passing of such decree a surety, cannot be executed against him. **BUNSIDHAR v. BEHARI LALL, 62 P. R. 1871.**

(183)—*Personal decree, Execution of, against party undertaking satisfaction thereof.*—A personal decree against one person cannot be executed against another, simply because the latter undertook to satisfy the decree on the ground that the former was his agent and that the subject-matter of the suit concerned him. A separate cause of action might be furnished by such undertaking. **DIWAN RAM CHAND v. MUHAMMAD SULTAN, 75 P. R. 1876.**

(184)—*'Ex parte' decree not expressly binding surety-defendant — Execution purchase of his property—Title.*—Where an *ex parte* decree in a suit for rent against the lessee and his surety,



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

did not expressly bind the surety, and the decree-holder himself purchased such surety's property in execution, *held*, the decree-holder took no title to such property. **BHUGWAN CHUNDER ROY CHOWDHURY v. MANICK BIBEE**, 9 C. 388 = 11 C.L.R. 577.

(185)—*Surety, Liability of—Bond for appearance of judgment-debtor.*—The judgment-debtor came up in Court and his property was to be attached, when the petitioner offered to give security that the judgment-debtor would appear in Court at the next hearing of the case, if time were allowed for him to make some arrangement to satisfy the decree. In the bond that he executed and filed in Court, he simply stated that the petitioner would present the judgment-debtor in Court. There was no condition in the bond that he was responsible for the amount of the decree if the judgment-debtor should fail to present an application in bankruptcy. At the next hearing the judgment-debtor appeared in Court. It was contended for the decree-holder that since, the judgment-debtor had made no application to be declared insolvent, the petitioner had forfeited the bond and was liable to discharge the decree. *Held*, that the contention was invalid. **HIRA v. HAR SARUP**, 186 P.L.R. 1903.

(186)—*Surety—Suing the surety in execution proceedings—Surety's liability to be sued in a separate suit.*—The plaintiff obtained a decree against his debtor for certain instalments, under a mortgage-bond, and in the execution he applied under s. 287, Civ. Pro. Code, 1882, to have his lien declared over the mortgaged property in respect of the remaining instalments which had not become then due. This lien was declared and in the appeal which the debtor preferred, the defendant became his surety. The appeal was dismissed and the lien order consequently remained in force. The plaintiff proceeded with the execution proceedings, and sold the property. He then sought to enforce the first security bond against the surety: *Held*, that the defendant did not undertake any responsibility for the original decree; his undertaking was really to allow the sale to take place with the lien thereon, and as there had been a sale, this undertaking had been fulfilled. The person undertaking to keep the property available for sale no doubt incurs a liability, but his liability cannot be enforced in execution as not being a liability for a decree, but he must be sued separately, and loss from neglect of care specially proved. **RAMCHAND v. ABDUL ALI**, 2 Bom. L.R. 203.

(187)—*"Striking off" a case or proceeding, improper—Dismissal of case for default—Limitation—Civ. Pro. Code, 1882, s. 230.*—There is no provision in the Civ. Pro. Code for striking off a case the only proper mode of dealing with a case whether a regular suit or miscellaneous proceeding, when the parties do not appear, is to dismiss it. The rights of the parties are not affected by the "striking off" of a case. [F.,

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3 M.L.J. 298, 21 M. 261; R., 15 A. 84, F.B., L.B.R. 1893—1900, 340.] When a case is dismissed in consequence of the parties not appearing, an application may be made under s. 108 of the Civ. Pro. Code for its restoration; s. 108 applies to regular suits, but under s. 647 it is equally applicable to all proceedings other than suits and appeals. [R. 15 A. 84, F.B., 3 C.L.J. 276.] Where the execution proceedings in connection with a decree of 1858 continued down to 1883, the proceedings being "struck off" and restored more than twice, both before and after the Code of 1877, and the Judge on appeal found that the execution proceedings had been continuous throughout and that there had been no unreasonable delay in the prosecution of the execution proceedings, *held* that execution of the decree was not barred by s. 230 of the Civ. Pro. Code of 1882. **BISWA SONAN CHUNDER GOSSAMY v. BINANDA CHUNDER DIBINGAR ADHIKAR**, 10 C. 416. (11 C.L.R. 17, F.) [R., 18 A. 482, F.B., 76 P.R. 1904 = 132 P.L.R. 1904.]

(188)—*Execution cases—Striking off the file—Proceedings to keep alive decree—Bona fides—Limitation.*—Where a Court executing a decree overrules the judgment-debtor's plea of limitation, and its order is upheld in appeal, and both decisions become final by operation of law, the appellate Court is not competent to go behind these orders in order to declare that the proceedings previously taken were ineffective to keep the decree alive. The only way in which execution cases can be struck off the file is under the provisions of ss. 110 and 114 of the Civ. Pro. Code, and these sections relate to those cases only in which plaintiff has failed to appear either in person or by pleader. A proceeding in execution which is not followed by some substantial result is not necessarily *mala fide* irrespective of all the other circumstances by which it may be accompanied. The practice of striking an execution case off the file with the consent of the parties and commencing steps of execution afresh in the event of the judgment-debtor not paying within the time allowed, is objectionable, and not warranted by law. **GOURMOHAN BANDOPADHYA v. TARACHAND BANDOPADHYA**, 3 B.L.R. App. 117 = 11 W.R. 567. [R., 7 C.L.R. 424.]

(189)—*Case referred for execution by Judge to Principal Sudder Ameen—Act V of 1836—Striking case off file after partial execution—Fresh application—Jurisdiction.*—A principal Sudder Ameen struck off execution proceedings from time to time in respect of a decree referred to him for execution by the Zillah Judge under Act V of 1826. *Held* that his jurisdiction over the case did not cease by his striking the case off his file after partial execution, so as to render necessary a subsequent reference by the Judge to enable the Principal Sudder Ameen, upon a fresh application being made for execution, to restore the case to the file. **GOURMONEE DOSSEE v. JOGUTINDRONARAIN**, 18 W.R. 319. (On appeal from, 2 W.R. Mis., 20).



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

(190)—*Civ. Pro. Code, 1882, ss. 373 (=O. XXIII, r. 1. new Code), 647 (= s. 141) — Decree—Application for execution withdrawn by decree-holder—Striking off of application by Court of its own motion — Proceedings in execution and proceedings in suits.*—Where the circumstances and facts in regard to an application for execution show that it was withdrawn at the instance of the pleader for the decree-holder, and that no sanction was given for its withdrawal with liberty to present a fresh application, *held* that any subsequent application made by the decree-holder was prohibited by the rule of s. 373 read with s. 647, *Civ. Pro. Code*, (10 A. 71, *Expl.*; A.W.N. 1888, 253, A.W.N. 1888, 272, A.W.N. 1889, 204, *R.*) But on the other hand, where a Court, of its own motion and without being moved either by the decree-holder or by his pleader, takes upon itself to strike off an application for execution for the mere purpose of clearing its file, that is not a proceeding under any provision of the *Civ. Pro. Code*, which would bar the decree-holder from making a fresh application, or one for a renewal of such irregularly disposed of application. [*Reversed on appeal*, 17 A. 106, P. C.; *Not F.*, 18 C. 635; *Appr. & F.*, 12 A. 392; *R.*, 13 A. 561, 26 B. 76=3 Bom. L.R. 431, 8 O.C. 227.] Procedure in execution is not to be conducted in a slipshod and slovenly fashion and the procedure in suits should be applied as far as it can be made applicable (s. 647, *Civ. Pro. Code*). *FAKIR-ULLAH v. THAKUR PRASAD*, 12 A. 179=A. W.N. 1890, 53.

(191)—*Civ. Pro. Code (Act X of 1877), s. 230 —Decree more than 12 years old—Decree for mesne profits—Mesne profits ascertained in execution—Limitation—Striking-off execution proceedings—Effect.*—A decree of 1854 awarded to the plaintiff possession of certain land and directed that the plaintiff should get *wasilat* from the defendants, but that the same should be ascertained through the intervention of a Court Ameen, and in the course of execution proceedings. It was on the 5th January, 1881, that the Judge decided, on the report of an Amin, that the plaintiff should get a particular amount as *wasilat*. On the 14th March, 1881, the decree-holder filed a petition praying that the mesne profits and costs be realised by attachment and sale of certain properties belonging to the judgment-debtor. *Held*, that the application was not barred under s. 230 of the *Civ. Pro. Code*, 1877, and that the decree of 1854 was merely an interlocutory order as regards the *wasilat* and did not become final in this respect until the 5th of January, 1881, and consequently the 12 years did not, as regards *wasilat*, commence to run until the latter date. [*R.*, 19 C. 132, F.B.] (a) When execution proceedings are struck off on the mere motion of the presiding judicial officer, the rights of the parties to those proceedings are not in any way affected. The striking-off is not in accordance with any provision in the *Civ. Pro. Code*. It is done merely for the convenience of the Court, and with a view to

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diminish the number of cases which otherwise might appear to have been pending in their Court for a long time. (b) When the striking-off takes place upon the application of the parties, or after their failure to appear when they have received due notice to appear, their rights may be affected by the striking off, but whether they are so or not would depend upon the circumstances of each case. *BARODA SUNDAR DABIA v. F.J. FERGUSSON*, 11 C.L.R. 17. [*F.*, 10 C. 416; *R.*, 15 A. 84.]

(192)—*Civ. Pro. Code, 1882, ss. 230, 257 (A)—Agreement to postpone execution proceeding—Suit upon agreement—Striking off execution proceeding Effect.*—A decree dated the 28th May 1843, was alive up to the 10th February, 1881, the date fixed for the sale of the debtors' property in execution of that decree. On that day, all the debtors except one K arranged with decree-holders that the money due under the decree should be paid by the 12th May, 1881, and that in the meantime the execution case should be removed from the file, the attachment subsisting, and that, if they, the debtors, failed to pay, execution should be taken out and that they would not object to it on the ground that the decree was more than twelve years old. The said terms were embodied in a petition presented to the Court and the Court sanctioned the arrangement and removed the case from the file. The debtors failed to satisfy the decree within the stipulated time; and on the 13th September, 1881, the decree-holders applied for execution. K, one of the debtors who was no party to the said arrangement, objected to the execution on the ground that it was barred under s. 230, *Civ. Pro. Code*, and it was finally settled that no execution could issue on that decree. The decree-holders then sued on the arrangement made on the 10th February, 1881, for the recovery of the amount for which execution was taken out, with the costs of that execution. *Held*, that the plaintiffs were entitled to succeed on proof of a contract between the parties on good consideration such as would entitle the plaintiff to bring the suit, and that the petition dated the 10th February, 1881, was not such a contract as gave the plaintiff a right of suit and that the petition at the most could be regarded as evidence to corroborate such a contract. The striking off execution proceedings could not possibly affect the proceedings between the parties relating to the continuance of the attachment, and it could at the most be regarded as an order passed for the purposes of administrative convenience, and the attachment subsisting, the decree-holder would be competent to proceed with the case and bring the property under attachment to sale. *SYAM SINGH v. BAIDYANATH RAI*, 13 C.L.R. 176. [*R.*, 15 A. 84.]

(193)—*Objection of judgment-debtor struck off without inquiring into merits—Effect.*—Where an application for execution has been simply struck off without any order adverse to the right



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on the merits, that application might be renewed again and again till judicially decided adversely to the applicant; and the same principle applies to an objection raised by a judgment-debtor to the execution of the decree. **ONKAR SINGH v. MOHAN KUAR, 20 A. 428 = A.W.N. 1898, 96. (15 A. 84, Appl.)**

(194)—*Time fixed for filing petition—Failure—Striking off petition—No disposal of petition—Pending.*—Where, in the case of a decree-holder who had applied for execution against a judgment-debtor residing outside the jurisdiction of the Court, the Court, which, under the circumstances, had the power, under s. 223 of the Civ. Pro. Code, on the application of the decree-holder to transmit the decree to another Court for execution, without any such application, gave the plaintiff a week to apply for an order of transmission, and, as he did not so apply, struck off the petition on the seventh day, *held* that this was not a disposing of the petition and it should still be treated as pending. **PAN-CHAGNULA SUBRAMANYAM AIYER v. POLIPALLI RANGIAH, 17 M.L.J. 616 = 3 M.L.T. 261. (27 A. 334, R.)**

(195)—*Execution of decree—Application for execution dismissed for default of prosecution—Civ. Pro. Code, ss. 97, 98, 99, 373, 647.*—The mere fact of an application for the execution of a decree being struck off for default of prosecution will not bar a second application, by reason of s. 373 read with s. 647 of the Civ. Pro. Code. **HIRA SINGH v. JOTI PRASAD, A.W.N. 1889, 204. (10 A. 71, A.W.N. 1888, 272, 253, R.) [D., 12 A. 179.]**

(196)—*Dismissal of petition for execution—Necessity for fresh attachment.*—It can hardly be laid down as a general proposition of law that, because an execution-case has been dismissed by reason of no steps having been taken by the decree-holder, within a certain time limited, to bring the attached property to sale, the attachment that has been already put upon it necessarily falls through. In each case it is a question of intention. If, in any particular case, the Court thinks that the decree-holder intended to abandon the proceedings, it may require an application for a fresh attachment before a sale-proclamation is issued. **GOBINDA CHANDRA PAL v. DWARKA NATH PAL, 33 C. 666. (9 M.I.A. 324, 327, P.C., R.)**

(197)—*Decree for mesne profits against father—Attachment—Execution proceeding struck off whilst attachment continued—Validity—Fresh proceeding in execution without attachment—Sale order—Death of judgment-debtor before sale—Sons and grandsons if bound.*—When an execution proceeding is struck off, it does not necessarily put an end to the attachment. It is competent for the Court to make an order striking off an execution proceeding, and, at the same time, continuing the attachment. (9 C.W.N. 601 = 32 I.A. 102, 1 O.L.J. 381, *Rel. on*; 18 A. 49, *Diss.*) When an executing Court, in striking off an execution proceeding, ordered the attachment to subsist

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for three months, and before that period expired, the decree-holder made a fresh application for execution, and the Court ordered sale proclamation to issue, in respect of properties attached in the previous proceeding, but the proclamation could not be served on the judgment-debtor, a member of a joint Mitakshara Hindu family, owing to his death, *held*, that, there being a subsisting attachment followed by an order for sale made in the lifetime of the judgment-debtor, the decree-holder was entitled to proceed with the sale and realise his decree. **PEARY LAL SINHA v. CHANDI CHARAN SINHA, 11 C.W.N. 163 = 5 C.L.J. 80. (6 I.A. 88, F.; 17 I.A. 194, D.; 12 A. 440, R.) [R., 30 M. 413 = 17 M.L.J. 334 = 2 M.L.T. 365.]**

(198)—*Striking off execution petition—Effect.*—An order striking off a petition cannot always be understood as having been made only for statistical purposes. **MULINTI VIRANA GOWD v. TIMMA REDDI, 8 M.L.T. 268 = 7 Ind. Cas. 809.**

(199)—*Act VIII of 1859, s. 270—Decree for possession and mesne profits—Mesne profits not assessed—Attachment—Execution proceedings struck off—Effect on attachment.*—An attachment made pending execution proceedings in the case of a decree for possession and mesne profits not assessed, is not an attachment such as is contemplated by s. 270 of Act VIII of 1859. [R., 1 C.L.R. 475.] Where in the course of proceedings in execution of a decree, both parties had notice to appear before the Court in the matter of those proceedings for the hearing and final determination thereof, and notwithstanding such notice the decree-holder failed to appear and the Court struck off the execution case, that act (striking off the execution case), by itself could scarcely under the circumstances bear any other meaning than that the Court thereby effected a complete termination of the case and the order then made must be taken to have had the effect of removing any attachment therein. The restoration of proceedings does not necessarily imply that the attachment is also restored. **BINDA BIBEE v. LALLA GOPEENATH, 14 B.L.R. 323 = W.R. 66.**

(200)—*Execution of decree—Order for sale—Application struck off—Restoration of application.*—The first application for the execution of a decree after the Civ. Pro. Code, 1877, came into force, was made under s. 230 of the Code, on the 16th December 1878. The sale of certain property being ordered, the judgment-debtor objected that execution was barred. The case was, however, struck off the file for non-payment of process fees without disposing of the objections. On the 1st October 1879, the decree-holder again applied for execution, and the sale of the property having been again ordered, the judgment-debtor repeated his objections which were disallowed, and this order was eventually confirmed on appeal by the District



**Execution of Decree—continued.****—18—Miscellaneous—continued.**

Court and the High Court. In the meanwhile, the execution case was struck off the file, on the ground of the records having been sent to the appellate Court. On the 18th of September, 1882, the decree-holder again applied for the execution of the decree, praying that "the suit might be restored to its number and that the decree-debt might be realised by attachment and sale of the property specified in the former schedule. *Held*, that he was entitled to obtain execution under the application of the 1st October, 1879, for the effect of the decision of the High Court in appeal was that the order for sales passed on such application was a proper one and ought to have taken place under it. **JAWAHIR SINGH v. JADU NATH, 7 A. 439 = A.W.N. 1885, 69.**

(201)—*Execution proceedings, striking off from file, Effect of.*—Whether the mere striking off of execution proceedings from the file has the effect of bringing them to an end, depends upon the circumstances of each case. [*R.*, 16 B. 294.] An arrangement sanctioned by Court whereby the judgment-debtor agreed to pay the decree-amount into Court in regular monthly instalments, would not have the effect of keeping the original decree in force so as to save a fresh application by the decree-holder, on failure by the debtor to pay after some time, not to enforce the said arrangement, but to execute the original decree, made more than three years from the date of the last application, from being barred. **HURRONATH BHUNJO v. CHUNNI LALL GHOSE, 4 C. 877 = 3. C.L.R. 161.** [*F.*, 5 B. 29; *D.*, 7 C. 61; *R.*, 15 A. 84, *F.B.*, 4 O.C. 333.]

(202)—*Execution of decree—Agreement to receive payments by instalments.*—An agreement entered into between decree-holders and judgment-debtors after partial execution cannot be subsequently set aside on the application of the judgment-creditors upon the ground that it exposes them to certain consequences, viz., the risk of incurring limitation, to which, if they had been more prudent, they would not have exposed themselves. **CHUNDER NATH MISSER v. GOUREE KOMUL BHUTTACHARJEE, 10 B. L.R. App. 28 = 19 W.R. 155.**

(203)—*Instalment decree—Execution—Limitation.*—When a decree is for money payable by instalments, in which the provision is that upon default in the payment of one instalment the whole decretal amount should become payable, limitation runs from the date of the first default. **BHOLANAND JHA v. PADMA-NUND SINGH, 6 C.W.N. 348.** (1 C.W.N. 229, *Rel. on*).

(204)—*Decree-debt payable by instalment—Default of one instalment—Limitation.*—An application to execute an instalment of a decree directing payment by instalments, was held to be within time, if made before 3 years from the date on which the instalment fell due, though after 3 years from the date of the decree, and limitation runs from the date of the first default, if

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

the decree provides that the whole amount is payable in default of any one instalment. **CHUNDOO LALL v. MUSSAMMAT SURFRAZ MEHAL BEGUM, 52 P.R. 1870.**

(205)—*Execution of decree—Decree payable by instalments—Finality of order passed in execution—Civ. Pro. Code, s. 230.*—In respect of a decree payable by ten yearly instalments, under which, on default of punctual payment of any instalment, the whole or the whole balance was made exigible in one lump sum, the decree-holder gave credit for five instalments, and applied for execution for the whole balance on default of payment of the sixth instalment, and obtained an order for the arrest of the judgment-debtor after notice issued and served. The case having been eventually struck off, the decree-holder made another application on the same grounds. *Held*, that it was not open to the judgment-debtor to raise the plea of limitation by denying the payment of the first five instalments, and contending that such payments cannot be recognised, and that limitation should be computed from the date of the decree and not from the time down to which credit was given from the payment of instalments,—in other words, by questioning the basis on which the previous application for execution and the order of the Court had proceeded. **KANJIMAL v. KANHIA LAL, 7 A. 373 = A.W.N. 1885, 60.**

(206)—*Execution of decree—Agreement between parties for payment of decree by instalments—Nature of sanction required to validate such agreement—Civ. Pro. Code, s. 257-A.*—A decree of the subordinate Judge dated the 27th June, 1881, having been transferred to the Collector for execution, the parties to it submitted to the Collector an agreement for the satisfaction of the decree by instalments. The Collector approved the agreement and sent it to the Court which passed the decree. On receipt thereof, that Court made the following order on the 31st July, 1885:—"Having been received to-day, let it be forwarded to the District Court to be put up with the record." On the 4th August, the District Judge ordered that the document was to be sent to the record-keeper to be filed with the record of the execution proceedings. On the 16th June, 1888, an application was made for execution of the decree by giving effect to the terms of the agreement. *Held*, that the order of the subordinate Judge above quoted was not such an order as was contemplated by s. 257-A of the Civ. Pro. Code, and was incapable of validating the agreement for the payment of the decree by instalments; and that since the Court executing the decree was not capable of sanctioning such an agreement, execution of the decree was barred by limitation. **MIRZA ZAHUR MUHAMMAD v. CHEDI LAL, A.W.N. 1891, 12.**

(207)—*Agreement to pay money-decree in instalment—Assignment—Execution by assignee.*—Where, in execution of a decree, the judgment-debtor agreed to pay the decree amount



**Execution of Decree—continued****—18.—Miscellaneous—continued.**

in instalments, *held* that the assignee of the agreement to pay the decree-amount in instalments could not enforce the agreement by proceedings in execution which had reference solely to the decree, as there was no transfer of the decree. **KANIK MAL v. BECHAI LAL, A. W.N. 1881, 101.**

(208)—*Execution of decree—Payment by instalment-bond—Kistbundi.*—A having obtained against B a decree for the payment of money, a kistbundi was inserted in the decree, by which it was arranged that the amount of the decree should be paid by instalments of Rs. 5,000. A considerable remission was allowed to the judgment debtors and some reduction was made in the amount of interest payable. The kistbundi contained an express proviso that, on default of payment of three consecutive kists, the whole amount due under the bond was to become at once realizable, and it also provided that in case of default the amounts due were to be recovered by execution to which the judgment-debtor was to make no objection. Certain instalments having fallen due, the judgment-creditor sought to enforce the kistbundi by execution. *Held*, that he was entitled to do so; that he was not bound to bring a regular suit, and that a provision in the bond by which payment might be enforced against property which could not have been attached and sold in execution of the decree, did not prevent the decree-holder from proceeding by execution, so long as he did not seek to enforce that provision. **AMEERUNNISSA KHATOON v. MEER MAHOMED HOOSSEIN, 2 C.L.R. 143.**

(209)—*Joint-decree against several persons—Execution applications against some of them—Saving of limitation against all—Compromise between decree-holders and some judgment-debtors does not affect others—Limitation.*—A joint-decree was passed against seven persons. Applications for execution were made against six of the judgment-debtors, and on the 30th of May, 1903, an agreement was entered into between them and the decree-holder to pay the decree by instalments. The seventh judgment-debtor was not a party to the agreement: *Held*, that the agreement had not the effect of releasing the estate of the seventh judgment-debtor. *Held*, further, that the applications for execution against some of the judgment-debtors are sufficient to keep the decree alive against all. **MUSAMMAT LACHMINA KUER v. SAMPAT RAI, 2 Ind. Cas. 88.**

(210)—*Execution—Instalment bond in substitution of decree.*—Where a judgment-debtor executes a kistbundi, which is filed in Court, one condition of which is that on failure of payment, the judgment-creditor should take out execution of the kistbundi, *held* that the kistbundi being in substitution of the decree, the judgment-creditor is not required to bring a fresh suit to recover what has already been

**Execution of Decree—continued.****18.—Miscellaneous—continued.**

decreed to him. **TARIF BISWAS v. KALIDAS BANERJEE, 2 B.L.R.A.C., 228=11 W.R. 86.** (5 W.R. 19, 6 W.R. 1, F.; 7 W.R. 47. R.) [Not F., 17 W.R. 396, 23 W.R. 129; R., 29 P.R. 1908, F.B.=71 P.W.R. 1907=31 P.L.R. 1907; Cons., 15 W.R. 542.]

(211)—*Bengal Act VIII of 1869, s. 59—"Under-tenure"—What it includes—Ejectment.*—The term "under tenure" as used in s. 59 of Bengal Act VIII of 1869, is not confined to a tenure intermediate between the zemindar and the ryot, but it would include any tenure which, to use the words of the section, "by title-deeds or the custom of the country is transferable by sale;" and a zemindar, who has obtained a decree for arrears of rent against a ryot having a transferable jote, cannot eject the latter, but can only sell the holding under s. 59. **KRISHTENDRA ROY v. AENA BEWA, 8 C. 675=10 C.L.R. 399.** [F., 10 C. 547.]

(212)—*Act X of 1859, ss. 105, 109—Execution of decree—Jurisdiction of Revenue Courts—High Court's powers—Attachment for arrears of rent.*—Act X of 1859 confers upon the Revenue Courts merely a limited jurisdiction and the High Court, under its general power of control, has the right to prevent them exceeding that jurisdiction. A decree for arrears of rent of a saleable under-tenure cannot be executed by the attachment of any immoveable property except the tenure itself, before it is shown that satisfaction of the decree cannot be obtained by execution against the person or moveable property of the debtor; and it is only after sale of the under-tenure that the other immoveable property becomes attachable. **DESARATULLA v. NAWAB NAZIM NAZIR ALI KHAN, 1 B.L.R., A.C., 216=10 W.R., 341.** [Appr., 14 C. 14; D., 7 C. 748.]

(213)—*Execution-sale for arrears of rent—Execution against other property—Under tenure—Ben. Act VIII of 1869, s. 61.*—Where, in execution of a decree for rent, what remained of the tenures, after satisfying a previous decree for money, was purchased by the defendant and where an attachment of the same tenures in execution of a fresh decree for arrears of rent, since fallen due in respect of the same tenures, was raised owing to the intervention of third parties, it was held that, it being open to the plaintiff to show by regular suit that the tenures were liable to be sold in execution of the decree, he could not, under s. 61 of the Beng. Act VIII of 1869, proceed against other immoveable properties of the defendant and that upon the facts of the case, he had disentitled himself to any equitable relief. **HURRISH CHUNDER ROY v. THE COLLECTOR OF JESSORE, 3 C. 712.**

(214)—*Decree for rent—Sale of under-tenure—Sale of other immoveable property of judgment-debtor.*—A judgment-creditor, holding a decree for rent due in respect of an under-tenure transferable by its own title-deeds or by the



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

custom of the country, is not bound to bring that under-tenure to sale in execution, before he can proceed against other immoveable property of the judgment-debtor. **KRISTO RAM ROY v. JANOKEE NATH ROY, 7 C. 748 = 9 C.L.R. 334.** (3 C.L.R. 564, *F.*; 1 B.L.R. A. C. 217, *R.*) [*Doubted*, 14 C. R. 14.]

(215)—*Portion of property in possession of decree-holder, judgment-debtor not competent to hypothecate.*—Since one-half of the *putnee* belonging to the debtor happened to be already in the hands of the decree-holder, the debtor was not competent to validly hypothecate that half. In this view, only one-half of assets of the *putnee* in this case was held to be available for the liquidation of the debt. **MR. J.B. MACKINTOSH v. SYUD NOWAB SUFDER ALI KHAN SUFDER JUNG BAHADOOR, 2 W.R. Mis. 4.**

(216)—*Execution of decree—Injunction Act VIII of 1859, s. 216—Indigo concern—Mortgagee—in possession—Sale of Patni talook—Darpatni—Regulation VIII of 1819—Representative.*—In 1861, A mortgaged indigo concern to B who afterwards entered into possession as mortgagee. While B was in possession, a *patni* included in the mortgage was brought to sale and sold for arrears of rent under the provisions of Regulation VIII of 1819. As a consequence of this sale, the *darpatni* rights of C in this talook were cancelled; and in 1867, C brought an action for damages against the executors of A in which he got a decree. In 1869, the executors of A sold the equity of redemption in the concern to B and, subsequently, on C's application, B's name was, without objection on his part, substituted on the record as the representative of the judgment-debtor. B afterwards applied under s. 15 of the Charter Act to have the order of substitution set aside, but his application was refused. *Held*, in a subsequent suit for an injunction, that B was entitled to have C restrained from executing the decree against him. *Held*, also, that the fact of the plaintiff's not appearing to oppose the substitution of his name on the record as the representative of the judgment-debtor, did not disentitle him to the injunction in this case, because the order not being warranted by the provision of s. 216 of Act VIII of 1859, under which it was professed to be made, was *ultra vires* and therefore a nullity. **AGRA BANK v. DHURONI DHUR SEN, 2 C.L.R. 283.**

(217)—*Arrears of revenue paid by lambardar for co-sharers—Charge obtained by lambardar—Decree in suit under s. 93 (g) of N.W.P. Rent Act (XII of 1881), charge not enforceable by attachment in execution of.*—The defendant, a lambardar, had brought a suit against his co-sharers to recover the amount he had paid for arrears of revenue due on their shares, and in execution of the decree obtained therein, attached the share on which the arrears had accrued. The charge, that the lambardar might have obtained by having paid arrears of

**Executoin of Decree—continued.****—18.—Miscellaneous—continued.**

revenue, was held to be not enforceable in execution of the decree which was merely a personal one against the judgment-debtors passed by a Revenue Court not competent to do more than pass a personal decree. For enforcing such a charge against the property in the hands of the plaintiffs, who were purchasers from the judgment-debtors, he could establish the same only by suit against them in a Court of competent jurisdiction. **LACHMAN SINGH v. SALIG RAM, 8 A. 384 = A.W.N. 1886, 134.** (11 M.I.A. 258, *R.*) [*R.*, 13 A. 195 = A.W.N. 1890, 228, A.W.N. 1891, 9.]

(218)—*Acts V and XIII of 1859—Execution—Sale of right to rent—Moveable property.*—In execution of a decree for arrears of rent, under Act X of 1859, a Collector has power to sell the judgment-debtor's right to recover rent due from an under-tenant. For the purposes of Acts VIII and X of 1859, rent comes within the terms "property" and "moveable property." **MAZESCHANDRA CHATTAPADHYA v. GURUPRASAD ROY, 5 B.L.R. 155 = 13 W.R. 401.** (1 B.L.R. A.C., 177. *D.*)

(219)—*Execution of rent-decree—Imperfect application—Limitation.*—Where an application for execution of a rent-decree under Rs. 500 was made within the three years' period of limitation, but no list of properties to be attached was given, and it was stated that the list filed with a previous application might be referred to, and a fresh list was however given after a year upon order of Court, *held* that the application must not be held barred (under s. 58 of the Rent Act, providing a special period of limitation), though the fresh list had been filed after the period, but specified in the previous application. **HARRIJ CHARAN BOSE v. SUBAYDAR SHEIKH, 12 C. 161.** (12 C.L.R. 279, *F.*)

(220)—*Act X of 1859, decree for enhancement passed prior to—Suit not maintainable for arrears of rent at rate specified in decree.*—In this case, admittedly, the plaintiff failed to execute a previous decree for enhancement obtained by him, and continued for several years to collect the rents paid by the tenants before such decree. On this action having been brought by the plaintiff under s. 17, Act X of 1859, it was held that he could not be allowed to recover under that decree, that is, to execute the former decree through a suit under Act X of 1859. **A. B. B. MACKINTOSH v. AUDHUR MONEE DOSSEE, 6 W. R. Act X, Rul. 87.** [*Rel. on*, 11 W.R. 571]

(221)—*Execution of conditional decree—"Supersession" of decree on failure of condition—Recovery of amount realised.*—Where a decree for enhanced rent, which made the payment at the enhanced rate conditional upon the confirmation of an earlier decree for enhanced rent for a previous year, by the appellate Court, had been executed, the debtor would be entitled on the reversal of the earlier decree, to



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

recover the amount realised at enhanced rates under the second decree, that part of the decree according to enhanced rate having been "super-seded" by the order of the appellate Court in the first suit. *MOHAMED ELAHEE BUKSH v. KALLY MOHUN MOOKHOPADHYA*, 5 C. 589 = 5 C.L.R. 519. (10 M.L.A. 203 = 3 W.R. P.C., 11, 3 C. 30, R.)

(222)—*Act X of 1859, s. 78—Decree for ejectment—Subsequent receipt of rent—Effect on execution of decree.*—Where subsequent to the passing of a decree for ejectment under s. 78, Act X of 1859, the tenant paid and the zemindar accepted rent, such receipt of rent rendered the decree impossible of execution. *NUBO KISHEN MOOKERJEE v. HURISH CHUNDER BANERJEE*, 7 W.R. 142.

(223)—*Bengal Act, VIII of 1869 — Decree declaring plaintiff's right to measurement—Execution.*—Where a decree declares that the landlord is entitled to measure the lands of his tenants, held that the decree is not capable of execution by deputing an Ameen to measure the village. But the landlord can himself proceed to measure the village; and if he is resisted by the tenants, he can invoke the aid of the authorities to assist him in carrying out his just rights. *HAZARI KHAN v. RAMDHONE CHAKI*, 7 C.L.R. 345.

(224)—*Sale of "five biswass" share—Effect of transfer on judgment-debtor's interest in certain groves.*—Where, in execution of a decree against a judgment-debtor a "five biswas" or quarter share of a zemindari was sold to the plaintiff and the latter sued for possession of certain groves on the ground that they were part of the zemindari and included in the property purchased by him, it having been found that the judgment-debtor's interest in the groves sued for was the right to the exclusive possession of one grove and a half share in two others, held that such an interest could not be included in the sale to the plaintiff as, if it were, the other co-sharers would be entitled to share in it, which would be inconsistent with the nature of the interest claimed by the plaintiff as auction-purchaser. *HARLAL v. HIMMAT RAI*, A.W.N., 1883, 301.

(225)—*Execution of decree—Mortgagee including sir land—Sale of sir land in execution of decree on mortgage—Property passes by sale.*—Where certain parcels of sir land, which had been hypothecated along with other land under the same instrument, were sold with such other land in execution of a decree obtained on the hypothecation bond; held, that such sale passed only the proprietary rights in the sir land. The ex-proprietary rights of the mortgagor in the sir land could not be affected thereby. *GHANSHAM DAS v. SHEOMANGAL SINGH*, A.W.N. 1891, 150.

(226)—*Decree directing sale of nij jote lands mortgaged — Mortgagor judgment-debtor, if competent to raise the question of the saleability of the jotes, in execution — Saleability or*

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

*otherwise of nij jote lands, onus of proof of—(Regulation III of 1872), s. 11 — Sonthal Pergunnahs Regulations — Settlement Court, decisions of—Suit, maintainability of.*—Where a mortgage decree distinctly provides for the sale of certain nij jote lands mortgaged, and directs that the mortgage-debt must be realized, in the first instance, by the sale of the mortgaged property, it is not open to the mortgagor-judgment debtor to object to the execution of the decree on the ground that the jotes are not saleable. The onus is not on the decree-holder, in such a case, even if it were open to the judgment-debtor to raise the question of the saleability of the jotes to show that the jotes are saleable, but on the judgment-debtor to prove that the jotes are not saleable. In the absence of a decision of any settlement Court or of a decision by any Civil Court on the question of the transferability of these jotes, a suit for the sale such jotes mortgaged does lie in the Civil Court. *KARTIK SAHU v. NILAMBAR SINGH*, 7 C.L.J. 101.

(227)—*Unenfranchised inam — Liability to attachment—Act XXIII of 1871 (Pensions), ss. 4 and 11.*—An enfranchised inam can be attached and sold in execution of a decree of a Civil Court. While s. 4 of Act XXIII of 1871 prevents a Civil Court from entertaining a suit relating to a pension or grant of money or land revenue, the omission of the grants of money or land revenue in s. 11, is significant, and shows clearly that such grants are not exempt from attachment. *BHIMARAJA VARADAYYA v. MANCHU KONDA NAMMALWARU*, 6 M.L.T. 132.

(228)—*Attachment of immoveable property—Decree-holder entitled to full payment—Attachment for arrears of revenue—Distribution Act XXXIII of 1871, ss. 42 and 43.*—Where the immoveable property of an agriculturist is attached in execution of a decree, the judgment-creditor is entitled to payment in full, unless and until the revenue is in arrears under s. 42, Act XXXIII of 1871 and attachment has been made under s. 43. *OMUR DEEN v. HASHUM*, 52 P.R. 1874.

(229)—*Execution of decree — Purchase by decree-holder of zamindari property sold in execution—Remission of Government revenue subsequent to purchase—Remission enuring for benefit of the decree-holder, not of judgment debtor.*—Certain zemindari property, against which there was a demand outstanding for revenue, was sold in execution of a decree for money, the demand for revenue being notified, and was purchased by the decree-holder. After the purchase, the revenue payable in respect of the property was remitted by the Government. Held, that such remission enured for the benefit of the decree-holder, and that the amount remitted could not be claimed by the judgment-debtor as a set-off against the balance of the decretal debt, which had not been satisfied by the sale of the zamindari property. *KASHI NATH v. BENI PRASAD*, A.W.N. 1904, 32.



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

(230)—*Variation of decree.*—It was provided by a decree that the title to certain properties mentioned therein vested in the plaintiff. In execution proceedings the defendants contended that certain parcels decreed as *kasht* land were in fact *kamat* lands and as such not included in the decree: *Held*, that to give effect to this contention was to rehear the decree and not to execute it. **UDWANT V. TOKHAN, 3 Bom. L. R. 318.**

(231)—*Execution—Adjective law—Limitation.*—Execution is a proceeding to enforce a decree of a Court, and comes under the head of purely adjective law. Therefore, such applications are governed by the law of limitation prevailing at the time they are made. In matters of substantive law, however, the law of limitation in force, at the period of the arising of the right, governs. **PASUPATI LATCHMIA V. PASUPATI MUTHAMBHATLU, 1 M. 52.**

(232)—*Execution of decree—Act X of 1859, s. 92—Necessity for application within 3 years from date of decree.*—The reasonable meaning of the provision in s. 92 of Act X of 1859 is that no execution shall issue upon a decree, unless a proper application for execution be made within three years from the date of the decree. If the meaning of the section should be taken to be that the warrant of execution must be signed within three years, a party might be deprived of the fruits of his judgment, for, even where he has made his application within three years and has acted with very great diligence, he may yet lose the benefit of his judgment by any delay on the part of the Court in hearing the application and passing orders thereon. **HEERALOLL SEAL V. POREN MATTEAH, 6 W.R., Act X, Rul. 84.** [*Expl.*, 4 B.L.R., F.B., 82; R., 12 W.R. 129, 20 W.R. 395, 3 C.L.R. 189, 6 C. 554=8 C.L.R. 19; D., 24 W.R. 16.]

(233)—*Act XIV of 1859, extension of, to Assam—Suit to enforce decree in Assam, subject to three years' limitation under s. 20 of Act.*—There cannot be two general laws of limitation applicable in one Province and so, when Act XIV of 1859 was extended to Assam, its provisions superseded the local rules current in that Province. The decree sought to be executed in this case bore date the 30th December 1861, and under the old Assam rules execution should have been out on or before 30th December 1862. Before that date, however, the new law in Act XIV of 1859 had come into operation in Assam setting aside the old rules in that Province. The decree-holder sued out execution within the period of three years allowed under s. 20, Act XIV of 1859, to enforce a decree, and was therefore entitled to have the assistance of the Court in recovering what had been decreed to him. **RAM LOCHUN SIRCAR SURBURAKAR V. PRITHEE RAM CHOWDHRY, 2 W.R. Mls. 43.**

(234)—*Act X of 1859, s. 92—Issue of process of execution—Limitation of three years from date*

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

*of judgment for sum not exceeding Rs. 500.*—Act X of 1859 is a Code of itself and all questions of limitation arising in cases instituted under that Act must be governed by its special provisions. Under the provisions of s. 92 of the Act, an application for execution of a decree for arrears of rent by proceeding against the immoveable property of the judgment-debtor would be beyond time if presented after the lapse of three years from the date of the judgment. The section enacts that no process of execution of any description whatsoever shall be issued under Act X after the lapse of three years from the date of the judgment, unless the judgment be for a sum exceeding Rs. 500. **PROSUNNO COOMAR SURMA CHOWDHRY V. RAM MOHUN SIRCAR, 3 W.R., Act X, Rul. 131.** [R., 13 W.R., F.B., 3=4 B.L.R., F.B., 82.]

(235)—*Decree under Act X of 1859, s. 92—Application for execution after three years from date of decree.*—On this application for execution of a decree under Act X of 1859, the Judge held that the application having been made after the expiry of three years from the date of the decree, it cannot be complied with under the provisions of s. 92 of Act X, and the High Court held that the opinion of the Judge was correct. It was sought to be contended that the words of the above section refer only to a first application for execution, but the High Court was of opinion that the object of the law was to oblige parties holding decrees for rent under Rs. 500 to execute their decrees within three years, and, if they failed to do so the decree or so much of it as remained unsatisfied, became infructuous. **BIMOLA DEBIA CHOWDHRAIN V. NILKANT SEIN, 3 W.R., Act X, Rul. 157.**

(236)—*Act X of 1859, s. 92—Execution on judgment in case below Rs. 500 to be taken within three years.*—S. 92 of Act X of 1859 is absolute in its wording, and lays it down distinctly that, in cases under Rs. 500, no process of execution shall be issued on a judgment after the lapse of three years. **CHCORAMUN SINGH V. CHOTOORSAL SINGH, 4 W.R., Act X, Rul. 27.**

(237)—*Barred decree—Order for execution by competent Court, Validity of.*—Though the execution of a decree may have been barred at the time of the application, an order for execution, if regularly made by a competent Court having jurisdiction to try the question, is valid, if unreversed. **MUNGUL PERSHAD DICHU V. GRIJA KANT LAHIRI, 8 C. 51, P.C.=11 C.L.R. 113=3 I.A. 123=4 Sar. 249.** [*F.*, 2 A.W.N. 1882, 151, 7 A. 282, 19 M. 54, 24 M. 669, 24 M. 683=11 M.L.J. 432, 47 P.R. 1906; *Appl.*, 6 B. 586, 8 A. 492=A.W.N. 1886, 156, 13 A. 564, 3 Bom. L.R. 416, 24 A. 282; *Rel. on.*, 2 C.L.J. 584, 14 Bur. L.R. 35=U.B.R. 1907, 1st Qr., C.P.C.; R., 6 B. 54, 9 C. 65, 6 A. 269=11 I.A. 37, P.C., 7 B. 341, 9 B. 328, 11 C. 376, 13 C. 257, 11 B. 537, 14 B. 206, 15 B. 128, 15 B. 242, 13 M. 347, 20 C. 551, 15 A. 84, F.B.,



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16 A. 443, 89 P.R. 1894, 23 C. 374, 25 C. 789, 27 C. 210, 4 O.C. 333, A.W.N. 1901, 32, 90 P.R. 1902, 31 C. 822, 1 O.L.J. 500, 2 C.L.J. 499, 3 C.L.J. 240=10 C.W.N. 209, 4 C.L.J. 573=34 C. 13, 14 C.W.N. 114, 47 P.R. 1906=86 P.L.R. 1907; D. 7 B. 316, 10 A. 51, 22 B. 83, 28 C. 122, 5 C.W.N. 80, 6 O.C. 44, 2 C.L.J. 384=9 C.W.N. 956, 11 C.W.N. 236, 17 M.L.J. 201=2 M.L.T. 167=30 M. 255, 35 C. 1060=8 C.L.J. 193=12 C.W.N. 216, Note.]

(238)—*Application for—Decree for possession of land against one set of defendants, possession through tenants against another and for costs and mesne profits against all—Limitation Act (XV of 1877), sch II art. 179 (4)—Limitation—“In accordance with law” meaning of—Application for execution of decree against some of several judgment debtors, if operative and effective against all.*—The words “in accordance with law” relate to the execution of the decree and it cannot be said that a person who executes a decree with the permission of the Court, a permission which the Court is expressly empowered to give, is not doing so in accordance with law. An application to realize costs from some only of the judgment-debtors is in accordance with law. Where a decree or order has been passed jointly against more persons than one, the application for execution of the decree, if made against any one or more of them, or against his or their representatives, shall take effect against them all. *BARADA KINKAR CHOWDHURY v. NABIN CHANDRA DUTT*, 11 C.L.J. 83=4 Ind. Cas. 408=14 C.W.N. 465. (20 C. 388, 18 C. 515, 26 C. 888, 32 M. 268, R.)

(239)—*Decree — Failure to execute—Fresh suit Maintainability.*—Decrees, being generally absolute and unconditional, must be enforced by process of execution. If they are not enforced within the limitation period, the decree-holder must lose his remedy, as he cannot bring a fresh suit for the same. *HAFIZ BAHAUDDIN v. MT. FATTEH BIBI*, 16 P.R. 1893. (93 P.R. 1879, F.)

(240)—*Sale in execution—Purchase of share in property to some extent incumbered—Presumption—Civ. Pro. Code, s. 318 — Act XV of 1877 (Indian Limitation Act), sch. II, art. 138 — Suit for possession.*—Where, in execution of a simple money decree, an undivided share in immoveable property, part of which was subject to mortgages, was sold, it was held that, in the absence of specific indications to the contrary, it must be presumed that the share sold was, as far as might be, the share which was not incumbered. Held, also, that the fact that an application, under s. 318 of the Code, made by an auction-purchaser, has been rejected as made beyond time, is no bar to a suit for possession of the property purchased. *SHEO NARAIN v. NUR MUHAMMAD*, A.W.N. 1907, 181=4 A.L.J. 434=29 A. 463. (9 C. 602, 14 C. 644, F.)

(241)—*Delay—Limitation.*—Where an attachment under a prior execution application was

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

removed, and the decree-holder had not shown reasonable diligence in making the next application, such prior application could not have the effect of saving the later one from being barred by limitation. *KADUMBINI DABYA v. KOYLASH CHUNDER PAL CHOWDHRY*, 6 C. 554=8 C.L.R. 19.

(242)—*Application by decree-holder for payment of money deposited in Court—Step-in-aid of.*—An application by a decree-holder to the executing Court for payment to him of a certain sum of money deposited in Court in partial satisfaction of the decree is not ordinarily an application to take some step-in-aid of execution within the meaning of art. 179 (4), Limitation Act, 1877. The “fruits of the execution of decree” postulate surely that the decree has been executed, and the partial fruits of the execution of the decree equally postulate that *pro tanto* the decree has been executed. To take steps, therefore, to acquire those fruits cannot logically be regarded as a step towards executing the decree; for *ex hypothesi* the decree must have been executed (in whole or in part as the case may be) before those fruits, whether in whole or in part, can be acquired, whereas the expression “step-in-aid of execution” must clearly mean that the decree has not been executed when that step is taken. *KASU v. ATAR SINGH*, 103 P.R. 1908, F.B.=142 P.W.R. 1908, F.B. (107 P.R. 1881, 88 P.R. 1884, 27 P.R. 1888, 18 P.R. 1904, 76 P.R. 1904, 8 C. 89, 10 C. 549, 11 C. 227, 23 C. 196, 10 C.W.N. 28; F., 11 M. 174, 16 M. 452, 17 M. 165, 22 B. 340, 6 A. 366, 12 A. 399, Not F.) [R., 80 P.R. 1909.]

(243)—*Application for time—“Step-in-aid of execution”—Previous application barred — Notice on judgment-debtor — Estoppel.*—An application for time is not a step-in-aid of execution and does not prevent subsequent applications from being barred. (27 C. 285, 3 C.L.J. 240, F.) A judgment-debtor is not estopped from contending that a previous application for execution was barred by limitation merely because notice had been served on him and he did not appear to contest the proceedings. *UMED ALI v. ABDUL KARIM*, 8 C.L.J. 193=35 C. 1060. (8 C. 51, 23 C. 374, D., [R., 1 Ind. Cas. 285.]

(244)—*Civ. Pro. Code, 1882, s. 206 (=s. 152 new Code). application under—Execution of decree—Limitation Act, 1877, art. 179 (4)—Application to proper Court.*—An application under s. 206, Civ. Pro. Code, does not give a fresh starting point to limitation, and cannot be regarded as an application to a proper Court to take a step-in-aid of execution. (13 A. 124, 4 A. 137, 8 A. 492, R.) This is obvious from a consideration of art. 179 (4) of the Limitation Act, 1877, the application under which must be one in accordance with law made to “the proper Court” for execution or to take some step-in-aid of execution of the decree. By Expl. II to art 179, “proper Court” means the Court whose



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

duty it is to execute the decree. The Court executing the decree may or may not be the Court which would have jurisdiction to take action on an application under s. 206, Civ. Pro. Code, and even if it was the Court which passed the decree, its functions as a Court executing the decree are not the same as its functions were as the Court making the decree. In executing the decree, the Court executing it must take the decree as it finds it, and cannot amend or alter it in any way. *DAYA KISHAN v. NANHI BEGUM*, 20 A. 304 = A.W.N. 1898. 43. [F., A. W.N. 1907, 169 = 4 A.L.J. 169, 27 A. 575 = 2 A.L.J. 287; D., 24 M. 25, 27 A. 485 = 2 A.L.J. 169 = 1905 A.W.N. 63, 25 A. 385, 10 C.L.J. 467.]

(245)—*Execution of decree—Limitation—Act XIV of 1859.*—When Act XIV of 1859 was passed, execution could only be taken under that law. If the original decree-holder failed to execute the decree in time, any right that another person may obtain to a share in the decree could give her no fresh starting point. *KASHEESSUREE DEBEA v. PROSUNNO NATH SIRCAR*, 1 W.R. Mis. 31.

(246)—*S. 206, Civ. Pro. Code—Application for amendment of—Order absolute not a step-in-aid of execution—Limitation Act, ss. 19, 20 & 21—Payment by one of the judgment-debtors, not as agent of the other debtors, cannot save limitation as against others.*—The respondent obtained a mortgage decree against two persons. An application for execution of the decree was made by him more than three years from the date of order absolute. In bar of limitation, he relied on an application for amendment of the order absolute under s. 206, Civ. Pro. Code, made within three years from the date of the order absolute, and part payments made by one of the judgment-debtors. The appellant, the other judgment-debtor, contended that the application was barred against him, inasmuch as the payments referred to would not bind him as he did not authorize the payer to make those payments. *Held*, that the order granting an application for amendment of a decree, under s. 206, Civ. Pro. Code, cannot be regarded, as an order passed upon review of judgment within the meaning of art. 179, cl. 3 of the Limitation Act, so as to justify the computation of limitation from the date of the order passed on such application. (20 A. 304, 8 A. 492, 13 A. 134, F.; 4 A. 137, R.; 25 C. 258, Diss.) A payment by one of the several debtors liable to pay, otherwise than as agent of the other debtors, cannot keep alive the right of the creditor as against any of those debtors other than the person making the payment. Ss. 19 and 20 of the Limitation Act do not lay down a general rule to the effect that an acknowledgment or part-payment by one of the debtors saves the operation of limitation as against all the debtors. Consequently, s. 21 of the Act cannot be deemed to be an exception to the rule and it mentions those cases only in which the act of one of a set of persons is likely to be considered as the act of

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

the others and, by way of explanation, it says that even in these cases, the acknowledgment of one shall not renew the period of limitation against others. *ASHAN-ULLAH v. DAKKHINI DIN*, A.W.N. 1905, 108 = 2 A.L.J. 287 = 27 A. 575.

(247)—*Execution petition struck off—Fresh starting point for limitation.*—A petition for execution presented by the decree-holder, even where an order has been passed striking it off the file, is none the less capable of affording a fresh starting point for limitation for a subsequent application for execution of the same decree. *THAKUR PRASAD v. FAKIRULLAH*, 17 A. 106 = 22 I.A. 44, P.C. = 5 M.L.J. 3 = 6 Sar. 526. [Appr., 21 M. 261.]

(248)—*Execution proceeding struck off as partly satisfied, no bar to fresh application for execution—Application for delivery of possession under Civ. Pro. Code (Act XIV of 1882), s. 319 if step-in-aid of execution—Limitation Act (XV of 1877), sch. II, art. 179—Judicial or ministerial act.*—An order under s. 319, Civ. Pro. Code, 1882, can only be passed by the presiding officer of the Court and is a judicial act. Consequently, an application by a decree-holder, who has purchased property in execution of his decree, for delivery of possession under that section, is a step-in-aid of execution within the meaning of art. 179 of sch. II of the Limitation Act (XV of 1877). (10 C.W.N. 28, F.; 27 C. 709, R.) An order striking off proceedings in execution as partly satisfied, which is made merely to avoid cases appearing in arrears in the quarterly returns, has no particular judicial value, and does not preclude the decree-holder from pursuing his remedy until the decree is satisfied. *PREM KRISHNA DHUR v. JURAMONI CHAUKIDAR*, 13 C.W.W. 694 = 1 Ind. Cas. 430.

(249)—*Circular No. II of 1859—Computation of time—Limitation.*—The date of the last order in execution and not the date of the decree was the date from which the period of six years sanctioned by Circular No. II of 1859 for the execution of a decree began to run. *PRUB DIAL v. RAM CHUND*, 46 P.R. 1870.

(250)—*Decree on appeal—Original decree modified—Civ. Pro. Code, s. 230—Limitation.*—Where the appellate Court modifies the original decree, it is the decree of the appellate Court that can be executed; and limitation runs from the date of the appellate decree. So the period of twelve years, prescribed by s. 230 of the Civ. Pro. Code, must be counted from the date of the decree passed on appeal. *MAHOMED MEHDI BELLA v. MOHINI KANTA SAHA CHOWDHRY*, 34 G. 874 = 7 C.L.J. 305. (25 C. 594, F.)

(251)—*Deposit of money in execution under a mistaken belief of liability—Suit to recover the same—Limitation runs from the date on which the decrer-holder withdraws the money*—The plaintiff, believing that the property sold in execution of a decree against himself and the



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

defendants belonged to him, deposited the decretal amount on the 20th February, 1901. Then he applied for release of the property from attachment. It turned out that the property belonged to the defendants and the amount deposited was made over to the decree-holder on the 13th December, 1903. The plaintiff then brought the present suit for recovery of the amount. *Held*, that the time would begin to run against the defendants from the date the money was made over to the decree-holder. **RAM SARUP v. CHHAJJU MAL**, 3 A.L.J. 667 = A.W.N. 1906, 288.

(252)—*Decree by first appellate Court, limitation for execution of, starting point of, in case of withdrawal of second appeal, date of final order or decree of the appellate Court.*—Application for execution of the decree of a first appellate Court, more than three years from its date, but within three years of the date of an order of the second appellate Court, dismissing the second appeal, as the result of an application for withdrawal of the second appeal. *Held*, time began to run from the date of the order dismissing the second appeal, such order being the one finally disposing of the second appeal, and not from the date of the decree of the first appellate Court. **SADAGOPA RAMANUJA PERIYA JEEYANGER v. LAKSHMI DOSS**, 1 M. L.T. 238 = 16 M.L.J. 393 = 30 M. 1. (9 C. 100, *Appr. & F.*; 22 B. 506, *Not F.*) [*F.*, 30 A. 385 = 5 A.L.J. 580 = A.W.N. 1908, 161; *Diss.*, 87 P.L.R. 1908 = 54 P.R. 1908 = 40 P.W.R. 1908.]

(253)—*Interest not mentioned in decree or order—Interest on costs awardable according to practice.*—In this case, the High Court reversed the order of the lower appellate Court and holding that the decree-holder may be allowed to take out execution within three years from the date of the final judgment, directed that, with regard to interest, the Judge will follow the usual practice of Courts giving interest on costs even when it is not specifically mentioned in the order. **SINGH v. LALLA KALEE CHURN**, 3 W.R. Mis. 21. [*Diss.*, 15 W.R. 415.]

(254)—*Execution of decree—Transfer of Property Act, IV of 1882, s. 89—Application under—Limitation Act, 1877, art. 179.*—An application for an order under s. 89, Transfer of Property Act, being a proceeding in execution of decree, is governed by art. 179, Limitation Act, 1877. **CHUNNI LAL v. HARNAM DAS**, 20 A. 302 = A.W.N. 1898, 40. (13 A. 278, *R.*; 16 A. 23, *Overruled.*) [*F.*, 20 A. 357, 25 M. 244, *F.B.*; *Appl.*, 23 B. 644; *Cons.*, 26 M. 780; *R.*, 24 A. 542, 6 O.C. 114, 27 A. 625 = 2 A.L.J. 371 = A.W.N. 1905, 136, 33 O. 867 = 4 C.L.J. 141.]

(255)—*Application moving Court to compel repayment in Court of money improperly taken out—Limitation.*—An application by the attaching-creditor asking the Court to compel a person who has improperly collected the debts, attached under an order of the Court, to disgorge the amount and pay it back into Court, under the

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

penalty, in case of refusal, of being arrested, is an application to the Court to exercise its inherent powers of compelling the restitution of money improperly collected in defiance of its orders. The Limitation rules provided for applications to execute decrees are not applicable to such an application. **GODU RAM v. SURAJ MAL**, 2 A.L.J. 16 = A.W.N. 1903, 9 = 27 A. 378. [*R. & Doubt.*, 17 M.L.J. 84 = 30 M. 207.]

(256)—*Suit by assignee of decree passed in 1857—Limitation.*—If the assignee of a decree passed in 1857 sued out execution within three years from the passing of Act XIV of 1859, he is in time and limitation cannot be applied. **RAMCHUNDER CHUCKERBUTTY v. KURREM BUX MEAH**, 5 W.R. 223.

(257)—*Limitation Act (XV of 1877), sch II, art. 175—Civ. Pro. Code (Act XIV of 1882), s. 368—Application of the article and section to execution proceedings—Estoppel—Pre-emptor denying locus standi of deceased vendee's sons to appeal—Whether he can give them a locus standi to execute his decree.*—Art. 175-C of the Limitation Act (XV of 1877) and s. 368 of the Civ. Pro. Code (Act XIV of 1882) do not apply to execution proceedings. In a pre-emption suit, the vendee died before decree. By inadvertence the decree was passed against the dead vendee. An appeal by the sons of deceased vendee was dismissed on the ground, taken by the pre-emptor, that as their father had died before the decree was passed, they had no *locus standi* to appeal. Later on, the pre-emptor attempted to get the decree executed against the same sons. *Held*, that the pre-emptor was legally—at any rate equitably—estopped from executing his decree against the sons, as he could not be allowed to confer on the sons a *locus standi* in execution proceedings which he had denied them in their appeal. **AMOLAK RAM v. SHANU RAM**, 174 P.L.R. 1911.

(258)—*Death of decree-holder—Abatement of execution proceedings—Admission of application to set aside abatement after time—Sufficient cause—Civ. Pro. Code, 1882, ss. 365, 371, 372—A—Limitation Act, 1877, s. 5.*—A decree-holder died in September 1898; the judgment-debtor, on the 18th October, 1899, secured an order from the executing Court directing the removal of the attachment on the ground that no application under s. 365, Civ. Pro. Code, had been made by the representatives of the deceased decree-holder within the limitation period. The trouble was that the decree-holder, a Sikh Jat, had died leaving a will, the probate of which, having been keenly contested by his heirs, was not granted to the executors until April 1900. In May 1900, two, out of the three executors, filed an application for execution, but the judgment-debtor contended that, by s. 365 of the Civ. Pro. Code the application was time-barred. *Held*, that the word "suit" includes all proceedings in a suit including the proceedings in execution, and



*Execution of Decree—continued.**—18.—Miscellaneous—continued.*

that the executors were bound to make and were capable of making the application at the time of the death of the testator. but that, under the peculiar circumstances of the case, there was sufficient cause preventing them from continuing the execution proceedings originated by the testator within the meaning of s. 371, Civ. Pro. Code, and that, therefore, under the provisions of s. 372-A, Civ. Pro. Code, and of s. 5 of the Limitation Act, they were entitled to an extension of the time for making the application to set aside the abatement order. *PRICE v. GOLAK NATH*, 39 P.R. 1903. (8 B. 241, 9 P. R. 1901, 6 A. 269, 63 P.R. 1900, R.)

(259)—*Decrees, Satisfaction of—Priority of attachment—Time for liquidation.*—Each of several decrees held by attaching creditors must be satisfied according to the priority of attachment. The holder of four decrees is not entitled to satisfaction of them first, simply because he, first in execution of one of the decrees, attached the estate. The time for liquidation of a claim after attachment in execution need not be limited to two years. It may further be extended at the discretion of the Court. *RAJA PUDDONA BHONJO BAHDOOR v. HURRO KISTO DOSS*, 1 W.R. Mis. 16.

(260)—*Application to execute decree under attachment—Dismissal of petition—Removal from file—Execution after removal of attachment—Limitation.*—Where the attachment of a decree is raised, the decree-holder has not got three years from the date of the removal of the attachment; he must apply for execution of his decree without undue delay after such removal. An application, for execution of a decree under attachment having been made, the Court dismissed the application, thereby meaning that the application was removed from the file. The decree-holder again applied for execution and the petition was dismissed on the ground that the attachment was still pending. On the attachment being removed, the decree-holder applied for execution of the decree. *Held* that the order which the Court ought to have made on the first application was an order to adjourn the matter until the attachment was raised, and from the circumstances of the case the Court must be taken to have made that order. So the second application was nothing but a motion to revive the first application. The summary dismissal of the second application could not prejudice the present application to give effect to the first application. Treating the order on the first application as an order of adjournment, it was competent to the first Court to allow the matter to be prosecuted after the raising of the attachment. *CHOKKALINGA PILLAI v. KUMARASAMI PILLAI*, 10 M.L.J. 132.

(261)—*Limitation—Revivor—Step-in-aid of execution—Limitation Act (XV of 1877), sch. II, arts. 179, 180—Payment not certified to Court—Civ. Pro. Code (Act XIV of 1882), ss. 244, 258.*—To constitute a revivor of the

*Execution of Decree—continued.**—18.—Miscellaneous—continued.*

decree, there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it. On an application for execution being made, the judgment-debtor objected that the decree was barred. This objection was overruled and it was decided that the decree was not barred by limitation: *Held*, the effect of the order was to entitle a decree-holder to proceed with the execution, and to revive the decree. Even if the decree-holder did not then choose to proceed with the execution and the case was struck off, any subsequent application for execution made by him within time would not be barred. (9 C.L.J. 271, F.; 30 C. 979, 25 A. 361, D.) To an application to execute an order of His Majesty in Council, which confirmed a decree of the Court below, art. 180 is applicable and applicable to the entire application. (8 C. 218, F.) A payment not duly certified under s. 258, Civ. Pro. Code, cannot be proved under s. 244 where no application under the former section has been made within the period of limitation prescribed by art. 173-A. To hold otherwise would be to render the article null and void. *KAMINI DEBI v. AGHORE NATH MUKHERJI*, 11 C.L.J. 91=4 Ind. Cas. 402=14 C.W.N. 357. (31 C. 480, 31 C. 437, D. & Expt.; 12 C.W.N. 485, D.; 20 C. 32, 15 M. 302, Rel. on.)

(262)—*Limitation—Plea of limitation regarding a previous application for execution—Civ. Pro. Code (Act XIV of 1882), ss. 234 and 248.*—In this case an application for execution was made on 20th August, 1903, which was admittedly within time. The next (the fifth) application for execution was made on 7th September, 1906. In this application the decree-holder prayed, *first*, that the names of certain persons including the appellant should be entered in place of a deceased judgment-debtor, *secondly*, that certain property should be attached, and *thirdly*, for a rateable distribution in the sale proceeds. The sixth application was made on 14th November, 1907, by the respondent who had purchased the decree and was thrown out on his failure to prove the purchase. The seventh and last application was made on 21st December, 1907. It was resisted on the ground that the fifth application on which the present one depended for its validity was barred by limitation. On the fifth application notices were issued under s. 234, Civ. Pro. Code, to show cause why the heirs of the deceased judgment-debtor should not be brought on the record. No one appeared and the names were entered. The decree-holder was then called upon to furnish process fees for notices under s. 248, Civ. Pro. Code, to show cause why the application for execution should not be granted. The application was ultimately thrown out because the decree-holder failed to furnish the process fees. *Held*, that in these circumstances the Court could not be considered to have determined that the application was made within time. The ruling in *Mungul*



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

*Prasad Dikhit v. Girja Kant Lahiri* cannot be extended to cases in which the judgment-debtor does not get an opportunity of putting forward a plea of limitation. *KANIZ FATIMA v. MUHAMMAD JAFART ALI*, 13 O.C. 90 = 6 Ind. Cas. 746.

(263)—*Limitation Act (XV of 1877), sch. II, art. 178—Execution of decree—Obstruction placed in the way of execution—Time to run from the removal of the obstruction—Revival of previous application for execution—Limitation.*—A decree-holder made an application for execution of his decree on 31st of March, 1905, and attached certain property. The judgment-debtor objected that the property sought to be attached was not liable to attachment. The objection, however, was rejected finally by the High Court on 11th of March, 1907. The decree-holder then made a second application on the 16th of June, 1909, for execution by attachment and sale of the same property. *Held*, that the second application was not time-barred. It was really, though not in form, an application to revive the first application. *SHEIKH ALI HUSAIN v. SHEIKH RAFI-ULLAH*, 7 Ind. Cas. 707.

(264)—*Refund of money realized in execution of a decree afterwards reversed in appeal—Limitation—Execution of decree stayed by injunction—Procedure.*—On the 7th October, 1901, an *ex parte* decree on a mortgage was passed in favour of the appellants. Before, however, the decree was made, the appellants had obtained an injunction restraining the respondents from realizing certain money deposited in Court to their credit. After this decree was passed, the appellants withdrew out of this amount Rs. 19,041. The decree was set aside on the 9th July, 1904. The suit was retried; and, on the 17th September, 1904, the Court of first instance made a decree in favour of plaintiff's for Rs. 17,711-7-0. This decree was affirmed by the High Court on the 18th December, 1906. On the 17th September, 1907, the respondents applied for a refund of the difference (Rs. 1,804) between the sum realized by the plaintiffs and the sum finally decreed. *Held*, that the plaintiffs were at liberty to proceed either by application or by suit (10 M.I.A. 203, 28 A. 665, 29 A. 143, R.), and that the application was not barred by limitation. *BITHAL DAS v. JAMNA PRASAD*, A.W.N. 1908, 206 = 5 A.L.J. 527. (28 C. 113, D.)

(265)—*Decree—Execution—Redemption of a Malabar Kanam—Ascertainment of the value of improvements in execution—Final decree—Limitation.*—Where a decree for redemption of a Malabar kanam provided that the plaintiff be put in possession of land upon payment by plaintiff to defendant of the mortgage amount and of the value of the improvements, to be determined in execution, the decree became a complete decree on the date on which the Court determined the value of improvements payable by the decree-holder. An application made to

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

execute the decree within three years from the latter date would be within time. *KRISHNAN v. NILAKANDAN*, 8 M. 137. (4 C. 629, Appr.)

(266)—*Decree as originally framed incapable of execution—Amendment of decree—Limitation Act (XV of 1877), sch. II, arts. 178 and 179.*—A decree for sale was obtained on a mortgage. The decree was made absolute on 3rd February, 1903. By mistake of the Court or its officers, the decree ordered the sale of a village which did not in fact exist. The decree-holders applied for correction of the decree, and on 14th November, 1903, the correct name was substituted. Within three years from that date but upwards of three years from that of the order absolute, the decree-holders applied for execution of the decree. *Held*, that the application was within time. A decree ordering sale of a non-existent village is incapable of execution, as it would be impossible to comply with the provisions of the law as to making and affixing proclamation on the property. *BIHARI v. RISAT*, 5 A.L.J. 403 = A.W.N. 1908, 191. (17 A. 39, Rel. on.)

(267)—*Application for—Amended decree, limitation in case of.*—*Held*, that an application for execution, made after three years from the date of the original decree, but within three months of the date of an amendment of the decree, by which it became for the first time capable of execution, was within limitation. *MUSAMMAT ZUBRA BIBI v. MUSSAMMAT ZULAIKHA BIBI*, 11 O.C. 22. (24 A. 300, 17 A. 39, 26 M. 780, F.)

(268)—*Limitation—Application in continuation of previous proceedings in execution.*—On the 7th December, 1903, the sale of certain immoveable property, which had been attached was ordered. On the 30th January, 1904, the Ameen reported that he had been unable to hold the sale, as there were no bidders. Notice of this fact was given to the decree-holder and he was allowed time till the 10th February to pay in fees for a fresh sale. On that date, no steps having been taken by the decree-holder, the case was ordered to be struck off "for the present." On the 13th January, 1906, the decree-holder again applied, asking that the property, which was still under attachment, might be sold. *Held*, that this was not a fresh application in execution, but merely an application to revive the former proceedings, and was not barred by limitation. *MUJIB ULLAH v. UMED BIBI*, A.W.N. 1908, 227. (5 C.W.N. 347, D.; 18 A. 482, 9 M.I.A. 324, R.)

(269)—*Execution of a decree passed by the Sub-Court, Godavari—Transfer of application for execution to the Special Assistant Agent, Godavari, direct—Order set aside by Governor-in-Council under agency rules—Fresh application for execution—Not barred—Limitation Act—S. 14—Bona fide prosecution—Reduction of time.*—Where the Sub-Court, Ellore, transferred a decree passed by it for execution direct to the Special Assistant Agent instead of to the Agent, Godavari, under cl. (3) of Rule 10 of the



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

Godavari Agency Rules, and where that order was set aside by the Governor-in-Council, and a fresh application for execution was put in in the proper Court, the applicant is entitled to a deduction of the time spent between the date of order of transfer to the wrong Court and the date of return of proceedings to the right Court in accordance with the appellate order, and he must be deemed to be *bona fide* prosecuting his application for execution, within the meaning of s. 14 of the Limitation Act, as he is not responsible for the order of the Court transferring it to a wrong Court. **KAKAMANI RAYAPPA v. KOTTA VENKANNA, 1 M.W.N. 1911, 362.**

(270)—*Limitation Act, XIV of 1859, s. 20—Decree obtained by guardian on behalf of a minor—Decree transferred fraudulently to defendants benami—Suit to set aside sale—Execution of decree.*—Where the guardian of certain minors had obtained a decree on their behalf and then sold it to a third party who was merely a *benamidar* for the defendant in the suit, and the minors, after coming to age, sued to set aside the sale as fraudulent and void and to have their names substituted on the record for that of the *benamtee* purchaser and to be allowed to take out execution of the decree, it was held that execution might be issued by the minors, although more than three years had elapsed before any proceeding had been taken under the decree. **MOULVEE ABDOOL ALI v. MEER MAHOMED MOZUFFUR HOSSEIN CHOWDHRY, 5 W.R. 173. [Affirmed, 16 W.R., P.C., 22.]**

(271)—*Execution of decree, Obstruction to—Limitation—Civ. Pro. Code, ss. 328, 330, 331—Act XV of 1877 (Limitation Act), sch. II, art. 167.*—B and A held a decree for certain immoveable property. They applied for execution of their decree, but, on the Ameen going to the spot to deliver possession, obstruction was offered by the *karinda* of one F. A. This obstruction was made the subject of a suit, which was decided by the Court of first instance in favour of the plaintiffs. The defendants appealed both to the District Judge and to the High Court, but their appeals failed on technical grounds. The decree-holders then applied again for execution, and obstruction was again made on the part of F. A. on the 30th January, 1886. On the 20th February, 1886, F. A. filed a *mukhtar-namah* in favour of the person who had actually been instrumental in obstructing the execution of the decree. The decree-holders filed a complaint of this second obstruction on the 13th March, 1886. This complaint was dismissed by the subordinate Judge as barred by limitation. The decree-holders then appealed to the High Court. *Held*, that the defendant F. A. might properly be said to have raised an obstruction within the meaning of s. 328 of the Civ. Pro. Code, when he filed a *mukhtarnamah* in favour of the person, who might or might not have been causing obstruction before that date and the claim was not barred by limitation. **BUDHAN v. FAZAL ALI, A.W.N. 1891, 131.**

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

(272)—*Application for—Proceedings, renewal of, in execution of decree of Rent Court—Limitation.*—An application for the execution of a Rent Court decree was made within the prescribed period of three years and certain immoveable property was attached with a view to sale. As the Government had directed that no sale of immoveable property should be sanctioned while the famine lasted, the Court executing the decree consigned the application to record on the 27th April, 1897. On the 29th January, 1898, the decree-holder presented another application, praying that the proceedings in execution be renewed and steps be taken for the sale of the attached property. *Held*, that the application of 29th January, 1898, was not a substantive and fresh application for execution but was one for the renewal or revival of execution proceeding which had been temporarily suspended and therefore was not barred by limitation. **MOHAMMAD SARFARAZ BEGAM v. HAR CHARAN DAS, 2 O.C. 110.**

(273)—*Limitation—Decree sent to another Court for execution—Stay ordered by Court which passed decree—Attachment of decree subsisting for more than three years—Subsequent application for execution.*—A decree passed by a Court at M was sent for execution to a Court at A. After one application for execution had been made to the Court at A, the Court M issued an order staying execution owing to the decree having been attached by a creditor of the decree-holder. The Court at A thereupon struck the execution proceedings off its file and sent a return to the Court which passed the decree that no execution had taken place. The attachment continued in force for more than three years, after which period the decree-holder again applied for execution. *Held*, that the Court at A ought not to have struck the execution case off its file, and that execution of the decree was not time-barred. **FARZAND ALI v. BHUP INDAR BAHADUR SINGH, A.W.N. 1901, 117.**

(274)—*Execution of decree—Limitation—Civ. Pro. Code, ss. 230 and 235—“Subsequent application to execute the same decree.”*—On the 13th of June, 1893, the holder of a decree for money passed on the 4th of October, 1883, applied for execution by arrest of the judgment-debtor. This application was granted, but the arrest was subsequently stayed by order of the Court, pending the result of a suit to contest the validity of the decree under execution. On the 18th of July, 1894, the arrest was again asked for, but this application was also infructuous. On the 17th February 1898, the decree-holder asked the Court to re-issue the warrant of arrest which had been returned unserved in 1894. From 1894 to 1897, proceedings had been stayed owing to objections raised by the judgment-debtor which were not finally determined till the 31st of July, 1897. *Held*, that the application of the 17th of February, 1898, was merely ancillary or incidental



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

to the application of 1894, and that execution of the decree was not time-barred. *ANWAR ALI KHAN v. PHUL CHAND*, A.W.N. 1898, 137. (18 A. 482, R.) [F., 21 A. 155.]

(275)—*Order in execution—Finality—Omission to pass attachment—Order—Fresh application—Limitation—Previous application under defective power—No objection—Effect.*—In execution proceedings, objection was taken that the execution application was barred by limitation, as, *inter alia*, the previous application was itself so barred. No order for attachment had been made under the above application, it was necessary first to issue notice to the judgment-debtor; after which, the case, postponed from time to time was struck off the file. Objection as to limitation was not taken. The previous application was also alleged to have been made by a person holding a defective power of attorney. *Held* that, if there was any such defect, the objection ought to have been raised during the pendency of the application, and in the absence of any such objection being then raised, that application was valid and an application to attach property, when not itself the application for execution of the decree, is a step-in-aid of execution within the meaning of art. 182, Limitation Act—*Quære*. Whether the above facts took the case out of the Privy Council ruling in 8 C. 51 to the effect that, when an order for attachment has been made by a competent Court, that Court must be considered to have determined that the execution was not barred and such decision must be regarded as binding until reversed. *LAKMI DAS v. GOBIND RAM*, 105 P.R. 1882. (8 C. 51, R.) [R., 4 P.R. 1886.]

(276)—*Civ. Pro. Code (Act XIV of 1882). s. 230—Execution of decree—Limitation—Application for execution of decree more than twelve years old—"Granted"—"Fraud" by judgment-debtor, effect of.*—An application for execution of a decree more than twelve years old cannot be entertained on the ground that it is in continuation of a previous application, which was made within twelve years from the date of the decree and within the time allowed by the execution Court, when the Court had rejected the previous application on the ground that the relief prayed for could not legally be granted. A Court executing a decree, while rejecting an application for execution, is not competent to order that a fresh application may be made within a certain time when it would be barred under law. To entitle a decree-holder to the benefit of s. 230, Civ. Pro. Code, 1882, it is not enough to prove fraud at some time during the twelve years' period, if the decree-holder had, at a later period, facility for executing the decree. *RAI CHAND v. JHANDE KHAN*, 75 P.L.R. 1909=113 P.W.R. 1909=4 Ind. Cas. 958.

(277)—*Execution of decree—Limitation.*—After an infructuous attempt by the decree-holder, on the 14th July, 1874, to execute a decree dated 20th August 1871, the parties

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

came to a private arrangement which substantially altered the decretal order in respect of the interest payable thereunder and making the payment periodical. Intimation of this arrangement was given to the Court on the 14th January 1875; the decree was a money-decree. Attempts were made in 1877, 1879 and 1880, to execute the decree as modified by the compromise. In July 1880, the decree-holder applied for the execution of the original decree. *Held*, that the application was time-barred, and the judgment-debtors were not estopped from objecting to the continued execution of the compromise because they had consented or submitted to its partial execution, in the department of execution of decrees. *JIWARAM v. HUSAIN ALI*, A.W.N. 1881, 118.

(278)—*Execution of decree—Question of limitation when not decided—Subsequent adjudication lawful—Civ. Pro. Code (Act XIV of 1882), s. 248—Issue of notice—No adjudication that application not barred—Decision at one stage cannot be questioned subsequently—"Res judicata"—General principles of law.*—Where the question, whether the execution of a decree is barred by limitation, is not decided, because the parties do not appear, there is no bar to the adjudication of the objection, when actually raised at a later stage of the proceedings. (28 C. 122, 3 C.L.J. 240, 10 C.W.N. 209, 15 A. 198, F.) The mere issue of a notice under s. 248, Civ. Pro. Code, 1882, not followed by any order for execution, or by any act of the Court such as attachment of property in furtherance of execution, cannot be construed as an adjudication by the Court that the application is not barred by limitation. Where a previous application for execution had been refused on the ground that it was barred by limitation, no subsequent application can be entertained for execution of the decree. A decision at one stage of execution proceedings cannot be questioned at a later stage, not because it is *res judicata* under s. 13, Civ. Pro. Code, 1882, but upon general principles of law. (8 C. 51, P.C.=11 C.L.R. 113, 8 I.A. 123, 11 I.A. 37=6 A. 269, 11 I.A. 181=7 A. 102, 15 A. 84, F.B., F.; 3 C. 47=4 I.A. 127, *Expt.*; 6 C. 203, 7 C.L.R. 61, R.) A decree was passed on November 28, 1899. The first application for execution was made on July 6, 1901, and process fees were paid on July 26. The application was subsequently dismissed. A second application was filed on July 25, 1904, which was rejected as time-barred on August 9, 1904. On July 28, 1905, a third application was made and notices were served on the judgment-debtor, but it was dismissed for default on March 28, 1905. The fourth application was made on December 20, 1907: *Held*, that this application was barred. *KHOSAL CHANDRA ROY CHOWDHURY v. UKILADDI*, 3 Ind. Cas. 47=14 C.W.N. 114.

(279)—*Execution sale—Execution of decree subsequently found barred—Suit to recover property from purchaser.*—Where a decree-holder



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

obtained an order for execution, the judgment-debtor unsuccessfully opposing the application on the ground of limitation, and himself purchased properties of the judgment-debtor; and, subsequently to the confirmation of sale and grant of certificate, the High Court decided, on appeal against the execution order, that execution was barred, *held*, a regular suit by the judgment-debtor for recovery of the properties would lie against the purchaser. *MINA KUMARI BIBEE v. JAGAT SATTANI BIBEE*, 10 C. 220. (1 B.L.R., A.C., 56=10 W.R. 154, D.) [R., 9 M. 130, 27 C. 810.]

(280)—*Application for—Against person of judgment-debtor—Petition for amendment to proceed against property—Order for amendment, Validity of—Amended petition to be treated as fresh application—Twelve years' bar—S. 230, Civ. Pro. Code—Res judicata.*—A decree-holder obtained a money-decree against the members of a certain *tarwad* on 30th July, 1891. In execution of that decree, the last application was made on 30th July, 1903, for arrest of one of the judgment-debtors. In March, 1904, the decree-holder made a petition to amend the application by inserting a prayer for attachment of the *tarwad* property, which was granted without notice to the judgment-debtors. In pursuance of the amended petition, the property was attached and brought to sale. The contention of the judgment-debtors was that the amendment ought not to have been allowed, that the application of March, 1904, to amend and attach the *tarwad* property must be treated as a fresh application, and as it was made more than 12 years after the date of the decree, it was barred under s. 230, Civ. Pro. Code. *Held* that the amendment ought not to have been allowed and that the amended petition must be treated as a fresh application to execute the decree and was, therefore, barred by the 12 years' rule under s. 230, Civ. Pro. Code; that the order for sale not having been passed after notice to the judgment-debtors, did not operate as *res judicata* and that execution against the *tarwad* property could not be proceeded with. *CHERATHI AMMA v. RAMAN NAIR*, 15 M L.J. 243. [F., 3 A.L.J. 324=A.W.N. 1906, 97.]

(281)—*Decree conditional on payment—No payment—Application for execution more than three years after decree—Limitation.*—Where a decree directs the defendant to surrender a garden on the plaintiff paying him a certain amount for improvements his application for delivery more than three years from the date of the decree is time-barred. *RAMAPPA v. CHARDA BHATTA*, 8 M.L.T. 251.

(282)—*Limitation—Decree ordering the defendant not to let rain water fall on the plaintiff's land.*—The plaintiff applied on the 17th December, 1898, to execute a decree, dated the 12th December, 1895, which ordered the defendant to make such improvements in the roof of his building so that it should not project over nor let rain water fall on the plaintiff's

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

land. The lower appellate Court held that the application was not time-barred because the plaintiff could not have demanded immediate fulfilment of the decree and that time did not begin to run until the defendant had had reasonable opportunity of obeying the decree. *Held*, that the application was time-barred, because there was nothing in the decree which postponed the period of its execution and it was evidently intended to come into force at once as the plaintiff could have demanded its immediate performance. *SHIDLINGAPPA v. DURDUNDEPPA*, 2 Bom. L.R. 199.

(283)—*Execution of decree, application for, on the last day of twelve years succeeding the date of decree—Civ. Pro. Code, s. 230.*—The applicant obtained a decree against the respondent on the 11th April, 1895. He made several applications for execution from time to time. The last application was dated the 11th April, 1907, being the last day of twelve years succeeding the date of the decree. *Held*, that the application could not be granted. *DEOKI NANDAN v. SAIYED NAZIR HASAN*, 11 O.C. 57. (6 M. 359, Not F.; 18 A. 482, 21 A. 155, R.)

(284)—*Limitation—Decree payable by instalments—Default in payment of instalments—Act XV of 1877 (Indian Limitation Act), s. 20—Civ. Pro. Code, s. 257-A.*—A decree for sale on a mortgage made the amount due thereunder payable by instalments with a condition that if default were made in payment of any instalment, the decree-holder might execute for the whole amount at once. Default was made, and the decree-holder exercised his option and obtained an order absolute for recovery of the whole amount due under the decree. On the 23rd of February, 1901, the decree-holder applied for execution in respect of the whole amount due and for sale of the mortgaged property. That application was, however, dismissed on the 15th May, 1901, for default of prosecution. On the 1st July, 1904, the decree-holder again applied for execution. *Held*, that execution of the decree was barred by limitation and that decree-holder could not under the circumstances pray in aid two payments of Rs. 150 and Rs. 50 alleged to have been received on the 11th of May, 1901, and the 15th of July, 1901 respectively. *BHAGWAN DAS v. JANKI*, A W.N. 1905. 268=28 A. 249. (16 A. 371, D.)

(285)—*Execution of decree—Limitation.*—An application for execution of a decree made on 6th February, 1873, was rejected on the 18th March, 1873, as barred by limitation, which order was set aside on appeal on the 2nd August, 1873. The next application was on the 12th February, 1876. This application was struck off for default on the 21st June, 1876. *Held*, that the application of the 12th February, 1876 was beyond time and barred by limitation. It was a fresh application and could not be regarded as a continuation of that of the 6th February 1873. *BHOLA DAT v. TULSHI SINGH*, A. W.N. 1881, 47.



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

(286)—*Execution of decree—Objection to execution after order granting execution—Objection allowed by District Judge in appeal—Limitation.*

—A decree-holder applied to the subordinate Judge for execution. The application was granted *ex parte* and the decree sent to the Collector for execution. Subsequently, and without applying for a review of the order granting execution, the judgment-debtor filed an objection in the Court of the subordinate Judge that the decree was time-barred. The Subordinate Judge considered the objection, but disallowed it. The judgment-debtor then appealed to the District Judge, who found that the decree was time-barred. The decree-holder then appealed to the High Court. *Held*, that though the procedure in the first instance was irregular, inasmuch as the subordinate Judge should not have entertained the judgment-debtor's application at all, yet, the finding of the lower appellate Court was correct and could not be disturbed. **THAKUR DAS v. GOBIND SINGH**, A.W.N. 1891, 147.

(287)—*Beng. Act VIII of 1869, s. 58—Execution process—Limitation.*—In execution of a decree for rent, dated 18th July, 1870, process was taken out on the 21st April, 1873, and on the 24th October following, an order was passed for *tulubana* to be deposited within seven days, but before that time expired (*i. e.*, on the 28th October), the case was struck off by an order, which though *prima facie* wrong, was not appealed against. The next execution process taken out was on the 6th December, 1873. *Held* that, as the last process, which was for a set-off, is not of the same nature as the first, which was for attachment of property, it is not a carrying out of the former, and as the order of 27th October 1873 remains uncanceled, the decree is barred under the Rent Law, s. 58. **SYUD AKRAM SHERE v. BABOO LALLJEE SINGH**, 24 W.R. 16. (6 W.R. 84, F.B., R.)

(288)—*Order of Sudder Court—Execution—Motion to Privy Council to stay execution—Delay—Refusal by Privy Council.*—Motion to rescind order of the Sudder Court, at Madras, for the execution, of a decree pending an appeal, and to stay execution, refused on the ground of the length of time that had elapsed from the making of the order and the probability of its having been acted on in India. *In re RAJAH BOMMARANJEE BAHADOOR*, 5 M.I.A. 298.

(289)—*Sudder Court, peremptory order to, for execution of Privy Council decree.*—Peremptory order of Judicial Committee for Sudder Court to carry into execution order in Council made on decree of Judicial Committee. *In re RAJAH VASSAREDDY LUTCHMEPUTTY NAIDOO*, 5 M.I.A. 300=3 Moo. P.C. 115=1 Sar. 446.

(290)—*Execution of Small Cause Court decree.*—A decree of a Small Cause Court (*mofussil*) could be executed by it, at any place within the local limits of the District Court to

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

which it is subordinate. The matter should be dealt with under Ch. XIX of the Code of 1877, and s. 648 has no reference to it. **BADAN BABAJEA v. KALA CHAND BEBAJEA**, 4 C. 823.

(291)—*Execution of decree—Construction 1129, when applicable.*—Where it is admitted that the lands sued for were actually taken in execution of a former decree and no question of identity remained to be decided, *held* that construction 1129 was strictly applicable. **KISHEN SOONDER ROY v. PROSUNNONATH BHUTTA-CHARJEE**, W R. 1864, 208.

Cases of execution of decree to be separately shown in the Monthly Statements, Nos. 2 and 3. **Cir. No. 34**, dated the 11th September, 1866, 6 W.R. Civ. Cir. Order, p. 7.

Circulates Resolution of the Government of India regarding the execution, in Foreign States, of decrees of civil tribunals of British India. **Civ. Cir. Memo No. 4**, dated 27th August, 1868, 10 W.R. Civ. Cir. 3.

Directing a certain percentage to be deducted from proceeds of sales in execution, of decrees and credited to Government. **Civ. Cir. No. 26**, dated 5th September 1871, 16 W.R. Civ. Cir. 9.

Promulgates new rules concerning the levy of fees on sale of moveable and immoveable property in execution of decree in Civil Courts. **Civ. Cir. No. 19**, 20 W.R. Rules and Orders of the H.C. p. 9.

Draws attention to provisions of Rent Law regarding execution of decrees in rent-suits for amounts not exceeding Rs. 500. **Civ. Cir. Or. No. 18**, dated 10th July, 1874, 22 W.R. Civ. Cir. 7.

Power of Court executing decree to refer to judgment, or award on which the judgment is based, to interpret decree—*See ACT XXIII OF 1871*, 95 P.R. 1906=83 P.L.R. 1907.

Liability of water-advantage-rate to attachment in execution of decree—*See ACT XXIII OF 1871*, s. 11, 96 P.R. 1906.

Two or more Sub-Judges having same local jurisdiction—Transfer of execution case by post from one Court to the other—Jurisdiction—*See ACT XXII OF 1887*, s. 13, 13 C.W.N. 265=4 Ind. Cas. 510.

*See BEN. ACT VIII OF 1869*, s. 52, 7 C. 566=9 C.L.R. 185.

Stay of proceedings while estate declared encumbered—Limitation—*See BEN. ACT VI OF 1876*, ss. 3, 12, 7 Ind. Cas. 787.

Order in—Without jurisdiction, Effect of—*See BEN. ACT I OF 1879*, ss. 135, 136, 137, 144, 9 C.W.N. 955=2 C.L.J. 384.

Right of a 16-anna proprietor to sell a *mokarari* tenure in execution of a decree obtained against all tenants for rent—*See BEN. ACT VIII OF 1885*, s. 65, 32 C. 680.



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See BEN. ACT VIII OF 1885, s. 65, 26 C. 103=3 C.W.N. 38.

Application, subsequent to Act VIII of 1885 (B.C.), for execution by assignee of merely the rent-decree passed before the Act—Sale by such assignee in execution of rent-decree obtained against recorded tenants, effect of, as regards unrecorded co-sharers—See BEN. ACT VIII OF 1885, s. 148, cl. (h), 1 C.L.J. 500.

Judgment-debtor discovered to be dead, on date of application for execution—Application for substitution after expiry of period of limitation—See BEN. ACT VIII OF 1885, sch. III, art. 6, 14 C.W.N. 971=12 C.L.J. 192=6 Ind. Cas. 971.

Mortgage of a zemindari village—Court-sale in—Payment by mortgagee of proportionate share of peishcush—Mortgagee-purchaser not a zemindar to enforce acceptance of patta—See MAD. ACT VIII OF 1865, s. 3, 5 M. 145.

Liability of emoluments of village offices to sale in—See MAD. ACT III OF 1895, s. 5, 28 M. 84=14 M.L.J. 468.

Land suit—Costs allowed to defendants—Right of *pro forma* defendant, against whom proceedings were held *ex parte*—Revision—See PUN. ACT XVIII OF 1884, s. 70 (1), (a), (b), 196 P.L.R. 1905.

Standing crops—Liability of, to sale in execution of decree—See PUN. ACT XIII OF 1900, s. 2, cl. 3, (b and d), 14 P.R. 1905.

Sale of ex-proprietary tenant's interest in—See U.P. ACT XII OF 1881, s. 9, 2 A.L.J. 358=A.W.N. 1905, 153.

See U.P. ACT XII OF 1881, ss. 178, 179, 180, 181, 192, 196, A.W.N. 1903, 183.

Second application for—By attachment and sale of properties, only a small portion of the decree being realized by attachment and sale on the first application—Continuation of proceedings—See U.P. ACT II OF 1901, sch. IV, A.W.N. 1906, 97=3 A.L.J. 324.

Civ. Pro. Code, Ch. XXXVII relating to reference to arbitration—Applicability thereof to execution proceeding—See ARBITRATION—REFERENCE TO ARBITRATION, 8 O.C. 263.

Assignment of decree by some of decree-holders to one of them—Application by assignee, whether in accordance with law—See ASSIGNMENT, 5 Ind. Cas. 120.

Attachment of property in wife's name—Benami—Onus of proof—See BENAMI TRANSACTION—GENERAL, 17 M.L.J. 339.

Agreement superseding decree, applicability of s. 257-A, Civ. Pro. Code, to—See CIV. PRO. CODE, 1882, s. 257-A. A.W.N. 1905, 57=2 A.L.J. 683.

*Res judicata* in execution proceedings—See CIV. PRO. CODE, 1882, ch. VII, 139 P.L.R. 1905.

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

Application of s. 108, Civ. Pro. Code, to proceedings in—See CIV. PRO. CODE, 1908, s. 2, O. IX, r. 13, s. 104, O. XLIII, r. 1, 3 C.L.J. 276.

No appeal lies from order of an appellate Court refusing stay of execution of decree under appeal—See CIV. PRO. CODE, 1908, ss. 2, 47, O. XLI, r. 5, 29 B. 71.

See CIV. PRO. CODE, 1908, ss. 10, 26, O. IV, r. 1, s. 47, 22 M. 256.

See CIV. PRO. CODE, 1903, s. 11, 3 S.L.R. 133=4 Ind. Cas. 478.

Previous order in—Effect of interpretation of decree—*Res judicata*—See CIV. PRO. CODE, 1908, s. 33, 7 A.L.J. 190=5 Ind. Cas. 210=32 A. 210.

Application by decree-holder for—Before realisation—Right of his representatives to rateable distribution—See CIV. PRO. CODE, 1908, s. 115, O. XXI, r. 90, 3 M.L.T. 249.

Re-hearing—See CIV. PRO. CODE, 1908, s. 141, O. IX, r. 9, O. XXI, r. 103, 12 C.L.J. 6=7 Ind. Cas. 241.

Restitution of property sold in, reversed in appeal—Procedure—See CIV. PRO. CODE, 1903, s. 144 (1), A.W.N. 1906, 315=4 A.L.J. 19=29 A. 143.

Execution of decree pending appeal—Reversal of decree in appeal—Right to restitution—See CIV. PRO. CODE, 1903, ss. 144 (1), 47, 33 C. 857=4 C.L.J. 192.

Execution against surety—Notice to surety—Competency of Court to which decree is sent for execution to issue notice—See CIV. PRO. CODE, 1908, s. 145, 29 B. 29.

Against surety, for due performance of appellate decree, whether to be proceeded against him in—Or by way of separate suit—See CIV. PRO. CODE, 1908, s. 145, O. XLI, rr. 5, 10, 109, P.R. 1906=1 P.L.R. 1907.

Appeal against order in execution—Auction purchaser after institution added as respondent in appeal—See CIV. PRO. CODE, 1908, O. I, rr. 8 (2), 10 (2), (3), (5), 11, O. XXII, r. 10, s. 141, 2 A.L.J. 516.

Agreement to pay decree-debt in instalments—Formal order not drawn up under s. 210, Civ. Pro. Code, effect of, on limitation as to—See CIV. PRO. CODE, 1908, O. XX, r. 11, 5 C.L.J. 25.

See CIV. PRO. CODE, 1908, O. XXIII, r. 1, s. 141, A.W.N. 1891, 124.

Application for specification of share by metes and bounds in respect of a defective partition-decree, whether amounts to application for—See CIV. PRO. CODE, 1908, O. XXVI, rr. 13, 14, 47 P.R. 1906=86 P.L.R. 1907.



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

Decree of Revenue Court—Character of decree—Execution—Civil Court—Grant of temporary injunction— *See* CIV. PRO. CODE, 1908, O. XXXIX, r. 1, 9 O.L.J. 125=36 C. 252=13 C.W.N. 791=1 Ind. Cas. 933.

Property of third person sold in execution—His remedy—Right to recover money erroneously deposited under s. 310-A, Civ. Pro. Code—*See* CONTRACT ACT, 1872, s. 72 12 C.W.N. 151.

*See* CONTRACT ACT, 1872, s. 135, 9 O.C. 28.

Direction in decree to pay extra Court-fee, effect of, on — *See* COURT FEES ACT, 1870, s. 11, 16 M.L.J. 543=30 M. 32=2 M.L.T. 23.

Plaintiff challenging a decree in execution of which his property was attached — Value of suit—*See* COURT FEES ACT, 1870, sch. II, art. 17, cl. (1) 7 O.L.J. 36, P.C.=12 C.W.N. 179=10 Bom. L.R. 1=5 A.L.J. 10=17 M.L.J. 618=2 M.L.T. 506=35 C. 202=14 Bur. L.R. 41=35 I.A. 22.

Resistance to delivery of possession in—Jurisdiction of Civil Court to direct prosecution of obstructors under s. 476, Cr. P.C.—Jurisdiction of High Court to set aside the order directing prosecution under s. 622, C.P.C.—*See* CRIM. PRO. CODE, 1898, ss. 195, 476 9 C.W.N. 364=32 C. 367=1 O.L.J. 161=2 Cr. L.J. 110.

Power of executing Court to refer to judgment and other documents to interpret decree — Divergence between decree and judgment — Decree-holder to be directed to apply for amending the decree — Practice — *See* DECREE — DECREE, CONSTRUCTION OF, 60 P.W.R. 1908.

*See* DECREE—DECREE, FORM OF, 8 C. 357.

Sale—Property purchased subject to a mortgage—Purchaser's right—*See* DECREE — MISCELLANEOUS, 35 C. 877.

Right to recover losses and expenses contingent on an uncertain future even in—*See* DECREE—MISCELLANEOUS, 2 S.L.R. 33.

Party to whom relief granted—Power to execute — *See* DECREE HOLDER, 17 C.P.L.R. 178.

*See* DECREE-HOLDER, 2 M. 216.

*See* ESTOPPEL—ESTOPPEL BY CONDUCT, 6 W.R. Mis. 107, 9 C. 265=9 I.A. 147, P.C.

Right declared by decree — Execution of decree barred—Right remains though remedy gone—*See* EVIDENCE ACT, 1872, s. 116, 11 Bom. L.R. 1093.

Judgment-debtor's partner's bid not accepted on first day of sale—Subsequent understanding between partner and the decree-holder not to bid against each other and that partner would get property for decree amount—Property purchased by decree-holder—No fraud by decree-holder to justify cancellation of sale —*See* FRAUD—EFFECT OF FRAUD, 13 C.W.N. 18=4 M.L.T. 421=9 C.L.J. 244=36 C. 226=1 Ind. Cas. 158.

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

Son's right to raise the question of the legality of debt in execution proceedings — *See* HINDU LAW—DEBTS, 147 P.R. 1907.

*See* HINDU LAW—INHERITANCE, 5 W.R. 161.

Attachment of Hindu son's interests in—Obtained personally against father—Liability of such interests to attachment—*See* HINDU LAW—JOINT FAMILY, 27 A. 16, F.B.=1 A.L.J. 310=A.W.N. 1904, 151.

Suit against Hindu father and his undivided son—Son exempted—Liability of ancestral property in execution of decree—*See* HINDU LAW—JOINT FAMILY, A.W.N. 1906, 137=3 A.L.J. 433.

*See* HINDU LAW—MAINTENANCE, 18 W.R. 473.

Question whether property, subject of mortgage-decree, belongs to judgment-debtor or stranger to be tried in regular suit and not in execution—*See* HINDU LAW—WILL, 8 C.L.J. 20.

*See* HUSBAND AND WIFE, 4 C. 140=2 C.L. R. 431.

Suit for injunction restraining execution of decree — *See* INJUNCTION—SPECIAL CASES, 18 M. 338.

*See* INJUNCTION—SPECIAL CASES, 3 C.L. R. 421.

Necessity for furnishing security where judgment-debtor has once applied to a proper Court for insolvency—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 9 O.C. 42.

Decree—Execution—Postponement of sale—Condition for payment of interest no decreed —Execution of decree for interest—*See* INTEREST—CASES WHERE INTEREST WAS NOT SPECIFICALLY PROVIDED FOR, 7 M. 400.

*See* INTEREST—CASES WHERE INTEREST WAS NOT SPECIFICALLY PROVIDED FOR, 5 W.R. Mis. 28.

Civ. Pro. Code, s. 583—Court's inherent power to undo a wrong committed in execution and to order restoration of what was taken in the commission of the wrong—*See* JURISDICTION OF CIVIL COURTS, 2 C.L.J. 537=9 C.W.N. 381.

Wajib-ul-arz — Permission to tenants to transfer only the materials—Sale of house in execution of decree—Rights of purchaser—*See* LANDLORD AND TENANT—TRANSFER OF TENANT'S INTEREST, 10 O.C. 4.

Knowledge of judgment-debtor of execution-proceedings—Confirmation of sale—Judgment-debtor's omission to object, effect of—*See* LANDLORD AND TENANT—MISCELLANEOUS, 9 C.W.N. 972.

Disability of some of joint judgment-creditors when time begins to run for applying for execution of decree—Limitation—*See* LIMITATION ACT, 1908, ss. 6, 8, 9 O.C. 269.



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

Application for execution—Some only of judgment-creditors affected by disability—*See* LIMITATION ACT, 1908, ss. 6, 8, 27 A. 67.

Death of decree-holder pending stay of—Right of minor to revive—Limitation—*See* LIMITATION ACT, 1908, ss. 6, 8, 11 C.W.N. 831.

One of several decree-holders a minor—Extension of time—Minor's right to execute whole decree—*See* LIMITATION ACT, 1908, ss. 6, 8, 7, 7 C.L.J. 308.

Joint decree-holders—Decree barred against one if barred against both—Joint execution—Creditors—C.P.C., 1882, s. 231—*See* LIMITATION ACT, 1908, ss. 6, 8, 7, 25 M. 431, F.B. = 12 M.L.J. 166.

Release of judgment-debtor from jail for non-payment of subsistence money cannot give a fresh starting point—*See* LIMITATION ACT, 1908, ss. 6, 8, 7, art. 182, 72 P.L.R. 1906.

Insanity of decree-holder when cannot save limitation—*See* LIMITATION ACT, 1908, ss. 6, 8, 7, art. 182, 72 P.L.R. 1906.

*See* LIMITATION ACT, 1908, ss. 6, 8, 7, art. 182, 13 M. 236.

Last application by a deceased adult decree-holder—Present application by deceased's son, a minor, beyond three years from the deceased's last application—Subsequent disability and initial disability—Limitation—*See* LIMITATION ACT, 1908, ss. 6, 8, 9, art. 182, 29 B. 68.

*See* LIMITATION ACT, 1908, s. 14, A.W.N. 1881, 3.

Applicability of s. 19 of the Limitation Act to proceedings in—*See* LIMITATION ACT, 1908, s. 19, 3 C.L.J. 347.

Application by judgment-debtor for postponement of sale and consent of decree-holder thereto not 'an application by decree-holder,' within the meaning of art. 179, Limitation Act, 1877, giving a fresh start of limitation—Acknowledgment of liability and part-payment of principal do not serve to give an extension of limitation—*See* LIMITATION ACT, 1908, ss. 19, 20, art. 182, 28 M. 40.

Compromise to have rest of decree executed at future time—Step-in-aid of execution—Acknowledgment—*See* LIMITATION ACT, 1908, s. 19, art. 182, 6 Ind. Cas. 366.

Process server demanding money from decree-holder—Complaint to the Court by decree-holder—Process server prosecuted but acquitted—Whether malicious prosecution—*See* MALICIOUS PROSECUTION, 6 A.L.J. 500=2 Ind. Cas. 355.

Execution of decree—Mesne profits, right to, not specifically awarded—*See* MESNE PROFITS—SUITS FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 3 C. 720=2 C.L.R. 75.

**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

Mortgage decree, whether attachment necessary for the execution of—Attachment of property—Application for removing attachment—Civ. Pro. Code, s. 278—*See* MORTGAGE—GENERAL, 4 L.B.R. 92=14 Bur. L.R. 201.

Property sold subject to mortgage—Right of auction purchaser to question validity of mortgage—*See* MORTGAGE—GENERAL, 7 A.L.J. 199=5 Ind. Cas. 874.

Contribution by reason of mortgaged property purchased by decree-holder is to be worked out in a separate suit and not in—*See* MORTGAGE—GENERAL, 4 C.L.J. 573=34 C. 13.

Sale-certificate—Vagueness in description—Effect—*See* MORTGAGE—REDEMPTION, 7 M. L.T. 191=5 Ind. Cas. 935.

*See* MORTGAGE—REDEMPTION, 16 B. 243.

Sale in—Of mortgage-decree—Purchase by mortgage of equity of redemption prior to sale in—Conveys no title—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 9 C.W.N. 225, P.C.=32 C. 198=2 A.L.J. 190.

*See* MORTGAGE—MISCELLANEOUS, 4 C. 789=3 C.L.R. 396.

*See* PARDANASHIN WOMAN, 7 C. 19=9 C.L. R. 25.

*See* PARTITION—MISCELLANEOUS, A.W.N. 1884, 215.

Fraudulently causing a decree to be executed—*See* PENAL CODE, 1860, s. 210, 88 P.L.R. 1902.

Right to pre-empt property sold in—*See* PRE-EMPTION—MISCELLANEOUS, 203 P.L.R. 1910=8 Ind. Cas. 777.

*See* PRESIDENCY SMALL CAUSES COURTS ACT, 1882, s. 31, cl. (b), 14 O.W.N. 662=6 Ind. Cas. 97=37 C. 574.

*See* PRIVY COUNCIL. PRACTICE OF—QUESTION OF FACT, 17 W.R. 340.

Judgment-debtor in jail—Power of Insolvency Court to release him—*See* PROVINCIAL INSOLVENCY ACT, 1907, s. 13, 30 P.L.R. 1910.

Decree passed by Munsiff in exercise of Small Cause powers—Transfer to regular side for execution—Necessity for application—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 27, 3 P.L.R. 1905.

Order directing sale of property in the hands of a Receiver has the effect of discharging the Receiver—*See* RECEIVER, A.W.N. 1905, 110.

Sale in execution of decree for share of rent—Effect—*See* BEN. REG. VIII OF 1819, s. 6, 8 C.L.J. 554.

Transfer of execution to Collector—Reference by Collector to District Judge—Order of District Judge—Government order rescinding notification empowering Collector to execute decree—*See* MAD. REG. V OF 1804, s. 35, 30 M. 193.



**Execution of Decree—continued.****—18.—Miscellaneous—continued.**

Decree of Village Munsiff—Sale of immovable property in execution—See MAD. REG. IV OF 1816, s. 30, 7 M. 220.

Decree against Head of a Mutt in suit on a pronote binding on successor at the time of—See RELIGIOUS ENDOWMENT, 16 M.L.J. 415=29 M. 553.

Decision in, in prior suit—Whether operates as *res judicata* in subsequent suit—See RES JUDICATA—PARTIES, 6 Ind. Cas. 229=8 M. L.T. 33=20 M.L.J. 546=33 M. 483.

Decree declaring wife's right to future residence and maintenance—Whether relief can be granted in execution proceedings—See RESTITUTION OF CONJUGAL RIGHTS, 1 S.L.R. 184.

Compromise decree—Conditions restraining alienation—See DESTRAINT ON ALIENATION, 10 O.C. 136.

See RIGHT OF OCCUPANCY—TRANSFER OF RIGHT, 10 C. 547.

Execution proceedings subsequent to trial of the suit are not judicial proceedings—See SANCTION TO PROSECUTE, 35 C. 133.

Suit for refund of assets paid in execution of decree—See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 9 M. 250.

See SMALL CAUSE COURT, PRESIDENCY TOWNS JURISDICTION OF—GENERAL, 26 C. 778=4 C.W.N. 590.

Order passed in—Under Act I of 1879 (Bengal), no second appeal lies from an—See SPECIAL OR SECOND APPEAL—GENERAL, 10 C.W.N. 284=33 C. 378.

Injunction restraining defendant from executing his decree—See SPECIFIC RELIEF ACT, 1877, ss. 54, 56, 6 Ind. Cas. 444=14 C.W.N. 878=12 C.L.J. 86=37 C. 731.

By creditor having notice of his debt being included in the insolvent's schedule—Liability of creditor for costs of insolvent—See ST. 11 AND 12, VIC., C. 21, ss. 7, 27, 48, 49, 8 M.L.T. 202=7 Ind. Cas. 801.

By a survivor of two joint decree-holders—Heir of a decree-holder, right of, to execute decree—See SUCCESSION CERTIFICATE ACT, 1889, s. 4, 10 O.C. 378.

Jurisdiction of execution Court to question validity of decree—See SUCCESSION CERTIFICATE ACT, 1889, s. 4, 145 P.L.R. 1906.

Execution of decree for rent due—Third person's property unintentionally sold in execution—Plaintiff omitting to notify that goods were his—Plaintiff's conduct no estoppel—See TORT, 129 P.R. 1908.

See TRANSFER OF PROPERTY ACT, 1882, ss. 67, 99, 22 C. 903.

Consent decree ordering money to be paid by instalments and creating charge on property—

**Execution of Decree—concluded.****—18.—Miscellaneous—concluded.**

Property not liable to be sold in execution of decree—Separate suit to be brought under s. 67—See TRANSFER OF PROPERTY ACT, 1882, ss. 67, 99, 100, 22 C. 859.

Necessity to have a decree under s. 88 of the Transfer of Property Act made absolute before—See TRANSFER OF PROPERTY ACT, 1882, ss. 88, 89, 8 O.C. 75.

Limitation—Pendency of application—Duty of Court on receiving application for order absolute—See TRANSFER OF PROPERTY ACT, 1882, ss. 88, 89, 1 M.L.T. 294=16 M.L.T. 503.

Decree under s. 88, Transfer of Property Act—Application for order absolute for sale—Whether application for execution of decree—See TRANSFER OF PROPERTY ACT, 1882, ss. 88, 89, A.W.N. 1908, 103=5 A.L.J. 272=30 A. 248.

Execution-sale in violation of s. 99 of the Transfer of Property Act—Confirmation of sale, effect of—See TRANSFER OF PROPERTY ACT, 1882, s. 99, 2 A.L.J. 123.

Execution of simple money decree, sale in pursuance of—S. 99 of the Transfer of Property Act, effect of, before and after such sale—See TRANSFER OF PROPERTY ACT, 1882, s. 99, A.W.N. 1908, 49=5 A.L.J. 121=30 A. 146.

Sale in execution—Money-decree in favour of mortgagee—Sale of mortgaged property in execution of—Sale void as contravening s. 99 of the Transfer of Property Act—See TRANSFER OF PROPERTY ACT, 1882, s. 99, 67, 33 C. 283.

**Execution-Creditor.**

See DECREE-HOLDER.

**Execution Proceedings.**

See EXECUTION OF DECREE.

(1)—General Clauses Act, s. 6—Execution proceedings.—The provisions of s. 6 of the General Clauses Act operate on proceedings in execution of decrees. THAKUR PRASAD v. AHSAN ALI, 1 A. 668, F.B. (2 B. 148, Appr.)

(2)—Civ. Pro. Code, 1882, s. 295—Marshalling—Equality.—Execution proceedings are essentially proceedings in which equitable principles of fairness and equality should prevail. A decree-holder who has but one fund to go against is entitled to ask, on the general equitable principle of marshalling, that another decree-holder who has two funds to go against, should go first against the fund which he alone can attach, and only share rateably in the fund common to both, as creditor for the amount of the debt which will then be unsatisfied. NIMBAJI TULSIRAM v. VADIA VENKATI, 16 B. 683.

(3)—Civ. Pro. Code (Act V of 1908), ss. 50, 52, 53—Execution proceedings commenced under the old Code—New Code enforced pending those proceedings—Proceedings to be governed by the new Code—Objections under the new Code, Parties to avail of.—The new Civ. Pro. Code having



**Execution Proceedings—continued.**

come into operation during the pendency of certain execution proceedings, the proceedings are governed by the new Code. No one has a vested right in the procedure law, and the law of procedure having changed *pendente lite* it must be followed, so far as the questions of procedure are concerned. The parties to execution proceedings can raise all those questions which they are entitled to raise under the new Code, but which they could not raise under the old Code. *INDARJIT v. SHEIK ARSHAD ALI*, 4 Ind. Cas. 492.

(4)—*Execution proceedings—Nominal party—Proceedings cannot be revived.*—Execution proceedings taken out against a person, in which such person is nominally a party are of no effect, and they cannot, in any proper sense of the term, be revived as against such person. *MUHAMMAD ISMAIL KHAN v. RASHID-UN-NISSA*, 8 A.L.J. 1277.

Striking off of execution proceedings—Review—See CIV. PRO. CODE, 1908, s. 141, 10 C. 538.

See LIMITATION ACT, 1908, s. 19, 8 C.W.N. 470.

See LIS PENDENS, 22 E. 939.

**Execution Sale.**

See SALE—SALE IN EXECUTION OF DECREE.

**Execution, Supreme Courts Act.**

See ACT VI OF 1855.

**Executive Government.**

*Ultra vires* act of an, is a nullity—See LIMITATION ACT, 1908, art. 14, 7 Bcm. L.R. 497=29 B. 480.

**Executor.**

See ADMINISTRATOR.

See CIV. PRO. CODE, 1908, O XXXI, rr. 1 to 3.

See HINDU LAW—WILL.

See HINDU WILLS ACT.

See MAHOMEDAN LAW—WILL.

See PROBATE.

See PROBATE AND ADMINISTRATION ACT, 1881.

See SUCCESSION ACT.

See WILL.

(1)—*Person not bound to accept office of executor gratuitously—Acceptance of office of executor.*—No person is bound to accept the office and discharge the duties of the executor gratuitously. Acceptance, by a person, of the office of an executor, and performance by him of duties as such, is sufficient consideration for a contract to pay him remuneration therefor. *NARAYAN COOMARI DEBI v. SHAJANI KANTA CHATTERJEE*, 22 C. 14.

**Executor—continued.**

(2)—*Executor and trustee, Difference between.*—The true position, powers and duties of an executor are essentially different from those of a trustee. *HARA COOMAR SIRCAR v. DOORGAMONI DASI*, 21 C. 195.

(3)—*Liability of Receiver, executor and trustee, contrasted.*—A Receiver occupies a position towards the estate in his hands different from that of an executor or trustee. A Receiver acts through the Court. His acts are virtually the acts of the Court. Executors or trustees, not acting through or under directions of the Court, do not and cannot, under ordinary circumstances, create obligations binding on the estate in favour of creditors. *MOHARI BIBI v. SYMA BIBI*, 30 C. 937=7 C.W.N. 799.

(4)—*Executor by implication under a will.*—A person directed to receive and pay the testator's debts and to get in and distribute his personal estate, though not expressly appointed, an executor by the will, is an executor by implication under the will. *In the matter of MONOHUR MOOKERJEE*, 5 C. 756=7 C.L.R. 228. [R., 26 B. 571, 6 C.L.J. 453.]

(5)—*Executor or administrator under will or Khoja, Position of, when given powers for payment of debts—Cutchi memons*—The powers of the executor or administrator of a Khoja as of a Cutchi Memon are generally limited to recovering debts, and securing debtors paying the same. But, where the Will of a Khoja gives full powers to the administrator for payment of debts, such administrator with the will annexed succeeds to those powers, occupying, therefore the same position as an English executor or the manager of a joint family as regards the matter of his representing, in a suit by a creditor, all the persons interested in such estate. *AHMEDBHOY HUBIBHOY v. VOLLEEBHOY CASSUMBHOY*, 6 B. 703.

(6)—*English law procedure when executor claims as legatee—Applicability to India.*—The procedure by which an executor of a will is obliged under the law, as he is in England, to shed his character of executor before he can appear in his true character of legatee is one by no means applicable to, nor is it necessary to introduce it into this country. *MUSSAMMAT BAGOON v. CHOWDHRY ZUHOORUL HAQ*, 13 W.R. 69.

(7)—*Executor. Incompetency of, to create charge over testator's estate*—Where the estate of a testator had been released by a separate deed for the purpose executed by a creditor holding a mortgage over the estate, it would not be competent for an executor appointed under the Will to charge the estate by means of any new contract in respect of the dues to such creditor. *CASSIBAI v. RANSORDAS HANSRAJ*, 4 B. 5.

(8)—*Executors, Power of, to mortgage—Probate and Administration Act (V of 1881), s. 90.*—Where the material clauses of a will were as follows:—"I have certain personal debts.



**Executor—continued.**

In order to pay off the said debt, the executors shall sell, mortgage or pledge, or demise properties of my estate and they shall pay off the said debts from the proceeds. If the executors desire to sell the immoveable properties . . . in order to purchase more profitable properties, they shall be competent to do that even," held "that these clauses do not imply a limitation on the powers of the executors to mortgage the property of the testator for purchasing other properties and not for paying off his debts." **RAJANI NATH MUKHOPADHYAYA v. RAM-NATH MUKHERJI**, 3 C.W.N. 483. [F., 8 C.W.N. 362, 3 C.L.J. 260.]

(9)—*Executors, power of, to mortgage testator's properties—Will, Construction of.*—Where a will contained the clause "the executor shall pay all my debts . . . ; if there be any difficulty in paying off the debts from the money due to me, the executor shall either sell the whole or a portion of my estate, or make any other settlement of the estate such as *putni* or *durputni*, etc., and shall pay off my debts from the consideration thus acquired." Held, that upon such authority, the executor had no power to mortgage any portion of the testator's estate. **KANTI CHANDRA CHATTOPADHYA v. KRISTO CHURN ACHARJEE**, 3 C.W.N. 515. [Expl., 3 C.L.J. 260 ; D., 8 C.W.N. 362.]

(10)—*Will—Power of executor under will—Indian Succession Act (X of 1865), s. 269—Mortgage—Power of sale.*—Executors under a will have, under s. 269 of the Indian Succession Act, 1865, which makes no difference between moveable and immoveable property, power to dispose of the property of the testator, either wholly or in part, in such manner as they think fit. After the Indian Succession Act came into operation, an Englishman domiciled in India made a will charging his lands with the payment of his debts. After his death, the executors under the will borrowed moneys from a Bank for the purpose of discharging the debts incurred by them in the administration of the testator's estate, and gave to the Bank a bond for the re-payment of such moneys. On the same date, the executor conveyed to the manager of the Bank, as security for the debt created by their bond, all their right, title and interest in certain estates of the testator, giving him at the same time a power of sale. On the same date, again, the executors executed another instrument, whereby they constituted the manager of the Bank for the time being, their true and lawful attorney for them and in their names, to sell the estates and do all acts necessary for effecting the same. Default having been made in the payment of moneys due by the executors, the manager of the Bank, in the exercise of the power given to him by the executors, and as their attorney, sold the estates to a certain person. The purchaser, being resisted in trying to get possession by a legatee of the testator, sued the legatee and the executors for the declaration of his right to, and for the possession of, the estates purchased by him. The legatee contended that the executors had

**Executor—continued.**

no power to confer a power of sale. Held (*Stuart, J., dissenting*), that the executors have, under s. 269 of the Indian Succession Act, authority to confer a power of sale, and that the sale made by the manager of the Bank in virtue of such power conferred a valid title and operated to convey the property to the purchaser. **A. L. SEALE v. BROWN**, 1 A. 710, F.B.

(11)—*Mortgage by executor—Validity.*—For saving the estate of a testator from sale in execution of a decree against him, his executor mortgaged the testator's property for raising funds to pay off the decree debt. The mortgagees sued to enforce his claim against the estate. Held, that the fact that there were funds to pay off the decree debt without effecting the mortgage would not render invalid the plaintiff's claim against the estate, unless there was good reason to infer that the executor knew of those funds, or might have known of them if he had exercised ordinary diligence in making enquiries on the point. **KALEE NARAIN ROY CHOWDHRY v. RAM COOMAR CHAND**, W.R. 1864, 99.

(12)—*Bond passed for minors by executor and guardian—Agreement on attaining majority to pay by instalments—Estoppel from disputing liability.*—Appellant who carried on business as banker alleged that she had made large payments for the respondents, during the time that they or some of them were minors, in respect of jumma of revenue due to the Government from a Zemindari belonging to them. For these sums, the respondents on taking possession of their Zemindari, had given a kistbundee or engagement to pay the amount by instalments ; and, for one of the instalments so secured, the action in this case was brought. These advances were alleged to have been made at the instance of the executor and guardian of the minors, and the circumstances were such that if the respondents had instituted a suit to take the accounts of the guardian, and, charging collusion between him and the appellant, had investigated the transactions which had taken place, it might have appeared that there was no such sum as was claimed by the appellant justly due to her. The Sudder Court decided in favour of the respondents, resting their judgment on the ground that no adjustment of accounts had taken place to ascertain the balance really due to the appellant before the kistbundee was granted. On appeal, the Judicial Committee was of opinion that the objection could not, under the circumstances, prevail. The respondents could not be permitted after the death of the guardian to dispute the liability for payment of the debt which they had deliberately undertaken to pay. **GHOLAB KHOONWURREE BEBEE v. ESHUR CHUNDEY CHOWDHRY**, 2 W.R., P.C. 47=8 M.I.A. 447. [R., 2 B.L.R. O.C. 11.]

(13)—*Also residuary legatee—Mortgage by—Legatee's right to impeach—Legacy charged on immoveable property—Priority—Notice—Constructive notice—Delay—Consent.*—A mortgage



**Executor—continued.**

by an executor, who is also residuary legatee, to secure his private debt, though valid as against creditors, may be set aside, even at the suit of a pecuniary legatee; for, the nature of the claim of a legatee may be ascertained from the will, whereas, if a reasonable time has elapsed since the death of the testator and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid or that there are other assets for payment of the debts, if any. When the mortgage was executed years after the time fixed in the will for payment of the legacy and the legacy had remained unpaid, the lapse of time was a circumstance that might be taken into consideration in determining whether the executor was acting with the consent of the legatee. *Held*, that in the circumstances of the present case the rights of the parties remained unaffected by the delay. **THE BANK OF BOMBAY v. SULEMAN SOMJI**, 12 C.W.N. 993, P.C., 4 M.L.T. 201=18 M.L.J. 435=5 A.L.J. 661=10 Bom. L.R. 1065=8 C.L.J. 343=33 B. 1=1 Ind. Cas. 369=35 I. A. 139.

(14)—*Disposal of property—Rights of creditors or legatees—Executors applying testator's property for their own private purposes—Mortgage by an executor who is also a residuary legatee—Mortgage from an executor who is residuary legatee, claims as between.*—In not investigating the title under which he takes, a person is ordinarily guilty of great and culpable negligence which disentitles him from defeating claims that would have come to his notice had he exercised reasonable care. The ignorance arising from abstention to make the ordinary investigations and inquiries cannot better his position. In India there is no distinction as there has been in England between moveable and immoveable property in so far as it relates to the power of executors to dispose of property administered by them. Executors have full power of disposal over their testators' estate and generally speaking neither creditors nor legatees can follow assets aliened for value in exercise of that power. So strong is this rule that the alienees for value are safe in their title, though the alienation was for a purpose foreign to the will, if they took without notice of this vice. But if the alienees take with notice, then they are in no better position than the executors from whom they claim, and the assets can be followed in their hands both by creditors and by legatees, who have been prejudicially affected. Where executors dealt with assets not for the purposes of the will, but applied them to their own private purposes, a person taking the assets with knowledge that they were so applied, is a party to the devastation, and the assets in his hand could be followed by pecuniary legatees prejudiced by the improper dealing of the assets. A mortgage, by an executor, who is also a residuary legatee, to secure his private debt may be set aside even at the suit of a pecuniary legatee for the nature of the claims of legatees, they taking under the will, may be ascertained; but as to

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creditors, it is different; if a reasonable time has elapsed since the death of the testator, and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid, or that there are other assets for payment of the debts, if any, therefore, the mortgagee would be safe as against creditors. In deciding between the conflicting claims of a pecuniary legatee and a mortgagee from an executor who also is legatee, the question seems to hinge not so much on the character of the disposition, as upon whether the circumstances justified the inference that the mortgagor was in possession as legatee and not as executor. **GOOLAM HOOSEIN v. BANK OF BOMBAY; SOOLEMAN v. RAHIMTULLA**, 7 Bom. L.R. 407; *Confirmed on appeal*, 10 Bom. L.R. 1065.

(15)—*Administration of estate—Directions to continue trade—Due course of administration—Selling or mortgaging testator's estate—Notice—Payment of legacies—Agent of mortgagor and mortgagee—Conveyance—Estate vested in different capacities.*—Where a testator by his will empowers his executors to "continue to carry on trade and business" in the testator's name, the executors are thereby not empowered to embark upon any new enterprise so as to affect the rights of others derived under the will but only to continue his business. An executor has authority to sell or mortgage the property of the testator in due course of administration and give a complete title, free from the charge or trust, to a purchaser or mortgagee. Such a purchaser or mortgagee, therefore, is not bound to enquire whether the legacies charged on his estate by the testator had been paid and he must be presumed to have acquired a free, complete and valid title unless it is clearly proved that he had express or constructive notice that a certain other person had claims against the estate and the executor was acting in breach of the trust. A purchaser from an executor is neither entitled nor bound to inquire whether debts or legacies charged on the testator's estate have been paid or not and without such inquiry he can obtain a good title. Similarly a purchaser or mortgagee from an executor who is also devisee is not bound to inquire whether legacies or debts charged on the estate have been paid or not. Where a person, who acts as agent both of the mortgagor and the mortgagee in a transaction, acts fraudulently towards the latter by not disclosing to him the flaw in the title, the latter is entitled to say that the agent's knowledge should not be imputed to him and used to his prejudice. When a person having several estates and interest in the denomination of land joins in conveying all his estates and interests in the lands to a purchaser, every estate and interest vested in him will pass by that conveyance, although not vested in the character in which he became a party to the conveyance. **SOOLEMAN v. RAHIMTULLA**, 6 Bom. L.R. 800.

(16)—*Power of executor under will—Money borrowed on pro-note—Charge on estate.*—In



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the absence of any special power given by the Will, an executor cannot render the estate liable for moneys borrowed by him for the purposes of the estate. **RAMANATH PAUL V. KANAI LAL DEY, 7 C.W.N. 104.** (*Farhall v. Farhall*, L.R. 7 Oh. 123, R.)

(17)—*Debt contracted by one of several executors—Liability of estate—Personal liability.*—Upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally and cannot be sued as executor so as to get execution against the assets of the testator. In a suit on a promissory note given by only one of several executors, after the death of the testator, for goods apparently supplied to the estate, held, that the estate of the testator is not liable for it. **DEBENDRA NATH BISWAS V. HEN CHANDRA ROY, 31 C. 253=7 C.W.N. 135.** (11 M.I.A., P.C., 198, R.) [R., 31 P.R. 1906=133 P.L.R. 1906.]

(18)—*Omission to appoint executor—Right of Court to appoint executor—Tenor of the will taken into consideration.*—On a testator's omission to appoint an executor under his will, it is competent for a Court to appoint as executor the person who, it would appear from the tenor of the will, the testator contemplated should be executor. *In the goods of COURJON, 25 Q. 65.* [R., 6 Bom. L.R. 78, 1 N.L.R. 164.] (*In the goods of Punchard*, L.R. 2 P. and D. 369 (1872); *In the goods of Adamson*, L.R. 3 P. and D. 253 (1875), F.)

(19)—*Liability of executor for devastavit by co-executor.*—Held per *Norman, J.* (*Phear, J.*, dissenting) that an executor who takes no share in the administration of his testatrix's estate is nevertheless liable for the loss occasioned by his co-executor neglecting to get in the assets. *Per Phear, J.*—In order to make one executor liable for devastavit committed by his co-executor, there must be a distinct allegation in the plaint that the devastavit has been committed by the co-executor to the knowledge of the executor. **GREENWAY V. HOGG, Bourke, A. O.C. 111=Cor. 97.**

(20)—*Liability of executor for devastavit.*—An executor will not be held liable for devastavit if the will was so framed as to mislead him. **HOGG V. GREENWAY, 2 Hyde 3.**

(21)—*Will—Trust—Executor—Investment—Shares—Conversion—Liability of an executor in Bombay to make good loss occasioned to estate by his neglect to convert the shares owned by his testator.*—The rules and decisions of the English Court of Chancery regarding the duty of an executor to convert, in the absence of a special direction to that effect in the will, do not, without great qualifications, apply in the High Court of Bombay; and the Supreme and High Courts of Bombay have not, by any general rule or uniform practice, adopted any Government security accessible to a private executor or trustee in such manner as to form an authoritative guide to him in the management of the property. The will of a Portuguese

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testator did not give any special direction for conversion, or any sufficient indication of an intention on the part of the testator that the residuary devisees and legatees should enjoy the residue successively *in specie*, so as to exempt the executors from the duty of conversion, and the executors did not convert certain shares belonging to their testator, which subsequently became much depreciated in value. Held that the executors were not liable for the loss so occasioned to the estates of the testator. **M.A. DE SOUZA, V. IGNACIO FRANCISCO DE SOUZA, 12 B.H.C. 184.** [R., 8 B. 432.]

(22)—*Probate—Will—Executor who has acted required to lodge Will and obtain probate.*—One Tulsidas died in 1883, leaving a Will by which he appointed his brother Tapidas, his executor, and directed that, in the event of the death of Tapidas, his son Damodar should act as executor. Tapidas was the sole residuary legatee under this Will. Tapidas acted as executor until his death in 1886, and Damodar then acted and continued to administer the estate, but probate of the Will was not obtained either by Tapidas or Damodar. Tapidas left a Will which was duly proved, under which he made his two sons Damodar and Dhyabhai residuary legatees and executors. In 1895, Dayabhai applied for a citation to be issued to his brother Damodar requiring him to bring in and prove the will of Tulsidas. Damodar contended in reply that there was no necessity to prove the Will, that the estate had been fully administered and that he had no funds left in his hands out of which he could pay the costs of probate. Although the Succession Act, 1865, and the Probate and Administration Act, 1881, do not provide for a case like this, still, following the English cases on the point, it was held that Damodar must lodge the Will in Court, and that, on the applicant Dayabhai paying half the estimated cost of obtaining probate (including probate duty), the executor Damodar should take out probate of the Will. **DAYABHAI TAPIDAS V. DAMODAR TAPIDAS, 20 B. 227.**

(23)—*Will—Application for probate by executor—Executor, whether could submit to arbitration, Question of execution of Will—Admissibility of evidence to explain written document—Evidence Act (I of 1872), ss. 91, 92.*—The questions in this case were whether an executor against whose application for probate a caveat has been entered can lawfully submit to arbitration the question whether the will propounded by him was duly executed by the deceased and whether an award made upon such submission against the will would preclude a Court of probate from considering the application. Held that the question whether an award in such a case, that the will is invalid, is binding on the executor and the Court of probate, depended on whether a submission by the former involving such an agreement was lawful and constituted a valid adjustment of the probate suit within s. 375 of the Civ. Pro. Code. The executor had no power, however, to delegate the exercise of



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his judgment to another, and whatever his opinion may be as to the will, and whether or not he has intermeddled with the estate, he could not bind himself to treat the will as a forgery if an arbitrator so decided. S. 508 of the Civ. Pro. Code is not applicable to probate proceedings. The provisions of s. 69 and of other sections of the Probate Act (V of 1881) preclude the possibility of a Probate Judge referring the question of the execution of a will to arbitration, unless possibly all the beneficiaries appeared before him and consented to that course. If, thus, a Judge could not himself refer such a question to arbitration, he clearly cannot act upon an award which the executor and caveator have otherwise than through the Court submitted to. On the question whether the applicant referred the *factum* of the will to arbitration, parol evidence was held to be admissible. The submission paper was not so plain in its language as to show accurately what was the nature of the dispute referred to arbitration and to exclude further evidence. Such further evidence showed that the dispute to which the submission related was not as to the execution of the will but as to the amount to be paid to the caveatrix in consideration of her withdrawing her opposition. It was therefore not competent to the arbitrator to determine the question of the execution of the will, and his award was consequently *ultra vires*, and not binding on the executor. *GHELLABHAI v. NANDUBAI*, 21 B. 385. [F., 31 C. 357=8 C.W.N. 197; R., 24 M. 326, 26 B. 76=3 Bom. L.R. 431, 12 C. L.J. 91, 14 C.W.N. 924=12 C.L.J. 185; D., 33 B. 69=10 Bom. L.R. 366.]

(24)—*Will—Executor's right to be allowed money lent by him to estate—Limitation.*—An executor who has used his own monies for the purpose of estate, is entitled to be allowed such monies in his accounts, and limitation in such a case does not arise until the accounts are taken. *KRISHNARAV RAMCHANDRA v. BENA BAI*, 20 B. 571.

(25)—*Empowered to pay barred debt of testator, if just.*—Where a debt was justly due by the testator, his executor may pay it, though barred by limitation, and equity will give him credit for such payment. *TILLAKCHAND v. JITAMAL*, 10 B.H.C. 206.

(26)—*No legacy devised by testator—Commission allowed as remuneration.*—In the case of executors in India, Courts are empowered to award remuneration to them, in the shape of commission on the assets, when the testator leaves no legacy to such executors as a return for their trouble and services. *In re THE ESTATE OF THE LATE SARDAR DYALH SINGH MAJITHIA*, 76 P.R. 1905=195 P.L.R. 1908.

(27)—*Executor—Purchase by trustee for himself—Relinquishment of executorship—Purchase by trustee for another—Fiduciary relationship—Administration suit—Subsequent suit against purchaser to set aside sale.*—J, as the executor

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of his deceased father S, obtained a decree which he held in trust for S's heirs, namely, himself and his brothers. One of the brothers, H, died leaving the plaintiffs, his sons and heirs, and his brothers J and M, his executors. J renounced the executorship. M then sold to J the interest of H's sons for an inadequate consideration. In a suit brought by the sons of H, against J and M to set aside the sale-deed, held that J held a fiduciary character for the plaintiffs and that according to the rules of equity, the sale could not stand but that J was bound to return to H's sons their share in that estate upon receiving back the purchase money which he gave for it. If a person, knowing that another holds a fiduciary position and has a better knowledge of the value than the vendor, employs that person to purchase for him, and the trustee purchases secretly in his own name for the benefit of that other, the sale is equally invalid against the person for whose benefit it is purchased by the trustee as it would be against the trustee himself. Where an administration suit has been brought by the parties whose interest had been sold against the executor of their father's Will by whom the sale had been made, a decree obtained in that suit does not bar a suit against the purchaser for setting aside the sale. *DHONENDER CHUNDER MOOKERJEE v. MUTTY LALL MOOKERJEE*, 14 B.L.R. 276, P.C.=23 W.R. 6=2 I.A. 18=3 Sar. 408.

(28)—*Executor and his duties—Manager of minor's estate.*—The duties of the executor are to administer the estate of the deceased, only so far and so long as to enable him to carry out the terms of the Will of which he is executor. Afterwards, if it appears from the Will, that the intention of the testator was to appoint the executor to be the manager of the minor's estate, he can manage the estate on behalf of the minor as such. He can as executor make over the property to himself as manager of the infant, without an administration suit or without the Will being revoked. *TARAN SINGH HAZARI v. RAMRATAN TEWARI*, 31 C. 89.

(29)—*Executor, accounts from—Filing of accounts—Practice.*—It is the duty of an executor to file his accounts without compelling the parties interested in the estate to take out an order to compel him to do so. If an executor improperly and without sufficient reason fails to file the accounts, he will have to bear the costs of the order for compelling him to do so. An executor is not justified in declining to file his accounts simply because there may be a dispute as to the period from which the accounts should begin. But a party interested in the estate will be ordered to bear his own costs of the order if his application is frivolous or vexatious or if he has been guilty of long delay or laches or, if he has acquiesced in the executor not filing the accounts. *In re JETHA PADAMSI*, 7 Bom. L.R. 451.

(30)—*Discharge of—Discharge as to future liability.*—It is open to the Court, if it so



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pleases, to discharge the executor in regard to future liability and future acts and not in the least affect his liability in regard to his past transactions. As soon as an executor has discharged the debts of the testator and has paid the legacies and funeral and testamentary expenses and has invested any surplus that may have remained, he ceases to be an executor and becomes a trustee in the proper sense. *In re AMARCHAND*, 7 Bom. L.R. 195=29 B. 188.

(31)—*Decree against—Decree passed against one is binding or others.*—The executors and administrators of the deceased person from a continuing representation of the deceased's estate and therefore a decree obtained and execution had against them must bind their successors in the absence of fraud or collusion. *BAI MEHERBAI v. MAGANCHAND*, 6 Bom. L.R. 858.

(32) — *Partnership, Winding up of.*—The right to wind up the affairs of a dissolved partnership is personal to the members of the late firm; and, on the death or bankruptcy of one of them, his executor or trustees will not be permitted to take the management of the affairs of the partnership out of the hands of the other partners. *SHIDAPPA v. SHIVLINGAPPA*, 1 Bom. L.R. 42.

(33)—*Will—Executor accepting office and acting as executor—Right to set up adverse title—Estoppel—Executor not taking out probate—Effect—Members of joint family acquiring property without aid of ancestral property—Nature of property—Presumption—Hindu Law.*—If an executor under a will accepts the office and acts as an executor with full knowledge of all the circumstances bearing on his rights, he will subsequently be estopped from repudiating the will and setting up an adverse title against a beneficiary claiming under the will. (29 M. 239, F.) *Per White, C.J., and Wallis, J.*—The fact that an executor has not taken out probate (at any rate where the law does not require him to do so) is immaterial. (8 B. 241, 27 B. 140, 32 I.A. 244, R.) *Per Wallis and Miller, JJ.*—Where members of a joint family acquired property by working together, without the aid of the ancestral property, the presumption is they acquire it as joint family property, unless a different intention to acquire it as co-owners is proved. *MUNISAWMI CHETTY v. MARUTHAMMAL*, 8 M.L.T. 124=20 M.L.J. 687=7 Ind. Cas. 176. (24 M. 149, R.)

(34)—*Will—Liability to account—Death of executor—Suit for account against his legal representative—Probate and Administration Act (V of 1881), s. 98.*—The defendant was the son of the deceased executor of the will of the plaintiff's husband. The prayer in the plaint was: *firstly* for a decree for an account on the footing that the defendant was liable to render an account for the period during which his father acted as executor, and, *secondly*, for a decree for the amount as may be found due upon adjustment of account: *Held*, that, assuming that the legal representative of a deceased

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executor was not only liable for a devastavit committed by the latter, but might also be called upon to render any account which the latter should have, but had not, rendered, the plaintiff had failed to establish her claim to an account, as there was nothing to show that the account due from the deceased executor under s. 98 of the Probate Act had not been rendered or that there rested upon the deceased executor any duty to account over and above the duty imposed by the section. *KHETTRAMOMI DAS v. DHIRENDRA NATH ROY*, 7 Ind. Cas. 804.

(35)—*Probate of whole Will does not become ineffectual by degrees—Executor, Mortgage from—Not bound to enquire into necessity for loan unless special circumstances exist—Executor borrowing on hand-note for Government revenue—Mortgage executed 20 years after testator's death—No cause for enquiry by mortgagee.*—Where probate is granted of the whole Will and administration of the whole estate of the testator, there is no authority for supposing that they become ineffectual by degrees, as the various legatees die or obtain their legacies. Until the estate has been administered and the Will carried into effect, the administration must be regarded as incomplete, and the executor as clothed with the powers given him by the law. Unless it is shown that a mortgagee from an executor had notice that the executor was exceeding his powers, or had been put to enquiry, he is entitled to a decree against the estate; and he is not bound to enquire whether the executor is mortgaging the estate for the proper purposes of administration, unless there are special circumstances to put him to enquiry. If a man lends money on mortgage to an executor in Bengal to pay off hand-notes, said to have been given for money borrowed to pay off government revenue or rent, it cannot be held that the mortgagee had notice that the executor was dealing wrongfully with the property, or was put to enquiry; nor can it be held that the recital of the fact that part of the consideration money had originally been borrowed on hand-notes was enough to give the mortgagee notice that the executor was exceeding his powers (8 C. W. N. 135, A. 710, R.) The principle of English Law laid down in *Tanqueray-William and London*. *In re* (1882), 20 Ch. D. 465 to the effect that, if the mortgage is executed by the executor more than 20 years after the testator's death, the mortgagee ought to enquire into the necessity of the loan, is not supported by any authority in this country. *UMAMAYI DASSYA v. RAJA JANKI BALLAV SEN*, 1 Ind. Cas. 248.

(36)—*Execution—Application for execution by executors without taking probate, if proper—Step-in-aid of execution.*—An application for execution made by the executors of the original decree-holder, though probate had not then been obtained, if in form a proper application, is a step-in-aid of execution. *HARI BADANI DAS v. GOBINDA CHANDRA DAS*, 9 C.L.J. 382=4 Ind. Cas. 118. (20 C. 755, R.)



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(37)—*Probate and Administration Act* (V of 1981), s. 34—*Administrator pendente lite when to be appointed—Executor, debtor, to estate—No obstacle to his acting executor—Executor can file suit to save limitation before obtaining probate—Wrong exercise of discretion in appointing administrator pendente lite—High Court's power of interference.*—It is necessary that, before appointing an administrator *pendente lite*, the Court should be satisfied that the appointment is necessary and proper. Where there is no question as to the appointment of the executor, the Court should refuse to appoint an administrator *pendente lite*. Therefore, where the main object of the caveator was to get the first will substituted for the second which was impugned but in both the wills the petitioner was appointed the executor. *Held*, that no appointment of an administrator was necessary. The fact that the person appointed as executor by a will is a debtor to the estate, is no obstacle to his acting as executor, or remaining in charge of the estate pending the probate proceedings, especially when the amount of debt is not large and he has not in any way misrepresented that amount. An executor named in a will has the power to file suits if necessary to recover any debts due to the estate: he cannot obtain a decree until his position is confirmed by probate; but limitation will be saved. Where there is no necessity for the appointment of an administrator *pendente lite*, but the District Judge appoints one, he does not exercise his discretion judicially, and the High Court will interfere. *JOGENDRA LAL CHOWDHURY v. ATINDRA LAL CHOWDHURY*, 2 Ind. Cas. 638.

(38)—*Legatee obtaining decree against executor—Costs.*—Where a legatee obtains a decree against an executor who has a beneficial interest under the will, the intention is to make the costs payable, not by the estate of the testatrix, but by the executor himself, and the execution-sale is valid so far only as it conveys his beneficial interest. Where the executors under a will, after certain dispositions of the property, are to enjoy what remains, *held* that the property is not a mere gift to the executors subject to a charge, but that their interest is in the surplus profits. *DEBNARIN BOSE v. SREEMUTHY COMULMONEE DOSSEE*, 20 W. R. 39.

(39)—*Executor de son tort.*—The sections of the Indian Succession Act relating to executors *de son tort* are not applicable to Hindus—*Quære.*—Whether, after the debts specified were paid, the defendant was, as to the surplus and his management of it, in the position of an executor *de son tort*; and whether, practically, it may in some cases be difficult to avoid the application of the principle on which executorship *de son tort* is founded to Hindus. *SUDDASOOK KOOTARY v. RAM CHUNDER*, 17 C. 620 (2 Ind. Jur. N.S. 234, R.) [R., 14 M. 61, 10 C. W.N. 566.]

(40)—*Executor de son tort—Receipt of dues to the estate before issue of probate to executor—*

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*Creditors of deceased, Right of, against the executor de son tort—Indian Succession Act* (X of 1865), s. 265.—This was an application under s. 25 of Act IX of 1887 praying the High Court to set aside the decree made by a Provincial Small Cause Court against the defendant as executor *de son tort* of her deceased husband. It was contended that since there was a rightful executrix in existence when the defendant intermeddled with the estate of her deceased husband, she could not as was clear from s. 265 of the Succession Act (X of 1865), be sued by a creditor of the deceased, she being under the circumstances, responsible only to the rightful executrix. The High Court however, held that, at the date of the collection by the defendant, there was no rightful executrix in existence within the meaning of s. 265 of the Succession Act, as no probate had then been in fact issued to the executrix. It is settled law that probate is necessary to complete the title of a rightful executor, and until it is taken out, a person who intermeddles with the assets constitutes himself an executor *de son tort*. The defendant was therefore liable to the plaintiff as an executrix *de son tort*, and the decree passed by the Small Cause Court in favour of the latter was therefore correct. *NAVAZ BAI v. PESTONJI*, 21 B. 400.

(41)—*Liability of executor de son tort—Burden of proof.*—The liability of an executor, *de son tort*, extends to the amount of the assets received, but where he has mingled this with his own so as to make it impossible to distinguish the one from the other, the Court may, for lack of evidence, treat the whole as available to make restitution. [F., 20 M. 446, 35 C. 276=12 C.W.N. 237=3 M.L.T. 147: R., 6 M.L.J. 186, 28 M. 351.] It a person suing the executor *de son tort* has shown that some property has passed into his hands, the extent to which such property is received being peculiarly within his knowledge, he is bound to show that he has not received enough to satisfy the debt. *MAGALURI GARUDIAH v. NARAYANA RUNGIAH*, 3 M. 359.

*Liability to account—Administrator General as—Of the surviving trustee of religious endowment—See ACCOUNTS—SUIT FOR ACCOUNTS*, Cor. 68.

*Hindu executor transferring to Administrator-General, property of deceased testator—See ACT II OF 1874*, s. 31, 21 C. 732.

*Position of Hindu executor—Right of transfer—See ACT II OF 1874*, s. 31, 22 C. 788, P.C.=22 I.A. 197.

*Discharge of, the Court can pass an order even on his own application—See ACT V OF 1902*, s. 4, cl. (2), 7 Bom. L.R. 195=29 B. 188.

*Sum borrowed by executor to discharge testator's debts—Personal liability of executor—See ADMINISTRATION SUIT*, 11 Bom. L.R. 250=2 Ind. Cas. 161.

*Position—See CIV. PRO. CODE*, 1908, s. 47, O. XXI, rr. 95, 96, 6 A-L.J. 71, F.B.=5 M.L.T. 185=31 A. 82=1 Ind. Cas. 416.



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Express or implied appointment of—See CIV. PRO. CODE, 1908, O. I, r. 10 (1), O. VI, r. 15 (2), (3), 10 C.W.N. 662=33 C. 657.

Joinder of causes of action in suits against—See CIV. PRO. CODE, 1908, O. II. rr. 4, 5, 8 Bom. L.R. 734=31 B. 105.

Applying for probate—Position of—Dismissal of application for default—Whether, may propound will again—See CIV. PRO. CODE, 1908, O. IX, r. 9, 14 C.W.N. 924=7 Ind. Cas. 126=12 C.L.J. 185.

Suits against—Executor under a will can be sued by the legatee for the legacy bequeathed therein: he is under no obligation to bring an administration suit making the other legatees under the will parties to it—See CIV. PRO. CODE, 1908, O. XXI, r. 11 (2), 3 Bom. L.R. 932=26 B. 301.

In sole possession of the shares in joint stock companies—Juridical possession—Applicability of proviso to s. 178, Contract Act—See CONTRACT ACT, 1872, s. 178, 12 Bom. L.R. 870=8 Ind. Cas. 183.

Attorney, change of, by executor—Employment of attorney by testator—Costs—See COSTS—SPECIAL CASES, 6 C.W.N. 306.

See COURT FEES ACT, 1870, 3 C. 733=2 C.L.R. 436.

Executrix—Power to possess estate as against Court of Wards claiming on behalf of residuary legatee—See COURT OF WARDS, 12 C.W.N. 1065=36 C. 28=1 Ind. Cas. 514.

See HINDU LAW—DEBTS, 7 M. 586.

Mortgage by executor—Plaintiff failing to show that mortgage has been validly created in that capacity—Raising fresh issue—See ISSUES—ADDITIONAL ISSUES, 3 B.L.R., O. C. 7=11 W.R. O.C. 21.

Estate in the hands of—Personal liability of—See LANDLORD AND TENANT—GENERAL, 10 Ind. Cas. 560.

Bill of costs, delivery of—Maintainability of suit by executor of attorney—See LEGAL PRACTITIONERS—ATTORNEY AND CLIENT, 3 B.L.R. C.C. 96.

Whether, is a trustee for specific purposes within the meaning of s. 10 of Limitation Act—See LIMITATION ACT, 1908, s. 10, art. 120, 7 M.L.T. 123=5 Ind. Cas. 832, 30 C. 369=7 C.W.N. 353, 14 B. 476.

Suit by executor—Names of beneficiaries subsequently substituted as plaintiffs—See LIMITATION ACT, 1908, s. 22, 7 C.W.N. 817.

See LIMITATION ACT, 1908, art. 123, 12 M. 487.

Decree for account against—Mortgage of property of deceased—Lis pendens—See LIS-PENDENS, 8 C. 79=9 C.L.R. 176=10 C.L.R. 113.

**Executor—concluded.**

Of Mahomedan takes whole estate of testator, under Probate and Administration Act, and is trustee—See MAHOMEDAN LAW—PARTITION, 13 C.W.N. 153=4 Ind. Cas. 462.

Conduct of, to be examined and his liability to be determined when accounts of an estate are taken—See PARTITION—GENERAL, 3 Ind. Cas. 247=10 C.L.J. 503.

Payment of debt to representative of deceased person—Discharge—Right of—Of the deceased to ignore such payment—Notice of claim—Duty of executor's negligence, effect of—See PAYMENT, 72 P.R. 1903.

Personal liability of—See RENT, SUIT FOR, 15 C.L.J. 458.

See REPRESENTATIVE OF DECEASED PERSON, 4 C. 342=3 C.L.R. 154.

Incomplete gift of Government Promissory Notes—Suit by—Of donor to recover notes—jurisdiction—See SMALL CAUSE COURT, PRESIDENCY TOWNS, JURISDICTION OF—GENERAL, 12 B. 573.

Application by executor for succession certificate—Will disputed—Jurisdiction to decide genuineness of will—Remand—Duty of Judge—Executor whether bound to take out probate—See SUCCESSION CERTIFICATE ACT, 1889, s. 1 (4), 16 B. 712.

Trade of testator carried on by the—Liability of the—See TRADE, 12 Bom. L.R. 1=34 B. 209=5 Ind. Cas. 594.

Liability of, for loss caused to estate—See TRUSTS ACT, 1882, 29 B. 170.

When can claim advantages provided by s. 34, Trusts Act—Remedy of—See TRUSTS ACT, 1882, 11 Bom. L.R. 495=33 B. 429=3 Ind. Cas. 164.

**Executor de son tort.**

See EXECUTOR.

See SUCCESSION ACT, 1865, ss. 265, 266.

Principles of English Law relating to—How far applicable to Hindus—See ADMINISTRATOR, 10 C.W.N. 566.

Position of administrator *pendente lite* after suit—Interference—See ADMINISTRATOR, 12 C.W.N. 237=3 M.L.T. 147=35 C. 276.

Liability of—Proof of possession of some of the properties of the deceased—Burden of proof as to how much was received—See BURDEN OF PROOF—POSSESSION AND PROOF OF TITLE, 6 M.L.T. 362.

Creditor of a deceased Hindu in possession of his assets, liability of, to pay his other debts—Suit by other creditors to recover their debts, form of—*Plene administravit*, plea of, by creditor in possession of assets—See HINDU LAW—DEBTS, 28 M. 351.

Whether widow of one member in possession of joint family is an—See HINDU LAW—JOINT FAMILY, 7 M.L.T. 211=5 Ind. Cas. 362=20 M.L.J. 308=33 M. 423.



**Executor de son tort—concluded.**

See JOINDER OF PARTIES, 6 M.L.J. 186.

Liability of—See LIMITATION ACT, 1908, s. 10, 11 Bom. L.R. 1187 = 4 Ind. Cas. 283.

See REPRESENTATIVE OF DECEASED PERSON, 2 Ind. Jur. N.S. 234.

See SUCCESSION ACT, 1865, s. 190, 18 B. 337.

**Excutors' Year.**

See SUCCESSION ACT, 1865, ss. 297, 326, 7 Bom. L.R. 755.

**Executory Bequests.**

See BEQUEST.

(1)—*Succession Act, 1865—Contingent or executory bequests.*—In regard to contingent or executory bequests, the Succession Act, 1865, has laid down a hard and fast rule, which must be applied, whenever it is applicable, without speculating on the intention of the testator. *NORENDRA NATH SIRCAR v. KAMALABASINI DAS*, 23 C. 563 = 23 I.A. 18, P.C. = 6 M.L.J. 71 = 6 Sar. 667. [R., 33 C. 947 = 10 C.W.N. 695 = 3 C.L.J. 502; F., 3 C.W.N. 478.]

**Executory Contract.**

See CONTRACT.

Assignment of—See CONTRACT—MISCELLANEOUS, 5 Bom. L.R. 373.

Assignment—Legality and validity of—See TRANSFER OF PROPERTY ACT, 1882, s. 3. 10 C.W.N. 755 = 33 C. 702.

Benefit of, if actionable claim and can vest in official assignee—See TRANSFER OF PROPERTY ACT, 1882, ss. 3, 6. 11 C.W.N. 566 = 34 C. 286 (On appeal from 10 C.W.N. 755 = 33 C. 702.)

**Executory Trust.**

See SUCCESSION, 6 O.C. 305.

**Executrix.**

Power of attorney by executrix—Powers of, to perform discretionary duties through attorneys—See POWER OF ATTORNEY, 13 C.W.N. 1190 = 3 Ind. Cas. 859.

**Exemptions from land revenue in territories not subject to Act XI of 1852.**

See BOM. ACT VII OF 1863.

**Exemption from land-revenue in territories subject to Act XI of 1852.**

See BOM. ACT II OF 1863.

**Exonerated Defendant.**

Civ. Pro. Code, 1882, s. 244—Exonerated defendant—Right to come in under—Appeal—See APPEAL—DECREES AND EXECUTION OF DECREES, 22 M. 131.

**Ex parte Decree.**

See CIV. PRO. CODE, 1908, O. IX, rr. 11, 13.

See DECREE—EX PARTE DECREE.

See EVIDENCE—DECREES, JUDGMENTS AND PROCEEDINGS IN SUITS.

(1)—*Ex parte decree—Applications to set aside by some defendants—Contested decree against other defendants—Plaintiff's appeal against contesting defendants—Self-contained appellate decree—Jurisdiction of first Court to entertain application for setting aside ex parte decree after decree of appellate Court.*—It cannot be laid down broadly that, as soon as an appeal has been preferred against a decree, the authority of the original Court to deal with that decree is completely taken away. (30 M. 535, 17 M. L.J. 436, Not F.; 9 Ind. Cas. 189, 13 C.L.J. 221, 15 C.W.N. 399, 39 C. 394, R.) After the decree of an original Court has merged in the decree of an appellate Court, the only Court which is competent to entertain an application for amendment of the decree is the Court of Appeal. (11 A. 267, 6 C.L.J. 542, R.) A mortgage-suit was resisted by the sixth and seventh defendants alone and the suit proceeded *ex parte* against the other five defendants. The decree directed the sale of two-thirds of the mortgaged property and declared that, if the mortgage-debt was not satisfied thereby, all the seven defendants would be personally liable. The plaintiff appealed against that portion of the decree which declared that an one-third share of the mortgaged property was not liable—that is, the appeal was directed against the sixth and seventh defendants alone, who filed a memorandum of cross-objections to the effect that they should not have been made personally liable. The appeal and the cross-objection both succeeded, as the appellate Court held that the whole property was liable but that the sixth and seventh defendants were not personally liable. The decree of the appellate Court was made self-contained and the provisions of the decree of the original Court, so far as they related to the first five defendants, were re-produced and incorporated in the decree. The first five defendants then applied to the first Court to have the *ex parte* decree set aside. Held that the Court had jurisdiction to entertain the application: that the questions in controversy between the plaintiff and the first five defendants were not raised in the appeal; that the decree of the first Court was not affirmed, modified or reversed in so far as the first five defendants were concerned, and that the effect of the appellate decree was not to merge the *ex parte* decree therein. *BRIJA LAL SINGH v. MAHADEO PRASAD*, 12 Ind. Cas. 669. (4 C.W.N. 456, 5 Ind. Cas. 525, 12 C.L.J. 53, 22 W.R. 537, D.)

(2)—*Limitation Act, 1908, Art. 164—Ex parte decree.*—In execution of an *ex parte* decree, attachment was made, proclamation issued and sale held long before the application to set it aside was made. Held that, under art. 164 of Act IX of 1908, such applications could be made within 30 days from the date when



**Ex parte Decree—continued.**

petitioner had knowledge of the decree where the summons was not duly served. **SANGU IYER v. SUBBIAH IYER, M.W.N. 1912, 361.**

(3)—*Distinction between cases decided ex parte in the absence of one of the parties after first hearing and those decided in the absence of one of the parties at adjourned hearing.*—There is a distinction made by the Code of Civil Procedure between cases decided *ex parte* in the absence of one of the parties at the first hearing and cases decided in the absence of one of the parties at the adjourned hearing. **SITAL HARI BANERJEE v. HEERA LAL CHATTERJEE, 21 C. 269. (2 A. 67, R.)**

(4)—*Suit adjourned from one date to another—Court's convenience—Failure of Court to direct witnesses to appear on adjourned date—Decree ex parte on latter date—Defendant not prevented by sufficient cause from appearing—Appeal—Remand of suit—Court not bound to direct appearance of witnesses—Civ. Pro. Code, 1882, s. 162—Remand illegal—No appeal against order of remand—Appeal treated as revision—Civ. Pro. Code, 1908, O. XLIII, r. 1, cl. (a), O. XLI, r. 23.*—A Munsiff adjourned the hearing of a suit from one date to another, not at the request of parties but for want of time, but failed to direct the witnesses who were present to appear on the adjourned date of hearing. On the adjourned date, he passed an *ex parte* decree. An application to set aside the *ex parte* decree was refused. There being no appeal against the order of refusal, an appeal was preferred against the *ex parte* decree itself. The District Judge, on appeal, found that the defendants were not prevented by sufficient cause from appearing on the date fixed for hearing, but set aside the decree and remanded the case for disposal after giving the defendants an opportunity to adduce their evidence, on the ground that the District Munsiff failed to direct the witnesses who were present to appear on the adjourned date. *Held* that s. 162, Civ. Pro. Code, 1882, does not impose any such duty on the trying Court, and that the order of remand was made without jurisdiction. (24, M. 200, R.) *Held*, also that, as no appeal lies against the District Judge's order of remand, because O. XLIII, r. 1, cl. (a), Civ. Pro. Code, 1908, does not give an appeal against an order of remand which is not passed under O. XLI, r. 23, Civ. Pro. Code, 1908, the Civil miscellaneous appeal may be treated as a Civil Revision Petition. **VIJAYARAGHA REDDI v. KOMMARAPPA REDDI, 11 M.L.T. 199.**

(5)—*Ex parte decree—Decree, Affirmance of, by appellate Court—Non-contesting defendants' application to set aside ex parte decree, if maintainable in original Court—Civ. Pro. Code (Act XIV of 1882), ss. 57, 108—Plaint, Return of—Limitation Act (XV of 1877), s. 14—Suit, when instituted—Suit pending—Lease for a fixed term of years—Lessee's rights—Assam Land and Revenue Regulation (I of 1886) s. 8, cl. (b)—“Acquired”—Actual possession of, and settlement with, third person—Heirs of original settlement-holder, if can claim settlement—Khasiahs.*

**Ex parte Decree—continued.**

—When a decree is attacked by way of appeal to a superior Court, if the decision of the Court of appeal affirms that of the Court of first instance, the original decree becomes merged in the decree of the Court of appeal. But the application of this general principle may be modified by special circumstances. A decree was originally passed against the contesting defendants and *ex parte* against the others. The contesting-defendants alone appealed against the adverse decision. To that appeal, the only respondents were the successful plaintiffs. The appellate Court affirmed the decision of the original Court. A second appeal was presented to the High Court by the contesting defendants, and the only respondents there also were the plaintiffs. The second appeal was dismissed. The defendants, who had not entered appearance, then applied to the original Court, under s. 108 of the Code of 1882, to set aside the *ex parte* decree: *Held*, that the application to the original Court under s. 108 was maintainable (14 C.L.J. 42, F.; 13 C.L.J. 228, D.) *Held* also, that it was too late for the plaintiffs to raise the objection for the first time in the High Court as to the jurisdiction of the original Court to set aside the *ex parte* decree. The combined effect of s. 57 of the Code of Civil Procedure and s. 14 of the Limitation Act is, that, when the plaint is returned to be presented in a Court of competent jurisdiction, the suit is to be considered as instituted on the date of such presentation, and the plaintiff should amend the plaint so as to include all intermediate transactions between the date of the first presentation and the date of presentation to the competent Court. The Court may, for the sake of justice, take into consideration changes in title the *pendente lite*. (6 C.L.J. 74, 6 C.L.J. 102, R.) As against the non-appearing defendants, the suit was to be treated as pending under s. 14 of the Limitation Act, from the time when it was instituted up to the time when the plaint was ordered to be returned for presentation to the proper Court, irrespective of the proceedings by way of appeal at the instance of the contesting defendants, to which the non-contesting defendants were no parties. (3 W.R. 20, 16 W.R. 47, R.) A lease for a fixed term of years does not terminate before the expiration of the stipulated term, by the mere fact of the death of either the lessor or the lessee. Upon the death of the lessee, there is a transmissible interest, which vests in his heirs by succession. Before Assam Land and Revenue Regulation came into force, the rights of the parties were governed by the terms of the contract between the grantor and grantee, as also the customary rules of inheritance to which the parties were subject. The mere recognition by the grantor of a third person as successor of the original grantee does not prejudice the position of the heirs. Cl. (b) of s. 8 of Regulation I of 1886 applies to a case in which a person has acquired land, not merely because it has been directly settled with him by the Government, but also because he has



**Ex parte Decree—continued.**

obtained it from the original grantee by transfer, succession or otherwise. It includes a case in which a person, before the commencement of the Regulation, acquired the land by inheritance from a person with whom it had been settled by the Government under a lease for a term of not less than ten years. Upon the death of the person with whom the settlement for ten years was made in 1884, and in spite of the hostile possession of a third person after his death, his heirs became the owners of the interest originally vested in him, and as soon as the Regulation came into force on the 1st July, 1886, the heirs became land-holders within the meaning of cl. (b) of s. 8 of the regulation. Hence, upon the expiry of the term of ten years fixed in the lease of 1884, the interest of the heirs did not completely terminate. They were entitled to claim settlement from the Government, and their rights were not affected by settlement with a third person. (17 C. 819, R.) The name *santeng* is applied properly to persons resident in the Jaintia Hills; but they as also the residents of the Khasia Hills are properly known as Khasiahs. **HEDLOT v. KARAM, 15 C.L.J. 241=13 Ind. Cas. 377.**

(6)—*Stranger not to revive litigation, when ex parte decree was passed.*—A stranger would not be allowed to come in and revive litigation, decided *ex parte*, where no proceedings are taken against the *ex parte* decree by the person against whom it is made. **JUDOO NATH SIRCAR v. SREEMUTTY ELOKASHEE DABEE, 25 W.R. 420.**

(7)—*Fraud in decree—Effect on purchaser.*—The purchaser of an *ex parte* decree strongly tainted with fraud cannot be allowed to profit by it. **DOOLAR JHA v. RUNJEET ROY, 15 W.R. 340.**

(8)—*Ex-parte decree—Due service of summons, a condition.*—No legal decree can be passed *ex parte*, unless a Court be satisfied of the due service of the summons. **RAM LOCHUN SOOR v. NITYA KALEE DEBIA, 12 W.R. 210.**

(9)—*Bengal Act, III of 1870—Its applicability to the setting aside of ex parte decree in rent suit.*—Bengal Act III of 1870 does not apply to the setting aside of an *ex-parte* decree for arrears of rent passed by a Deputy Collector, and partially satisfied by attachment and sale of lessee's property; and where the sureties, on his death, object to the decree on the ground that summons has not been served on them. **AJODHYA RAM KHAN v. SREEMUT PAL, 19 W.R. 129.**

(10)—*Civ. Pro. Code, 1859, s. 170—Defendant summoned to give evidence—Failure to attend—Decision against defendant.*—In a case where defendant specially summoned to give evidence fails to attend, and there is evidence to support the plaintiff's case, the Court must decide against the defendant, **ISUN CHUNDER GHOSE v. HURISH CHUNDER BANERJEE, 12 W.R. 369=9 B.L.R. 218, Note.**

**Ex parte Decree—continued.**

(11)—*Ex parte decree, suit to set aside—Application under s. 108, Civ. Pro. Code, 1882, Failure of—Guardian ad litem, Appointment of, without consent—Effect of—Mortgage by father—Father, if can be appointed guardian ad litem of minor son—Minor not properly represented, Effect of—Mortgage for legal purpose—Proper decree—Relief not claimed, Granting of.*—The failure of an application to set aside an *ex parte* decree does not bar a subsequent suit for declaration that the decree is not binding upon the plaintiff on the ground of fraud or for any other valid reason. No person can be appointed guardian *ad litem* without his consent. Merely because a plaintiff chooses to propose a certain person as guardian *ad litem* of an infant defendant, it does not follow that such person is bound to accept the office. It is the duty of the plaintiff to secure the consent of the proposed guardian. A father, professing to act as the head of a Mitakshara family, executed a mortgage of the family property. In a suit by the mortgagee to enforce the security against the father and the infant son: *Held*, that the father could not be appointed guardian *ad litem*, as his interest was adverse to that of the son. If a minor defendant is sufficiently represented by a guardian *ad litem*, a decree passed against him cannot be successfully impeached. But if his interest has not at all been protected, the decree is inoperative against him. A mortgagee brought a suit against his mortgagor, professing to act as the head of a Mitakshara family, and his minor son, for enforcement of the mortgage security. The minor was not represented. A decree was obtained against the father after trial on the merits and an *ex parte* decree against the son. The minor then brought a suit for declaration that the *ex parte* decree was fraudulent, collusive and not binding upon him. The plaintiff was not born, when the mortgage was executed by the father for a legal purpose. *Held*, that the equity of redemption which was vested in the plaintiff by his birth was not extinguished by the proceedings under the mortgage decree, and that the plaintiff was entitled to redeem, though no express prayer for redemption was made in the plaint. **BAL KISHAN LAL v. TOPESWAR SINGH, 15 C.L.J. 446.**

(12)—*Ex parte decree—Application for setting aside—Period of limitation expired—Review—"Other sufficient cause"—Service notice—Sepoy—Notice received without objection without the intervention of Commanding Officer—Civ. Pro. Code (Act V of 1908) O. V, r. 28 O. XLVII, r. (1)—Limitation Act (IX of 1908), sch. I, art. 169.*—Where the period prescribed for making an application for setting aside an *ex parte* decree has expired, the party aggrieved by the decree is not entitled to ask for review of the judgment. The Legislature having expressly provided a party aggrieved by an *ex-parte* decree a method for obtaining justice, it is highly improbable that such person had another remedy also by way of review. A party can only ask for a review of judgment on the ground of "other sufficient cause," if he is able



**Ex parte Decree—continued.**

to show that the judgment is incorrect. Where, a notice of appeal was sent to a *sepoy* respondent without the intervention of his Commanding Officer, and the *sepoy* received it without demur, he cannot subsequently urge, in an application to set aside the *ex parte* decree, that he was not duly served, the notice not having been sent through his Commanding Officer. **SANTU v. ARJAN DAS, 13 Ind. Cas. 318.**

(13)—*Judgment by default — Application to set aside—Civ. Pro. Code, 1859, ss. 114, 119—Payment of costs of hearing.*—On an application made under s. 119 of Act VIII of 1859, to set aside a judgment by default. *Held*, that the words "prevented by any sufficient cause from appearing" should be read so as to include the case of the absence of the plaintiff's counsel or attorney, when such absence has been caused by a *bona fide* mistake. Under such circumstances a judgment by default, under s. 114, was set aside, upon payment by the attorney of the plaintiff of the costs of the hearing. **ORIENTAL FINANCE CORPORATION, LIMITED v. THE MERCANTILE CREDIT AND FINANCE CORPORATION, 2 B.H.C. 267. [D., 13 B. 12.]**

(14) *Judgment by default — Civ. Pro. Code, 1859, s. 119.*—On appeal from the rejection of an application made, under s. 119 of Act VIII of 1859, to set aside a judgment by default. *Held* that, in order to satisfy the Court "that the plaintiff was prevented by any sufficient cause from appearing," it was enough to show that there had been a *bona fide* mistake, which was not unreasonable. **HARDATRAI SHRIKISANDAS v. VICTORIA FINANCE AND BULLION ASSOCIATION, 3 B.H.C.O.C. 60. [D., 13 B. 12; Expl., 6 B. 304.]**

(15)—*Application for setting aside ex parte decree—Where security is required on such application—Whether such security should not be excessive — Whether such security should not be in excess of the value of the mortgaged property in suit.*—Where on an application to set aside an *ex parte* decree passed in a suit on a mortgage bond, whereby property is mortgaged for Rs. 6,000, which is presumably worth more than that sum, an order is made directing the *ex parte* decree to be set aside on the defendants furnishing security for Rs. 10,000, and on their failure to do so, upholding the decree. *Held* that the security required by the lower Court was excessive, and it was ordered that the security be reduced to Rs. 1,000 to be furnished within a month from the date of the order and that, on such security being given, the case should be restored to the file for trial. **MAUNG SEIN v. ARMUGAM CHETTY, 14 Bur.L.R. 214.**

(16)—*Limitation Act, 1877, s. 4, sch. II, art. 179 — Joint mortgage-decree, set aside against one defendant as being ex parte—Re-hearing—Decree supplementing previous decree — Execution—Limitation — Res judicata — If applies when previous application different—Proper procedure in dealing with decree passed ex parte against some defendants but on contest against others.*—Plaintiff sued on a mortgage claiming a decree against several defendants jointly and

**Ex parte Decree—continued**

the suit was decreed, but the decree as regards one of the defendants was set aside on the ground that no notice had been served on her, and at the fresh trial a decree was passed against her. The decree as against the other defendants had in the meantime been made absolute. On an application for an order absolute against all the defendants on the basis of the decree against the female defendant, the Court disallowed it except as against the female defendant. *Held*, on an application for execution of both the decrees jointly, that the later decree supplemented and completed the decree previously passed, and limitation in regard to the application ran from the date of the later decree. That the decree-holders were not estopped from making the present application, as it was different from the application, for order absolute which was based on only one of the two decrees, and was dismissed as against the defendants who were not parties to it. "It might have been more in accordance with strict procedure if the Court had set aside the whole judgment and proceeded to re-try the case against all the defendants, but the irregularity in the procedure worked no wrong and was of no consequence." **HAJI ASHFAQ HUSAIN v. LALA GAURI SAHAI, 15 C.W.N. 370, P.C.=8 A.L.J. 332=9 M.L.T. 380=13 C.L.J. 351=13 Bom. L.R. 367.**

(17)—*Account, Suit for—Preliminary decree passed, after taking evidence of defendant on commission, if an ex parte decree—Order setting aside such decrees, if made without jurisdiction—Remedy, where fraud is alleged—Final or supplementary decree settling the account in the absence of defendant, if ex parte—Order setting such decree aside, if without jurisdiction—Account, Decree for, Nature of.*—Where the evidence of the defendant was taken and considered by the Court or, in other words, the case of the defendant was partially entered into and the Court passed its judgment on the merits of the case, such decree cannot be held to be *ex parte*. If the decree was obtained by fraud, the defendant would have his remedy by way of review or by a suit properly framed for the purpose. A decree for accounts is not a mere direction to enquire and report the proceeds and must always proceed upon the assumption that the party calling for it is entitled to the sum found due. It is a decree affirming his rights, only leaving it to be enquired into how much is due to him from the party accounting, and such a decree directing the defendant to account is a final decree and one which is appealable to the Privy Council. A final decree settling the amount due, if passed in the absence of the defendant who was unavoidably absent and was unrepresented at the final hearing, is a decree passed *ex parte* and is liable to be set aside, and opportunity should be given to the defendant to be heard on the question of how much is due from him. **JASOD DASSI v. RAMESHWARI DASSI, 14 C.L.J. 603. (35 C. 1023, 3 M.I.A. 175, 18 I.A. 6, F.)**

(18)—*Limitation Act (IX of 1908), s. 3, sch. II, art. 164—Ex parte decree—Application to*



**Ex parte Decree—continued.**

*set aside—Applicability of Act.*—Art. 164, Limitation Act, 1908, is not inapplicable to an application to set aside an *ex parte* decree made after the Act came into force, when the suit was decided before the Act came into force. S. 3 of the Act clearly lays down that the provisions of the Act apply to all suits, appeals and applications filed after the coming into force of the Act. **MUSSAMMAT ZAIB-UL-NISA v. MUSSAMMAT GHULAM FATIMA, 70 P.L.R. 1911.**

(19)—*Ex parte decree—Summons served on defendant's brother—Defendant living far away—Ex parte decree set aside.*—Where the defendant was not at the house at T, where the summons was left with his brother, and the defendant was then living at A, far away from T, and no attempt was made to serve him personally, *held*, that the decree passed against him *ex parte* ought to be set aside. **SANKARA BHATTA v. SUBRAYA BHATTA, 9 M.L.T. 358 = 9 Ind. Cas. 763.**

(20)—*Ex parte decree, grounds for setting aside of—Civ. Pro. Code, 1908, O. IX, r. 13.—Held*, that, if a defendant against whom a decree has been passed *ex parte*, has resort to the special summary remedy provided by O. IX, r. 13, Civ. Pro. Code, he must satisfy the Court that in fact the summons was not duly served upon him or that he was prevented by sufficient cause from appearing when the suit was called on for hearing. *Held further*, that, in the absence of any of the two grounds mentioned above, the Court has no jurisdiction to restore the suit to the pending file, merely because the suit was one for possession of land. **DURGA BAKHSH BABU v. MAHABIR, 14 O.C. 111. (26 M. 599, 30 M. 274, D.; 46 P.R. 1905, 10 Bom. L.R. 904, R.; 23 A. 99, F.)**

(21)—*Decree—Ex parte against defendants—Set aside against some—On re hearing, Fresh decree prepared against all—Merging of former decree in latter.*—In a suit for sale upon a mortgage, as also in a suit for foreclosure of a mortgage, there can be but one decree. In a suit for sale brought against P and his sons R and B, and the sons of R and B, a decree was passed on 30th April, 1897, in the absence of P and B. P's application for restoration of the case was dismissed. Thereafter B and his sons applied for restoration of the case and the case was restored. During the trial of the case P and others were not parties. A decree was, however, passed against all the defendants including P and others whose applications had been dismissed. They brought a suit for declaration that the Court had no jurisdiction to pass the decree against them. *Held* that the Court had full jurisdiction to pass the decree of 1902 and the effect of it was that the decree of 1897 merged in it. **RAM RATAN GIR v. PRAGDAT PANDE, 8 A.L.J. 364 = 9 Ind. Cas. 838. (29 A. 623, F.; 8 C.W.N. 473, D.)**

(22)—*Ex parte decree—Appeal against ex parte decree, Arguments, permissible in support of—Civ. Pro. Code (Act XIV of 1882), ss. 108 and 540.*—Although a person, against whom

**Ex parte Decree—continued.**

an *ex parte* decree has been made, is entitled to appeal against it, instead of resorting to the procedure prescribed by s. 108 of the Code, yet, his contentions on appeal must be limited either to questions of law or to such arguments as arise upon the record as it stood when the *ex parte* decree was passed. He is not entitled to ask the appellate Court to accept the appeal on grounds which could be urged in an application under s. 108 and to remand the suit for re-hearing it. **JADU NATH BASAK v. RAM NARAYAN, 12 O.C. 25 = 1 Ind. Cas. 329. (4 A. 387, 17 B. 733, 23 A. 167, R.; 8 C. 272, 23 C. 738. Appr.; 30 M. 54, Diss.)**

(23)—*Civ. Pro. Code, (Act XIV of 1882), s. 108—Ex parte decree, Setting aside—Non-service of summons—Fraud—Separate suit to set aside ex parte decree—Right of suit, when arises.*—It is not open to the defendant, against whom an *ex parte* decree has been passed, to challenge the decree in an independent action, on the ground that the summons was not served on him. His remedy, if he wishes to set aside the *ex parte* decree on that ground, is by an application under s. 108, Civ. Pro. Code, 1882. He cannot have that decree set aside in an independent action, except by establishing that the decree was obtained by fraud. **LAKSHMINARAIN DUTT v. FAZIL MAHOMED, 7 Ind. Cas. 163. (21 C. 605, 28 C. 475, 29 C. 395, 21 A. 279, Rel. on.)**

(24)—*Fraud—Ex parte decree—Bona fide, belief.*—Where it is alleged that an *ex parte* decree was obtained by fraud, and it is shown that the defendant did not reside at the place where the summons was served, it is not fraud on the part of the plaintiff if he had a *bona fide* belief that the defendant resided there. **MAUNG NGWE YA v. ALAGAPPA CHETTY, 8 Ind. Cas. 599.**

(25)—*Civ. Pro. Code (Act XIV of 1882), s. 108—Application to set aside ex parte decree—Applicant sued as partner but not served personally—Sufficient cause.*—When a defendant, against whom an *ex parte* decree has been passed as one of the partners without the summons having been served on him individually, applies for the setting aside of the *ex parte* decree, and he denies that he is a partner of the other defendants, the Court should set aside the *ex parte* decree and re-hear the case on its merits. It should not put upon the defendant the burden of proving that he is not a partner, before setting aside the *ex parte* decree. To do so would be trying in the miscellaneous application a question arising on the hearing of the case on its merits. Such procedure is not contemplated by s. 108 of the Civ. Pro. Code, 1882. **CHOKALINGAM CHETTY v. SOOBRAMANIAN CHETTY, 8 Ind. Cas. 448.**

(26)—*S. 108, Civ. Pro. Code, 1882—Ex parte decree—Application to set aside, if may be heard pending appeal by the defendant.*—The mere fact that an appeal has been preferred from an *ex parte* decree and is pending does not



**Ex parte Decree—continued.**

preclude a defendant, against whom the decree was passed from applying, under s. 108, Civ. Pro. Code, 1882, for an order to set it aside. **DAMADAR MANNA v. SARAT CHANDRA DHAL**, 13 C.W.N. 845=3 Ind. Cas. 468. (12 C.W.N. 885, *Affirmed*.)

(27)—*Ex parte decree—Application to set it aside after confirmation on appeal.*—Plaintiff's suit was decreed *ex parte*. Defendant's appeal against the decree was rejected. Subsequently, defendant succeeded in his application to the original Court to set aside the *ex parte* decree, and the order setting aside the *ex parte* decree was upheld on appeal. *Held*, that the original Court had no authority to set aside the *ex parte* decree, after it had been confirmed on appeal. The Chief Court, on revision, set aside the decrees of the lower Courts and directed the original Court to try the case on the merits. **MEHDI v. BAHADAR**, P.L.R. 1900, 407.

(28)—*Satisfaction—Setting aside—Civ. Pro. Code, s. 108.*—Satisfaction of an *ex parte* decree does not disentitle a judgment-debtor from applying to a Court to set it aside. **ZENDOLAL v. KISHORILAL**, 1 Bom. L.R. 213=23 B. 716.

(29)—*Setting aside—Presidency Small Cause Court.*—The Court of Small Causes at Bombay has inherent power to deal with an application to set aside an order made *ex parte* and to set it aside upon a proper cause being substantiated. **TYEB BEG v. ALLIBHAI**, 8 Bom. L.R. 803=31 B. 45.

(30)—*Setting aside of*—Where an *ex parte* decree is passed against more defendants than one, and the decree is executed against one of them only, then that is not an execution of process for enforcing judgment against the others within the meaning of Art. 164 of the Limitation Act, 1877. The latter can, therefore, apply to have the *ex parte* decree set aside within thirty days of the date of any process in execution against them. **HANMANT v. SHANKAR**, 9 Bom. L.R. 323=31 B. 303.

(31)—*Ex parte decree not illegal or invalid*—The mere fact that a decree is obtained *ex parte* does not make it illegal or invalid. **VISENU v. DATTU**, 9 Bom. L.R. 1099.

(32)—*High Court Rule 111.*—The plaintiff is not entitled to have a suit set down for an *ex parte* decree before the date filed in the summons for the hearing of the suit, even though the defendant has not filed his written statement within four weeks from the date of the service of the summons as required by Rule 111. **DHIRAJLAL P. SHROFF v. HORMUSJI E. BOTTLEVALLA**, 10 Bom. L.R. 301=32 B. 534.

(33)—*Civ. Pro. Code (Act V of 1908), s. 11—Res judicata—Finally decided—Ex parte decree—Decree executed—Fraud—Minor's right to relief on the ground of fraud by fresh suit not allowed—Limitation Act (IX of 1908), sch. II, art. 95—Limitation—Suit to set aside decree on the ground of fraud.*—In 1900

**Ex parte Decree—continued.**

an *ex parte* decree for possession of land was passed against the defendants, who were minors and represented by their cousins as guardians *ad litem*. The decree was executed and mutation of names was effected in 1902. In 1904 a decree for produce was passed against the defendants. In the present suit filed in 1907, the defendants sued to recover possession of the land and alleged that the *ex parte* decree was a nullity and they were not bound by it and the subsequent proceedings, for the guardians had colluded with the opposite side. *Held*, that the suit was not maintainable, until and unless the *ex parte* decree against them was set aside. The right as to the possession of the land was *res judicata* so long as that decree subsisted. *Prima facie* a suit to set aside the *ex parte* decree would be barred under art. 95, Limitation Act. **DIAL SINGH v. ALLAH DITTA**, 47 P.L.R. 1910=8 Ind. Cas. 232. (P.L.R. 1900, 431, R.)

(34)—*Application to set aside ex parte decree previous to execution.*—A defendant in an *ex parte* suit may apply for an order to set aside the *ex parte* decree against him, previous to the plaintiff's taking out execution of his decree. **SIRDAR GURBAKSH SINGH v. HURBUNS**, 152 P.R. 1879.

(35)—*Hearing adjourned at defendant's request—Absent defendant not precluded from showing sufficient cause to set aside decree.*—A defendant who got the hearing adjourned for his own benefit and who was absent at the adjourned hearing is not precluded from showing sufficient cause to set aside the *ex parte* decree passed against him for default. The question of what is sufficient cause, is one of fact dependent on the circumstances of each case. **SHANKAR DASS v. CROHAN**, 26 P.R. 1879.

(36)—*Application to set aside ex parte decree—Decree amount need not be deposited.*—The defendant in an *ex parte* case, who, within 30 days after the execution of the process for executing the *ex parte* decree of a Small Cause Court, applies for an order to set aside the decree, is not bound to deposit in Court the decree amount, and the Court has a discretion to pass an order as to costs. **MAMoola v. RAM GOPAL**, 59 P.R. 1871.

(37)—*Summons not good in law—Defendant entitled to new trial.*—The defendant in an *ex parte* case entitled to a new trial, if the summons on him is not good in law. **GOORMOOKH SINGH v. KOORA**, 79 P.R. 1868.

(38)—*Suit not to be heard ex parte at a place other than that mentioned in the summons.*—A suit should not be decided *ex parte* when it is taken on the day appointed, at a place other than the one where the defendant was summoned to appear. **GOORDIAL SINGH v. MUHEED DASS**, 61 P.R. 1867.

(39)—*In ex parte suits, plaintiff to establish a prima facie case—Slight evidence sufficient.*—The plaintiff in an *ex parte* cause, must produce sufficient evidence to show completely, on what



**Ex parte Decree—continued.**

the claim is based, and must make out a *prima facie* case, although slight evidence of what is not contradicted, may be sufficient. He must not leave any main portion of his case to be taken for granted. *RADHA LALL v. MOHKUM DASS*, 85 P.R. 1886.

(40)—*Decree by false personation is an ex parte one.*—A decree obtained by falsely personating the defendant is an *ex parte* decree under s. 119, Act VIII of 1859. *JAMAL DEEN v. NIHAL SINGH*, 87 P.R. 1869.

Setting aside—Right of minor—*See* ACT X OF 1897, s. 6, sch. I, art. 164, 8 Ind. Cas. 543.

Order under s. 108, Civ. Pro. Code, 1882, setting aside *ex parte* decree, whether appealable—*See* APPEAL—ORDERS, 22 C. 981.

*See* APPEAL TO PRIVY COUNCIL—GENERAL, 23 A. 220=28 I.A. 28=5 C.W.N. 153, P.C.

Execution of—Reversal of decree—Reversal of execution sale—*See* APPELLATE COURT—DUTY OF APPELLATE COURT, 6 C.L.J. 92.

Setting aside of—Sale—Appeal against order setting aside sale—*See* CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 90, 6 C.L.J. 102.

Sale under—Decree set aside—Second decree satisfied—Suit for possession by judgment-debtor—Not barred—*See* CIV. PRO. CODE, 1908, ss. 47, 144 (1), 6 A.L.J. 383=31 A. 364=1 Ind. Cas. 744.

Order setting aside *ex parte* decree not to be raised as ground of appeal from decree in suit—*See* CIV. PRO. CODE, 1908, s. 104, O. XLIII, r. 1, s. 105, O. IX, r. 13, 25 A. 280=A.W.N. 1903, 38.

Application to set aside—Duty of Court—*See* CIV. PRO. CODE, 1908, s. 115, 9 Ind. Cas. 32=9 M.L.T. 268=21 M.L.J. 451.

Court's inherent powers to set aside—*See* CIV. PRO. CODE, 1908, O. V, r. 6, 12 Bom. L. R. 462=6 Ind. Cas. 901.

Appeal from decree preferred by contesting defendants—Jurisdiction of first Court to set aside decree passed *ex parte* against other defendants—*See* CIV. PRO. CODE, 1908, O. V, rr. 9, 12, 17, O. IX, r. 13, 9 Ind. Cas. 189=15 C.W.N. 399.

Application to set aside *ex parte* decree—Irregularity in service of summons—*See* CIV. PRO. CODE, 1908, O. V, r. 17, O. IX, r. 13, 24 A. 302=A.W.N. 1902, 68.

Practice—Substituted service of summons—Setting aside *ex parte* decree—*See* CIV. PRO. CODE, 1908, O. V, rr. 19, 20 (1), O. IX, r. 13, 2 B. 449.

Advocate appearing and applying for adjournment and then withdrawing on the application being refused—*Ex parte* decree—Application for setting aside—Sufficient reason—*See* CIV. PRO. CODE, 1908, O. IX, r. 1, O. XVII, r. 3, 10 Ind. Cas. 770.

**Ex parte Decree—continued.**

Written statement filed—Council stating no instructions—*See* CIV. PRO. CODE, 1908, O. IX, rr. 7, 6 and 13, 6 B.L.R. 688.

Against several defendants—Decree set aside as against one on his application—Effect—Case if re-opened as against other contesting defendants—*See* CIV. PRO. CODE, 1908, O. IX, rr. 11, 13, 18 B. 142.

Application to set aside *ex parte* decree—Application by one of two defendants—Defence not common to both defendants—Decree set aside *in toto*—Validity of order—*See* CIV. PRO. CODE, 1908, O. XIV, r. 4, 26 M. 604=13 M.L.J. 308.

Setting aside—Limitation—*See* CIV. PRO. CODE, 1908, O. XXIX, rr. 2, 3, 12 Bom. L. R. 730.

Jurisdiction to set aside *ex parte* decree against a defendant, when another defendant's appeal against the decree dismissed—*See* CIV. PRO. CODE, 1908, O. XLI, r. 21, 15 C.W.N. 798.

Unexecuted and barred by limitation—Evidence of title—*See* EVIDENCE—DECREES, JUDGMENTS AND PROCEEDINGS IN SUITS, Agra, F.B., 78=Ed. 1874, 60.

Effect of—*See* FOREIGN COURT—JUDGMENT OF, 3 Ind. Cas. 190=19 M.L.J. 459=32 M. 469.

Suit based on—*Onus*—*See* FOREIGN COURT JUDGMENT OF, 41 P.L.R. 1910=165 P.W.R. 1909.

Decree set aside as against one of several joint judgment-debtors—Decree passed subsequently against exempted party—Execution of decree—*See* LIMITATION—GENERAL, A.W.N. 1907, 204=4 A.L.J. 552=29 A. 623.

Application to set aside—Knowledge of the decree—Limitation—*See* LIMITATION ACT, 1908, art. 164, 11 Bom. L.R. 1296=4 Ind. Cas. 586.

Application for refund of amount of an—Subsequently set aside—*See* LIMITATION ACT, 1908, art. 181, 28 C. 113.

*See* LIS PENDENS, 56 P.R. 1896.

Notice of appeal—Refusal to receive—Copy not affixed—No service—*Ex parte* decree—Effect—*See* PROCESS, 16 B. 117.

Transfer of—Payment of decree amount into executing Court—Application to set aside, made in Court passing decree, before entering satisfaction of decree, whether proper—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 17, 54 P.R. 1910=6 Ind. Cas. 945=141 P.L.R. 1910.

Conditions precedent to setting aside—Duty of Court where conditions not fulfilled—Defect whether cured by subsequent deposit of decretal amount—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 25, 5 A.L.J. 295=A.W.N. 1908, 141.

Applicability of doctrine of *res judicata* to—*See* RENT, SUIT FOR, 12 Ind. Cas. 329.



**Ex parte Decree—concluded.**

Not final decision—See RES JUDICATA—ADJUDICATIONS, 9 M.L.J. 60.

Whether res judicata—See RES JUDICATA—ADJUDICATIONS, 78 P.R. 1883.

How far operates as *res judicata*—See RES JUDICATA—MATTERS IN ISSUE, 2 Ind. Cas. 11.

In rent suit—*Res judicata*—See RES JUDICATA—MISCELLANEOUS, 6 Ind. Cas. 860.

Application for setting aside, rejected—No appeal preferred—Fresh suit for setting aside *ex parte* decree—*Res judicata*—See RES JUDICATA—MISCELLANEOUS, A.W.N. 1882, 4.

By appellate Court in favour of appellant—Revisional powers of High Court—See REVISION—GENERAL, A.W.N. 1885, 261.

See REVISION—GENERAL, 114 P.R. 1883.

Sale in execution of *ex parte* decree subsequently set aside, if a nullity—See SALE—SALE IN EXECUTION OF DECREE—GENERAL, 15 C.W.N. 875.

*Ex parte* decree, suit to set aside—See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—PRACTICE AND PROCEDURE OF, 4 C. 318 = 3 C.L.R. 482.

Jurisdiction of Registrar of Presidency S.C. Court to set aside—See SMALL CAUSE COURT, PRESIDENCY TOWNS, JURISDICTION OF—GENERAL, 30 C. 588 = 7 C.W.N. 547.

Second appeal—See SPECIAL OR SECOND APPEAL—APPEAL AGAINST ORDERS WHEN LIE AND WHEN NOT, 16 B. 117.

Application to set aside—See SUMMONS, Bourke, O.C. 25 = Cor. 151.

**Ex parte Hearing.**

See CIV. PRO. CODE, 1908, O. IX, r. 6. O. V, r. 6, 1 L.B.R. 226.

Defendant summoned as witness for plaintiff—Failure of defendant to appear—*Ex parte* proceedings against defendant—Legality—See WITNESS—GENERAL, 3 Ind. Cas. 45.

Evidence taken at *ex parte* hearing—See WITNESS—EXAMINATION OF WITNESSES, 3 B.L.R. A.C., 273 = 12 W.R., 130.

**Ex parte Injunction.**

See INJUNCTION.

(1)—The Court has jurisdiction to grant an *ex parte* injunction but in exercising the discretion the greatest care should be exercised. HARI v. SECRETARY OF STATE, 5 Bom. L.R. 481.

**Ex parte Order.**

See EX PARTE DECREE.

(1)—Appeal—*Ex parte* order absolute—Application to set aside *ex parte* order—No appeal against order dismissing application—Civ. Pro. Code (Act XIV of 1882), ss. 100, 108,

**Ex parte Order—concluded.**

588, cl. (9)—The kind of *ex parte* decree to which s. 108, Civ. Pro. Code, 1882, refers, is clearly the decree against a defendant referred to in s. 109, and that section refers to the initial stage of a suit when only the plaintiff appears. Therefore, an *ex parte* order absolute for foreclosure cannot be treated as a decree *ex parte* under s. 100; and an application to set it aside cannot come within s. 108. Consequently an order refusing such application is not appealable under cl. (9) of s. 588. KADIR BUX BAIPARI v. ABDUL ALI FAKIR, 2 Ind. Cas. 67. (32 C. 253, 2 C.W.N. 676. R.)

*Ex parte* order—Restoration—Revision—See CIV. PRO. CODE, 1908, O. IX, rr. 6, 13, O. XVII, rr. 2, 3, s. 115, 36 C. 189 = 1 Ind. Cas. 741.

Order refusing to set aside *ex parte* dismissal of application to set aside sale—Confirmation of sale—Appeal—See CIV. PRO. CODE, 1908, O. IX, r. 9. O. XXI, rr. 90, 92, s. 104, O. XLIII, r. 1, 6 Ind. Cas. 148.

Admitting appeal—Power to set aside—See LIMITATION ACT, 1908, ss. 4, 5, 159 P.L.R. 1901.

Admitting appeal—Application to discharge—Delay, Effect of—See LIMITATION ACT, 1908, ss. 4, 5, 12, 12 C.W.N. 25.

**Expediency.**

Political—No ground for dismissing suit—See RES JUDICATA—COMPETENCY OF COURT, 9 C.W.N. 357, P.C. = 7 Bom. L.R. 97 = 2 A.L.J. 135 = 28 M. 42.

**Expert Evidence.**

(1)—*In admiralty cases.*—In admiralty cases the expert evidence should be strictly confined to questions of navigation and kindred questions, i.e., it must be expert evidence and nothing more. CLAN SHAW v. CASHMERE, 1 Bom. L.R. 570.

(2)—*In handwriting.*—A solicitor who makes a special study to qualify himself as an expert in handwriting, is entitled to a special remuneration for his work in so qualifying himself. DAHIBAI v. SUNDERJI, 9 Bom. L.R. 819 = 31 B. 430.

(3)—*Expert evidence, when relevant—Value of such evidence.*—The opinion of an expert on facts proved or admitted is only relevant when the Court has to form an opinion on a point of science or art. Expert opinion even on admitted or proved facts will differ and then the Court has to decide which opinion it will rely on. But when the facts are not admitted, the Court has first to come to a conclusion on the evidence as to what facts have been proved and then apply to such facts the various expert opinions which have been offered. But if it is not a point of science or art, the Court or jury can form an opinion without expert evidence though the line where there no longer remains a point of science or art on which the Court



**Expert Evidence—concluded.**

has to form an opinion is not always very clearly defined. *MONOSSEH v. SHAFURJI*, 10 Bom. L.R. 1304.

Advantage of expert opinion regarding value of land—See ACT I OF 1894, s. 18, 32 C. 343.

Will challenged—Examination of medical experts to test value of evidence of attending physician—Examination of expert in Bengali language and legal terms—See EVIDENCE ACT, 1872, ss. 3, 45, 101, 135, 16 C.W.N. 266.

Evidence of experts—Whether admissible on questions of Hindu Law—See HINDU LAW—ADOPTION, 16 M.L.J. 178=29 M. 437.

Opinion of handwriting expert without examination in Court, if admissible—See WILL—EXECUTION, 15 C.W.N. 728.

**Experts.**

With special skill employed to supply particular boilers—Duty to exercise skill without relying on others—Failure—Negligence—Damages—See CONTRACT ACT, 1872, s. 24, 13 C.W.N. 59=1 Ind. Cas. 351.

**Expropriatory Tenancy.**

See LANDLORD AND TENANT.

(1)—Rent payable by an ex-proprietary tenant—Person entitled to receive—Land Revenue Act (III of 1901), s. 36—Rent Act (Oudh), ss. 7-A and 126.—The respondent sold his share in a village to the appellant and became an expropriatory tenant of land which had been his *sir*, and the rent payable therefor was determined under s. 36 of the Land Revenue Act. *Held*, that the respondent was the tenant of the appellant alone, and not of all the co-sharers in the village, and therefore the appellant alone was entitled to maintain a suit for arrears of rent against the respondent. *CHHOTE LAL v. RAMADHIN*, 13 O.C. 70=5 Ind. Cas. 945.

Ex-proprietary tenants mortgaging trees to Government for *takvi* advances—Relinquishment of their rights to zamindar—Right of Government—See ACT XII OF 1884, s. 5, 26 A. 540=A.W.N. 1904, 101=1 A.L.J. 261.

See U.P. ACT, XVIII OF 1873, ss. 7, 9, 2 A. 735.

Occupancy tenant and ex-proprietary tenant not same—See U.P. ACT XII OF 1881, s. 7, 20 A. 219, F.B.=A.W.N. 1898, 47.

See U.P. ACT XII OF 1881, s. 7, 8 A. 256.

See U.P. ACT XII OF 1881, ss. 7, 9, 7 A. 633, F.B.=A.W.N. 1885, 185.

Creation of a mortgage by an—Not an act within s. 93 (b)—See U.P. ACT XII OF 1881, s. 56, 93 (b), 9 A. 244=A.W.N. 1887, 29.

Agreement to surrender ex-proprietary rights—Possession not delivered—Suit for damages for breach of contract—See U.P. ACT II OF 1901, ss. 10, 20, 83, 8 A.L.J. 826.

**Expropriatory Tenancy—concluded.**

Exchange of Zemindari between co-sharers—Rights of ex-proprietary tenants—See U.P. ACT II OF 1901, ss. 10, 202, 8 A.L.J. 329.

Application for fixing rent of ex-proprietary holding made under the old Act—Order passed after the new Act—Subsequent suit for arrears of rent for a period prior to the order—Effect of order—See U.P. ACT III OF 1901, ss. 3, 87, 91, 2 A.L.J. 206.

Proprietary title—Extinguishment—See CIV. PRO. CODE, 1908, O. I, rr. 8 (2), 10 (2), (3), (5) and (11), 12, 2 Ind. Cas. 848.

Determination of question as to expropriatory tenancy—Jurisdiction—See JURISDICTION OF REVENUE COURTS, 8 Ind. Cas. 857.

Sale of ex-proprietary rights—Recovery of Nazrana—See LEASE—GENERAL, 6 A.L.J. 555=2 Ind. Cas. 261.

Agreement to pay rent at a stipulated rate—Rent not determined by Revenue Court—Fair rate—See RENT, 6 A.L.J. 161=5 M.L.T. 347=3 Ind. Cas. 31.

Liability of, to pay rent fixed by Revenue Courts—See RES JUDICATA—CAUSE OF ACTION, 15 O.C. 45.

**Ex-proprietor.**

(1)—Right to sell a house—Common law—Sale of site and materials—*Wajib-ul-arz*.—A *wajib-ul-arz* provided that an ex-proprietor had a right to sell the materials of the house; held that the terms implied that the site could not be sold and a purchaser from the ex-proprietor could not acquire the right to live in the house. Such was also the common law of these provinces. *JAMNA PRASAD v. PANNA LAL*, 4 A. L.J. 754=A.W.N. 1907, 287. (20 A. 248, R.)

Extending St. 9 Geo. 4 C. 14.

See ACT XIV OF 1840.

**Extension of Time.**

Application for extension of time—Notice if necessary—See ACT VI OF 1882, ss. 169, 214, 25 M. 576.

Giving security in appeal—Extension of time—Powers of Court—See APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE, 10 C. 557, P.C.=11 I.A. 7.

See APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE, 2 C. 128.

See CRIM. PRO. CODE, 1898, s. 195, 8 C.W. N. 797.

Conditional decree for payment of sum certain within fixed time—Court cannot extend time—See DECREE—ALTERATION OR AMENDMENT OF DECREE, 13 A. 400=A.W. N. 1891, 150.

For payment—See DECREE—DECREE, FORM OF, 26 C. 639=3 C.W.N. 628.



**Extension of Time—concluded.**

Till the opening day where time fixed for deposit of decretal amount ends on a holiday—*See* HOLIDAY, 3 C.L.J. 339=10 C.W.N. 535.

Bona fide mistake of vakil—Extension of time—Payment of deficient stamp duty—*See* LEGAL PRACTITIONERS — PLEADER—MISCELLANEOUS, 9 M.L.J. 348.

Application for—For filing paper books—Sufficient cause to be shown—*See* PRACTICE AND PROCEDURE, 27 C. 57, 27 C. 60, Note.

*See* PRACTICE AND PROCEDURE, 9 B. 250.

Process fees—For payment of process fees—*See* RULES—RULES OF HIGH COURTS AND SUPREME COURTS, N.W.P. A.W.N. 1897, 157.

**Extinguishment of Easement.**

*See* EASEMENTS ACT, 1882, ss. 47, 15, Expl. 1, 9 Bom. L.R. 1101.

**Extra Assistant Commissioner.**

*See* BUR. ACT XI OF 1889, L.B.R. 1893—1900, 285.

**Facsimile.**

Impression of—Of testator's signature on will—Validity—*See* SUCCESSION ACT, 1865, s. 50, 25 C. 911=2 C.W.N. 642.

**Factorles Act.**

*See* ACT XV OF 1881.

**Factors Act.**

*See* ACT XX OF 1844.

**Factory.**

Flour mill worked by camel—Objectionable smell arising from negligent user—Nuisance—Right of Municipality—*See* BOM. ACT III OF 1901, s. 151, sub-s. (1) (a), (2) and (3), 9 Ind. Cas. 886.

**Factum Valet.**

*See* HINDU LAW—ADOPTION.

(1)—*Doctrine of 'factum valet,' extent of the applicability of, to cases of adoption.*—The doctrine of 'factum valet' has been held to be applicable as well in the Dayabhaga school, as in the various sub-divisions of the Mitakshara school. In cases of adoptions, when questions arise in respect of formalities, ceremonies and similar other points which amount to moral or religious suggestions, and which relate to the *modus operandi* of the adoption, without affecting its essence, the doctrine of *factum valet* could be undoubtedly applied upon general grounds of justice, equity and good conscience, irrespective of the authority of the texts of Hindu Law. In the absence of any such texts expressly to the contrary, the doctrine will apply to adoptions which, having been made in substantial conformity to the law, have infringed only minor matters of form or selection. The capacity to give, the capacity

**Factum Valet—continued.**

to take, and the fitness to be taken in adoption are the three main elements essential to constitute an adoption apart from questions of form. These being matters essential to the validity of the transaction are, as such beyond the province of the maxim 'quod fieri non debuit factum valet.' *GANGA SAHAI v. LAKH-RAJ SINGH*, 9 A. 253. (5 I.A. 40, 2 A. 164, 4 M.H.C. 164, 10 B. 80, 12 B.H.C. 365, 3 B. 273, R.) [R., 10 A. 289, 11 A. 194, 12 A. 328, 17 A. 294, 11 C.P.L.R. 56, 11 C.W.N. 147=4 C.L.J. 537.]

(2)—*Factum valet, whether applies to adoption by Brahmin of his daughter's son.*—The case of the adoption, by a Brahmin, of his daughter's son, does not fall within the proper limits for the application of the maxim "quod fieri non debuit, factum valet." *GOPAL NARHAR SAFRAY v. HANMANT GANESH SAFRAY*, 3 B. 273. [R., 9 A. 253, 13 B. 160; D., 10 B. 80, 22 B. 812.]

(3)—*Hindu Law—Adoption of daughter's son—Factum valet.*—Amongst Brahmins, an adoption of a daughter's son is incestuous and invalid, and cannot be supported on the ground of "factum valet quod fieri non debuit." *BAGIRATHIBAI v. RADHABHAI*, 3 B. 298. [R., 17 A. 294; D., 22 B. 973.]

(4)—*Doctrine of—With regard to adoption of an only son.*—The adoption of an only son being not null and void under the Hindu Law, held that where such an adoption has actually taken place, the maxim "quod fieri non debuit factum valet" would apply. *BENI PRASAD v. HARDAI BIBI*, 14 A. 67, F.B.=A.W.N. 1892, 161 [R., 17 A. 294, 24 B. 367, 1 Bom. L.R. 144.]

(5)—*Maxim of "factum valet."*—Though the principle of "factum valet" is acted upon to the fullest extent only in Bengal, it is recognised also in other Schools of law. [Cons., 14 A. 67, F.B.; R., 3 B. 273, 11 M. 43] *Semble.*—In the Benares School an indigent married daughter has a preferential claim to her father's property over a wealthy married daughter. *WOOMA DAE v. GOKOOLANUND DASS*, 3 C. 587, P.C.=5 I.A. 40=2 C.L.R. 51=3 Sar. 786. [F., 23 B. 229; R., 4 B. 104, 17 B. 114.]

(6)—*'Factum valet,' Doctrine of—Adoption.*—If the *factum*, the external act, is void in law, there is no room for the application of the maxim. The truth is that the two halves of the maxim apply to two different departments of life. Many things which ought not to be done in point of morals or religion are valid in point of law. But it is nonsensical to apply the whole maxim to the same class of actions. (The remarks of *Westropp, C.J.*, in 12 B.H.C.R. 364 on the doctrine of *factum valet*, *Appr.*, *SRI BALUSU GURULINGA SWAMI v. SRI BALUSU RAMA LAKSHMAMMA*, 21 A. 480, P.C.=8 C.W.N. 427=26 I.A. 113=22 M. 398, 9 M.L.J. 67=1 Bom. L.R. 226=7 Sar. 330,

*See* HINDU LAW—FAMILY DWELLING HOUSE, 4 B.L.R. O.C. 72=12 W.R., O.C. 35.



**Factum Valet—concluded.**

Father's powers—Self-acquired property—Exclusive gift to one son—Factum valet (Acts done not void)—See HINDU LAW—GIFT, 1 A. 394.

Hindu Law—Gift of Hindu girl in marriage without consent of father—Suit for getting marriage declared null and void—Applicability of doctrine of *factum valet*—See HINDU LAW—MARRIAGE, 11 B. 247.

Marriage of minor celebrated by mother—Absence of father's consent—Suit for declaration of nullity of marriage—Factum valet—See HINDU LAW—MARRIAGE, 22 B. 812.

See HINDU LAW—MARRIAGE, 22 B. 509.

**Fair.**

(1)—*Fair—Levy of tax—Act XIX of 1844.*—The levy of tax on goods brought for sale at a fair by a private individual or a corporation is illegal in virtue of Act XIX of 1844. MAHADU v. SAKHARAM, 5 Bom. L.R. 703.

**Fair Comment.**

Limits of newspaper criticism—Imputing commission of criminal offence to person whether—See LIBEL, 12 C.W.N. 490=35 C. 495.

Mis-statement of fact in comment—Effect—See LIBEL, 14 C.W.N. 713=6 Ind. Cas. 81=37 C. 760.

**False Accounts.**

Two sets of accounts—Kept to deceive Government—Effect—See BOM. ACT III OF 1875, s. 7, 20 B. 668.

**False Charge.**

Suit for damages for bringing—Medical attendance—Costs—See DAMAGES—DAMAGES, SUITS FOR, A.W.N. 1887, 104.

See SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 4 B.L.R. A.C. 35, Note=10 W R. 115.

**False Complaint.**

Wrongful attachment on—To Magistrate—Suit for damages against complainant—Limitation—See LIMITATION ACT, 1908, Art. 23, 7 B. 427.

**False Description.**

See MAXIM, 4 Bom.L.R. 871.

**False Evidence.**

(1)—Collector or Deputy Collector acting under the Land Acquisition Act, whether a judicial officer—Proceedings of Deputy Collector not regulated by Civ. Pro. Code—Power to sanction prosecution for perjury—Duty of Civil Court when party dissatisfied with Deputy Collector's orders re, the value of land, etc., makes a reference.—A Collector or Deputy Collector, acting under the Land Acquisition Act, is not a judicial officer, nor can he be regarded as a Revenue Court. The proceedings of the Deputy Collector under the Act are not regulated by

**False Evidence—concluded.**

the O.P.C. A Deputy Collector has no power to pass orders sanctioning the prosecution of a person for giving false evidence in relation to proceedings taken by him under the Land Acquisition Act. The Deputy Collector is not in a position to pass any final orders in the matter of the value of the land or the right to claim the price fixed. A party dissatisfied can claim a reference to the Civil Court, whose duty it is to settle the matter judicially. Therefore, to subject parties claiming the right to such reference to a criminal prosecution, when the matters, on which the Deputy Collector had formed an opinion as a Revenue Officer under the Land Acquisition Act, must be submitted for the determination of a Court, is obviously premature and improper, and is almost certain to operate very prejudicially towards them in the trial before the Civil Court. DURGA DAS RUKHIT v. QUEEN EMPRESS, 27 C. 820. [F, 30 C. 36; R., 8 O.C. 118, 187 P.L.R. 1905=44 P.R. 1905. Cr.=3 Cr. L.J. 128.]

See DAMAGES—DAMAGES, SUITS FOR, 10 M. 87.

See SANCTION TO PROSECUTE, A.W.N. 1884, 57, 22 B. 936.

False verification of written statement—Civ. Pro. Code, s. 115—Indian Penal Code, s. 191—See WRITTEN STATEMENT, 6 A. 626=A.W.N. 1884, 52.

**False Imprisonment.**

(1)—*Information given to the Police—Prosecution after investigation—Acquittal of accused—Suit for damages for—Against informant, Maintainability of.*—A informed the Police that certain persons had attempted to murder him and named the plaintiff and others as being those who had done the act. The Police, after holding an investigation, sent them to a Magistrate. After holding a preliminary inquiry, the Magistrate committed them for trial to the Court of Session. The trial resulted in the acquittal of the accused. A was now sued for damages for false imprisonment. Held, that the suit was not maintainable. BALBHADDAR PANDE v. BASDEO PANDE, 3 A.L.J. 650=29 A. 44=A.W.N. 1906, 263. (26 M. 262, Appl.) [R, 6 A.L.J. 516=5 M.L.T. 387=2 Ind. Cas. 424.]

(2)—*Action for false imprisonment, when maintainable—Art. 19—Limitation Act, 1877.*—Nothing short of actual detention and complete loss of freedom will support an action for false imprisonment. [Bird v. Jones (1845), 7 Q. B. 742, F.] A person who is released on bail cannot be regarded as under imprisonment so long as he is on bail. Time begins to run from the date on which the plaintiff was enlarged on bail. Hence a suit for false imprisonment must be brought within one year from the date on which his imprisonment ends. MAHAMMAD YUSUFUDDIN v. SECRETARY OF STATE FOR INDIA, 30 C. 872, P.C.=30 I.A. 154=7 C.W.N. 729=8 Bom. L.R. 490=8 Sar. 503.



**False Imprisonment—concluded.**

(3)—*Action for false imprisonment—Arrest under satisfied decree by mistake of officers of Court—Plaintiff's Cause of action against officers—Limitation Act, sch. II, art. 19 and s. 22.*—This was a suit for damages for wrongful arrest brought by the judgment-debtor against the decree-holders and two of the officers of the Court, the head cashier and the chief clerk who, by mistake, in spite of the decree, having been already completely satisfied, issued the certificate of non-payment and the writ of arrest. The facts clearly showed a wrongful detention. As to the liability of the decree-holder the principle was applied, that when a Court of competent authority has disposed of the matter, though erroneously, then the party who takes out the warrant is not liable; but when the Court has no jurisdiction whatever to issue the warrant, then the whole proceeding is *coram non judice* and the parties are liable. The Court of Small Causes had clearly jurisdiction over the matter which was an ordinary money claim, though the officers of the Court acted erroneously in issuing the warrant. The party decree-holder was not liable since he had made the non-payment of the judgment, of which he had the best possible evidence in the certificate of the proper officer of the Court, the foundation and condition of his request for a warrant. As regards the other defendants, the officers of the Court, their liability was of a different character, the proceedings which ended in the wrongful arrest having arisen from some fault on the part of those officers, but the suit against them was barred by limitation under art. 19 of sch. II of the Limitation Act read with s. 22 of the Act, since, at the date of the suit, more than one year had elapsed from the date of the false imprisonment. *FISHER v. PEARSE*, 9 B 1.

See EXECUTION OF DECREE—MODE OF EXECUTION, 3 M.L.A. 164.

Preventing intending passenger of ferry boat to return from wharf through turnstile without payment—See *FERRY*, 14 C.W.N. 410, P.C. = 5 Ind. Cas. 842.

See JUDICIAL OFFICERS, LIABILITY OF, 3 B.H.C., App. 1.

Suit for compensation as to—See LIMITATION ACT, 1908, art. 19, 5 Bom. L.R. 490.

**False Personation.**

(1)—*Evidence afforded by prior records—False personation—Res judicata.*—Where the main question was whether, in fact, the heir to an estate, a minor in possession through the manager under the Court of Wards, had been, as the plaintiff alleged him to have been, put forward by false personation, a Divisional Court of Appeal decided in favour of the defence and dismissed the suit. Pending this decision, a Full Bench of the Allahabad High Court (in 12 A. 1) disposed of questions of law as to the admissibility in evidence in this suit of the judgment and record in a prior suit; in which it had been found, as a fact, that there had been at one time, in existence an heir born of the parentage which the defence in this suit

**False Personation—concluded.**

alleged to be that of the minor defendant. It was disputed in the present suit whether the minor defendant was the same individual whom his alleged mother, the defendant in the former suit (there being the same plaintiff in both suits), stated to be her son; also, whether, if that identity were proved, the suit would be barred as *res judicata*. This latter question was decided in the negative by the Full Bench, which held the judgment in the former suit not to be conclusive upon the present one; but also held the record to be admissible. There was no appeal from that decision; and on an appeal from the decree of the Divisional Court, the Judicial Committee affirmed, on the facts, the decree made. *PALAKDHARI SINGH v. THE COLLECTOR OF GORAKPUR*, 13 A. 261, P. C.

See REGISTRATION ACT, 1908, s. 82 (c) 5 Bom. L. R. 138.

**False Representation.**

See EVIDENCE ACT, 1872, s. 115, 30 C. 539, P. C. = 30 I.A. 114 = 7 C.W.N. 441 = 5 Bom. L. R. 421.

**False Statement.**

Insolvent judgment-debtor—Civ. Pro. Code, s. 351 (a)—Accidental false statement in application—See INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 7 A. 295 = A. W. N. 1885, 50.

See POSSESSION—SUITS FOR POSSESSION, 2 C.L.R. 292.

**False Verification.**

Verification by mooktear—Civ. Pro. Code, 1859, s. 24—See PLAINT—VERIFICATION AND SIGNATURE, W. R. F. B., 41 = Marsh, 127 = 1 Ind. Jur. O. S., 44.

Of written statement—Civ. Pro. Code, s. 115—False evidence—Indian Penal Code, s. 191—See WRITTEN STATEMENT, 6 A. 626 = A. W. N. 1884, 52.

**Family.**

Meaning of—See ACT XXXV OF 1858, s. 13, 23 C. 512.

Defamation of deceased person—Suit by heir of deceased—Damage to reputation of family—Maintainability of suit—See DEFAMATION, 5 B. 580.

See INJUNCTION—INJUNCTION UNDER CIV. PRO CODE, 6 B.L.R. 571.

See STAMP ACT, 1879, SE. 3 (15), 25 (c), 19 C. 499.

**Family Arrangement.**

(1)—*Family agreement as to appropriation of shares in property—Subsequent gift to "heirs and children from generation to generation for ever," whether valid or void as creating a perpetuity—Nature of es'a'e taken by heirs.*—With regard to the estate left undisposed of under the Will and codicils of a Parsi testator, his heirs came to an agreement specifying who the several heirs were and laying down the



**Family Arrangement—continued.**

manner in which the shares were to be distributed and paid over. A clause in the agreement provided that after paying in full the debts of, and other claims against, the deceased "the remainder is to be apportioned to the above-mentioned heirs agreeably to their shares specified; but after their death their shares were to be received and enjoyed by their heirs and children from generation to generation for ever." In the present suit brought for a declaration of the rights and interests of the parties, as under the above family agreement, it was urged on appeal that the order of the lower Court was wrong in that it declared that the limitations in the family agreement under consideration, subsequent to the life-interests of the signatories, were null and void so that there was a resulting trust in favour of the heirs of the deceased testator, as declared by the said agreement in respect of the estate, created under such void limitations, and that the lower Court should have declared that on the death of each of the signatories of the said agreement, his or her heirs became absolutely entitled to the *corpus* of the property in which the deceased signatory had a life-estate. The High Court held that the settlement in favour of the heirs and children of each signatory to the agreement was legally valid and was not, as held by the Division Court, void as creating a perpetuity. Even if the signatories might have had that object in view, no apt words had been used to effect it. On the question of the nature of the estate the "heirs and children" take, it was held that unless the subsequent context plainly showed that they were intended to take less, they must be held to take an absolute estate. A gift to the heirs of A from generation to generation confers upon them when ascertained exactly the same estate as if the gift were to X and Y, the heirs of A *nominatim*. **FARDUNJI M. BANAJI v. MITHIBAI, 22 B. 355.**

(2)—*Hindu Law—Division of family property—Suit to enforce compromise—Fraud—Mistake in law.*—A compromise of family disputes come to between two major Hindu brothers for the partition of family property and embodied in a petition filed in the Collectorate, is enforceable by suit in the absence of evidence of fraud, though *bona fide* disputes might have existed as to the rights of the parties. **RAM NIRUNJUN SINGH v. PRAYAG SINGH, 8 C. 138=10 C.L.R. 66.**

(3)—*Compromise—Family arrangement.*—Family arrangements are governed by a special equity peculiar to themselves and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend. When the responsible members of a family agree to an arrangement, which is *per se* not unfair and which has been arrived at without undue advantage being taken, the Courts would be

**Family Arrangement—continued.**

slow to interfere, when subsequently one of the parties wishes to have that arrangement set aside. On the death of a proprietor leaving two wives and sons from one of them, disputes arose between them. A family arrangement was then arrived at, under the terms of which it was agreed that each widow should be allowed to retain possession of half of the deceased's property during her life-time for herself and her respective issue. In accordance with this arrangement mutation of names was effected in revenue papers. One of the sons for some three years after he arrived at majority acquiesced in the arrangement. *Held*, that, as the family arrangement was made by all parties *bona fide* and was acted upon for many years, it should not be disturbed by Court. **MUSSAM-MAT HASSAN BIBI v. FAZAL KADIR, 139 P.L.R. 1909.**

(4)—*Partition made in settlement of doubtful claim, if valid and binding on the parties thereto—Validity of arrangement, not dependent on length of time during which it has been acted upon.*—A partition or family arrangement made in settlement of a doubtful, if not a disputed claim, by arbitrators appointed by the parties, effecting a division of the family properties and debts, and drawing up a list of them, which is signed by the parties and carried out and acted upon by them for sometime, is a valid and binding arrangement, which the parties to it cannot deny, ignore or resile from. (13 M.I.A. 497, 14 M.I.A. 24, 22 B. 482, 21 I.A. 35=20 C. 373, 25 I.A. 161=26 C. 81, R.) *Per Mookerjee, J.*—If parties have settled a dispute, such settlement will not be set aside on the ground that it gave to one of the parties more than what he might possibly have recovered, if he had taken the judgment of the Court upon the matters then in difference between them (1 C.L.J. 388, R.) *Per Mookerjee, J.*—A family arrangement may be upheld, although there were no rights actually in dispute at the time of making it, and the Courts will not be disposed to scan with much nicety the *quantum* of consideration. It is a mistake to suppose, that the doctrine of family arrangement extends no further than arrangements for the settlement of doubtful or disputed rights; the principle is applicable to cases in which arrangements are made between members of a family not merely for the preservation of its peace, but also for preservation of its property. The validity of a family arrangement does not depend upon the length of time for which it has been acted upon. A fair compromise of a doubtful right is in itself a sufficient foundation for the agreement. But if an attempt is made to set aside a family arrangement on the ground of mistake inequality of position, undue influence, coercion, fraud or any similar ground, the length of time during which it has been allowed to stand unchallenged, may be a material element for consideration. **HELAN DAS v. DURGA DAS MUNDAL, 4 C.L.J. 323.** [F., 3 Ind. Cas. 85; R., 8 C.L.J. 458=13 C.W.N. 201, 10 C.L.J. 503=3 Ind. Cas. 247, 3 Ind. Cas. 241=9 C.L.J. 134=13 C.W.N. 309.]



**Family Arrangement—continued.**

(5)—*Family arrangement—Descendants of parties how far bound—Intention of parties.*—One Rupe Singh was the sole owner of a holding of 471 kanals of land, nearly whole of which was acquired by him. According to his wishes, a family arrangement was arrived at, to which his sons Suba Singh and Dewa Singh and grandson Kishen Singh, son of Dewa Singh, consented. Under it 205 kanals were allowed to Suba Singh, 109 kanals to Dewa Singh and 157 to Kishen Singh. After the death of Dewa Singh, the sons of Kishen Singh sued their uncle Bishen Singh for half share in the land that was allowed to Dewa Singh. *Held*, that the claim was not valid. In such cases effect must be given to the intention of the parties and there was no doubt that Kishen Singh was finally provided without further prejudice to the rights of the defendant, the other son of Dewa Singh. The plaintiffs were not justified in re-opening the matter and claiming any portion of the land then awarded to Dewa Singh. *BISHEN SINGH v. JAWALA SINGH*, 20 P.L.R. 1910—8 Ind. Cas. 776.

(6)—*Will or family arrangement—Immediate operation—Irrevocability—Registration—Registration Act (III of 1877), s. 17—Pleadings, inconsistency in—Costs—Successful party deprived of all costs.*—A document executed by the owner of an estate on 23rd May, 1861, which was plainly intended to be operative immediately and to be final and irrevocable, was held to be a non-testamentary instrument, e.g., a family arrangement, which as regards immoveable property failed of effect because it was not registered as required by s. 17 of the Registration Act (III of 1877). The appellants in whose favour the above decision was given, having set up a will of a later date had started with the case that the instrument in question was a will, but the will propounded by them being found not proved, they later on attacked the document on the ground stated above. Similar inconsistency appeared in the pleadings of their opponents. *Held*—That in the circumstances, the Judicial Committee was not precluded from giving effect to the real character of the instrument, but the appellants were deprived of their costs in all the Courts. *THAKUR UMRAO SINGH v. THAKUR LACHMAN SINGH*, 15 C.W.N. 497, P.C.=8 A.L.J. 465=13 C.L.J. 519=9 M.L.T. 507=13 Bom. L.R. 404.

*See CONTRACT ACT*, 1872, s. 25, 1 Bom. L.R. 495.

*See DEED—CONSTRUCTION OF DEEDS*, 6 B.L.R. 202, P.C.=14 W.R. P.C. 33=13 M.L.A. 497, 21 M. 299=25 I.A. 84.

*Hindu Law—Successive adoptions—Second adoption during life-time of first adoptee, invalidity of—Second adopted son jointly enjoying property as trespasser—Prescription—Bona fide binding nature of—See HINDU LAW—ADoption*, 22 B. 482.

*Binding character of—Powers of father—See HINDU LAW—ALIENATION*, 12 Bom. L.R. 621=7 Ind. Cas. 134.

**Family Arrangement—concluded.**

*Compromise by limited owner, if may be challenged by reversioner—See HINDU LAW—CONVERSION*, 15 C.W.N. 545, P.C.=8 A.L.J. 552=13 Bom. L.R. 427.

*Validity and binding character of—See HINDU LAW—JOINT FAMILY*, 11 Bom. L.R. 606=3 Ind. Cas. 257.

*See HINDU LAW—JOINT FAMILY*, 15 W.R. 33, P.C.=14 M.L.A. 24.

*Agreement among co-parceners not to partition, to what extent binding—Consideration—See HINDU LAW—PARTITION*, 12 C.W.N. 793.

*Partition-deed among co-parceners—Wife of co-parcener given a share jointly with her husband—Validity of arrangement—Effect—See HINDU LAW—PARTITION*, 27 M. 498.

*See HINDU LAW—PARTITION*, 1 Bom. L.R. 123=23 B. 636.

*Creation of reversionary rights in a daughter of a joint Hindu family by family arrangement—Suit by daughter for declaration—See HINDU LAW—REVERSIONERS*, 15 M.L.J. 392.

*Malabar Law—Powers of karnavan—Restriction thereon by family arrangement—See MALABAR LAW—JOINT FAMILY*, 8 M. 381.

*When binding—See PARTITION—GENERAL*, 3 Ind. Cas. 247=10 C.L.J. 503.

*Family arrangements—Consideration—Equity—See PROBATE—GENERAL*, 9 C.L.J. 19=1 Ind. Cas. 573.

*See REGISTRATION ACT*, 1908, s. 17, 30 P.L.R. 1901.

*Family arrangement—Suit for maintenance—Jurisdiction—See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL*, 11 M. 134.

*Compromise of doubtful rights—Person beneficially entitled under compromise—Suit to enforce compromise by person not a party thereto—See SPECIFIC RELIEF ACT*, 1877, s. 23 (c), 5 C.W.N. 386.

*See STAMP ACT*, 1879, s. 3, 7 C. 21.

**Family Custom.**

*See BURDEN OF PROOF—CUSTOM.*

*See CUSTOM.*

*See HINDU LAW—CUSTOM.*

(1)—*Evidence as to.*—It is admissible evidence for a living witness to state his opinion on the existence of a family custom and to state as the grounds of that opinion information derived from deceased persons and the weight of evidence will depend on the position and character of the witness and of the persons on whose statements he has formed his opinion; but it must be the expression of independent opinion based on hearing and not mere repetition of hearsay. *GURURUDHWAJA v. SAPARANDHWAJA*, 2 Bom. L.R. 831.



**Family Custom—concluded.**

(2)—*Custom of the family—Exceptional custom.*—A family custom in derogation of the ordinary law can be supported only on a sure foundation. **CHANDIKA BAKSH v. MUNA KUAR, 4 Bom. L.R. 376.**

(3)—*Settlement of lands by the British—Custom of the family—Effect of the settlement.*—At the introduction of the British Rule in 1849 in the Punjab, the settlement of the country was made under which the occupiers of the soil were recognized as the proprietors of their respective lands. At that time the proprietary title of Shah Nawaz Khan was recognized in seven villages by virtue of his chiefship. After Shah Nawaz Khan's death, a half share in the villages were claimed, under an allegation of custom in the family, by his younger son from the grand-son of the deceased, who was appointed successor to the chiefship; *Held* that the effect of the settlement in 1849 was not to create a fresh estate subject to the ordinary law of inheritance, but to continue to the chief for the time being, as it were *jure coronae*, the proprietorship of the villages which had been founded by his ancestors, and the succession to which had therefore been regulated by the custom of the family. **SARDAR MAHAMMAD v. NAWAB GHULAM KASIM KHAN, 5 Bom. L.R. 486.**

Effect of decision of Talukdar's committee—*See U.P. ACT I OF 1869, 26 C. 81, P.C. = 25 I.A. 161 = 2 C.W.N. 737.*

Inapplicability of Mitakshara Law—*See GHATWALI TENURE, 10 C. 677.*

*See HINDU LAW—IMPARTIBLE ESTATES, 12 W.R. 21, P.C. = 3 B.L.R. 13, P.C. = 12 M.I. A. 523.*

Impartible property—Vatan property attached to Office of Desai—Presumption—Evidence of family or local custom—Onus of proof—*See IMPARTIBLE ESTATE, 7 C.L.R. 1, P.C. = 4 B. 494 = 7 I.A. 162.*

**Family Dwelling house.**

Share in—And service rents—Right of execution-purchaser—*See EXECUTION OF DECREE—MODE OF EXECUTION, 10 C. 214.*

*See HINDU LAW—DEBTS, 27 M. 45.*

Direction in husband's will regarding residence of widow in—, how far binding—*See HINDU LAW—MAINTENANCE, 14 B. 490.*

*See HINDU LAW—PARTITION, 8 B.L.R. 60.*

*See PRESCRIPTION—EASEMENTS—LIGHT AND AIR, 3 C.W.N. 407,*

**Family Idol.**

Land set apart for use of family idol—Escheat to Government—Subsequent purchase from Government, effect of—*See CO-SHARERS—MISCELLANEOUS, 12 M. 287.*

**Family Pedigree.**

Admissibility—*See EVIDENCE ACT, 1872, s. 32, 5 C.W.N. 49 = 27 I.A. 183 = 23 A. 72, P.C.*

**Family Pension Fund.**

*See ACT VI OF 1882, s. 4, 17 C. 786.*

**Family Priest.**

Relationship—Evidence of—Special means of knowledge—*See EVIDENCE ACT, 1872, s. 32, cl. 5, 4 C.L.R. 173.*

**Family Settlement.**

*See CONTRACT ACT, 1872, s. 25, 1 Bom. L.R. 495.*

Consideration—Repudiation—Estoppel—*See CUSTOMS—PUNJAB—INHERITANCE, 170 P. W.R. 1911.*

Attempted family settlement in perpetuity—Ultimate, but illusory gift for charitable purposes—*See MAHOMEDAN LAW—WAKF, 22 C. 619, P.C. = 22 I.A. 76.*

*See MAHOMEDAN LAW—WAKF, 30 C. 666 = 7 C.W.N. 916.*

Release when operates as a—*See RELEASE, 9 Ind. Cas. 267 = 9 M.L.T. 342.*

Construction of—*See TRUSTS ACT, 1882, ss. 4, 6, 14 O.C. 356.*

**Faqir.**

*See ABANDONMENT, 7 P.R. 1892.*

**Faridkot.**

(1)—*Status of State of Faridkot—Court, foreign.*—The State of Faridkot has full power to prescribe rules for its civil jurisdiction. It can confer on its tribunals power to hear and decide a cause against a non-resident alien if the obligation has arisen out of a contract made while he was residing in the state. The Court of Faridkot is a foreign Court within the meaning of s. 2, Civ. Pro. Code. **RAJA OF FARIDKOT v. BIR SINGH, 191 P.R. 1888. [Cited & F., 66 P.R. 1889.]**

(2)—*Court of Faridkot—Judgment, foreign.*—As the Faridkot State has an independent civil, criminal and fiscal jurisdiction, the judgment of Faridkot Court is a foreign judgment within the meaning of s. 2 of Civ. Pro. Code, **SIRDAR GURDYAL SINGH v. RAJA OF FARIDKOT, 112 P.R. 1894. [R., 75 P.R. 1909.]**

Courts of Faridkot, judgments of—*See FOREIGN COURT—JUDGMENT OF, 22 C. 222, P.C. = 21 I.A. 171 = 4 M.L.J. 267.*

**Fasli Year.**

N.W.P. Land Revenue Act, XIX of 1873, s. 3, cl. 8. "agricultural year" as defined in, not—*See DEED—CONSTRUCTION OF DEEDS, 18 A. 388 = A.W.N. 1895, 123.*

*See INSTALMENT BOND, A.W.N. 1882, 174.*

**Fatal Accidents Act.**

*See ACT XIII OF 1855.*



**Father.**

Application by mother of illegitimate child to have the child removed from the custody of the father and placed under her custody—Mother being a prostitute—See ACT IX OF 1861, A.W.N. 1887, 239.

Right of—To guardianship and control of religion of minor—Right of Court to interfere—See GUARDIAN AND WARDS ACT, 1880, s. 17, 25 C. 881=2 C.W.N. 379.

Suit by minors against father—Mother cannot be next friend—Civ. Pro. Code, 1882, s. 457—See MINOR—SUITS BY AND AGAINST MINORS, 11 C. 733.

**Father and Son.**

Persons occupying the holding as sons, servant or wife—Liability to separate assessment—See BEN. ACT III OF 1884, ss. 85, 363, 2 C. W.N. 689.

Purchase by father in son's name—See BENAMI TRANSACTIONS—GENERAL, 8 Ind. Cas. 450.

Decree against sons for debt due by father—Form of decree—Personal decree—See DECREE, MISCELLANEOUS, 6 Ind. Cas. 397=8 M.L.T. 105.

Mortgage by father—Father if can be appointed guardian *ad litem* of minor's son—See EX-PARTE DECREE, 15 C.L.J. 446.

Decree against father how far binding on sons—See HINDU LAW—ADOPTION, 8 M.L.T. 355.

Death of an infant son whether specially within the knowledge of the father—S. 106, Evidence Act—See HINDU LAW—REVERSIONERS, 11 Ind. Cas. 202.

**Fazendari Tenure.**

See ENCROACHMENT, 16 B. 552.

**Fees,**

See COSTS.

See COURT FEES.

See COURT FEES ACT, 1870.

See LEGAL PRACTITIONERS—PLEADER—REMUNERATION.

(1)—*Agreement between Barrister and Client—Act I of 1846.*—The fees of a Barrister are not merces but honoraria. A Barrister, as such, cannot contract with his client as to his fees. *ACHAMPARAMBATH CHERRIA KUNHAMUN v. WILLIAM SYDENHAM GANTY*, 3 M. 138, F.B. [R., 8 C.P.L.R. 13, 25 A. 509=A.W.N. 1903, 104.]

See BEN. ACT VIII OF 1885, s. 16, 24 C. 241=1 C.W.N. 98.

Lien for fees—Lien of Commissioners on return for fees—See COMMISSIONER, Bourke, 24.

Suit for malicious prosecution—Vakils—Element in assessing damages—See DAMAGES—DAMAGES SUITS, FOR 5 M. 162.

**Fees—concluded.**

See DISCRETION OF COURT, 71 P.R. 1869.

Advocate's rights to sue for fees—See LEGAL PRACTITIONERS—ADVOCATE, 4 L.B.R. 55, F.B.

See PROCESS FEES, 4 P.R. 1873.

Custom of transferability on payment of fee—Not paid—See RIGHT OF OCCUPANCY—TRANSFER OF RIGHT, 8 C.W.N. 214.

Receipt passed by counsel for—Not chargeable with stamp duty—See STAMP ACT, 1879, art. 15, 16 A. 132, F.B.=A.W.N. 1894, 12.

See TRANSFER OF PROPERTY ACT, 1882, ss. 83, 84, 67, 11 M. 371.

**Fellow Servant.**

Death from accident caused by negligence of fellow servant—Company's liability—See RAILWAY COMPANY, 1 A.L.J. 653.

**Felo De Se.**

(1)—*Introduction of English law of forfeiture in India—Suicide.*—Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own State, and those who live amongst them and became members of their community, became partakers of and subject to the same laws. This rule held not to apply to the early settlement of the English in India, as the permission to the settlers to use their own laws within the factories did not extend those laws to Natives associated with them within the same limits. The English law of forfeiture of the personal property of persons committing suicide, even if applied to Europeans in India, was not applicable to Natives. *ADVOCATE GENERAL OF BENGAL v. RANEE SURNOMYEE*, 1 W.R.P. C. 14=1 Sutter. 315=2 Sar. 39=2 Moo. P.C. N.S. 22=9 Jur. N.S. 877=8 L.T. 848=2 N.R. 530=12 W.R. (Eng.) 21=9 M.I.A. 387. [R., 4 B.H.C. O.C. 1, 5 B.H.C. 172, 1 B.L.R. O.C. 87, 12 W.R. 413, 14 W.R. 305=5 B.L.R. 643, 3 B. 452, 5 B. 154, 5 B. 506, 12 C. 706, 24 C. 216, 28 C. 452=5 C.W.N. 659, 25 M. 457, 6 Bom. L.R. 131].

**Female Karnavan.**

See MALABAR LAW—JOINT FAMILY, 10 M. 223.

**Females.**

See PARDANASHIN WOMEN.

(1)—*Right of, to succeed to Palliam.*—Females are not precluded by any rule of descent, custom, or usage of the Cumbala Tottier caste from succeeding to a Palliam. *THE COLLECTOR OF MADURA v. VEERACAMOO UMMAL*, 9 M.I.A. 446.

Possession adverse to the—Adverse to the reversioner—See LIMITATION ACT, 1908, arts. 141, 142, 144, 41 P.R. 1903.

Possession of—Member, not that of a qualified owner—Onus of proof—See POSSESSION—GENERAL, 9 M.L.J. 33.



**Female Witness.**

Application for issue of commission to examine—Sufficiency of grounds set forth in affidavit in support of—See CIV. PRO. CODE, 1908, s. 132, 14 B. 584.

**Ferries (amending) Beng. Reg. XVI of 1819.**

See BEN. ACT I OF 1866.

**Ferries, Northern India Act.**

See ACT XVII OF 1878.

**Ferries Public and Canal Mad. Act.**

See MAD. ACT II OF 1890.

**Ferry.**

(1)—*Right to set up a ferry on one's own land as also over another's property—Ferry worked by one of several co-owners.*—It is a recognised law in India, that a man may set up a ferry on his own property, and take toll from strangers for carrying them across; and he may acquire such a right, by grant or by user, over the property of others. Where a co-sharer sets up a ferry on joint property, without in any way restricting the joint user of the property by the other co-sharers, no suit will lie for an injunction or damage or accounts of profits against such a co-sharer, even though he denies their title. LACHMESWAR SINGH v. MANOWAR HOSSEIN, 19 C 233=19 I.A. 48, P.C.=6 Sar. 133. [Expl., 32 C. 837=1 C.L.J. 437; R., 21 C. 340, 8 M.L.J. 92=21 M. 153, 4 C.W.N. 788, 14 C.P.L.R. 76, 25 B. 362, 19 C. 544, F.B.; D., 13 C.P.L.R. 153, 26 C. 553.]

(2)—*Proprietor of both banks of river, whether could claim right of ferry on that account.*—In this suit for the right of ferry over a river, the defendants, the present appellants, set up an agreement that had been come to between them and the plaintiff, whereby the right of ferry was given to the former. The Court of first instance found that although both banks of the river belonged to the plaintiff yet he had given up the right to the ferry by special agreement to the defendants, who had been in possession thereof for more than 12 years. The lower appellate Court reversed this order, on the ground that, as the plaintiff held both banks of the river, he, therefore, of necessity had the right of ferry. The High Court held that the mere fact of plaintiff owning, both banks, would not of necessity give him the right of ferry, and remanded the case for its decision with regard to the specific deed of agreement pleaded by the appellants under which the right of ferry in dispute had been made over to them. SOFIR MERDHA v. NOBO KISHORE MOHUNT, 2 W.R. 286. [D., 25 W.R. 53.]

(3)—*Ferry rights—Right to restrain another from starting ferry.*—An owner of a ferry, granted under a Government settlement, who plied it for hire, could restrain by suit another from running his ferry over the same spot, though that other levied no tolls on his ferry, if he did not use it exclusively for the conveyance of his own servants and ryots. LUCHMESSUR SINGH v. LELANUND SINGH 4 C. 399=3 C.L.R. 427. (16 W.R. 231, R.) [R., 18 C. 652.]

**Ferry--continued.**

(4)—*Right to ferry ghat—Change in course of rivers.*—The right to a ferry ghat cannot follow the starting point of the ferry whenever it may be carried by a change in the course of the river, unless the new position is in the possessor's land D. N. GORDON v. GOPEE SOONDUREE DOSSEE, 25 W.R. 58.

(5)—*Reg. VI of 1819 ss. 3, 6—Public ferries—Civil Courts—Jurisdiction.*—S. 3, Reg. VI of 1819 while it empowers Government to invade private rights of ferry, by the establishment of a public ferry, does not debar the Civil Court from giving relief in cases in which a Magistrate may, without the sanction of Government, have invaded a private right of ferry. Civil Courts are not prohibited, by that Regulation, from taking cognizance of matters connected with public ferries. Suit to have the former boundaries of a ferry maintained. The plaintiffs did not assert that heretofore they had enjoyed a right of private ferry which had been invaded by an order of Magistrate extending the boundaries of a public ferry. They asserted only that they had, heretofore, without charging toll, transported in their own boats or in boats hired by them their labourers and cultivators and implements of husbandry; and in the exercise of the right, which was not a right of ferry in the ordinary sense of the term, they complained that the order of the Magistrate extending the boundaries of the ferry was injurious to them because the persons who formerly supplied them with boats employed their boats in the service of the public ferry. (i) Held that such damage was much too remote to entitle them to relief. (ii) Held, also, that the damage done to the plaintiff by passengers and carriers who trespassed on their lands on their way to the ferry was too remote to entitle them to maintain the suit. (iii) Held, further, that the Magistrate's order extending the boundaries of the public ferry was an invasion, RAM GOBIND SINGH v. THE MAGISTRATE OF GHAEZEEPOOR, 4 N.W.P. 146.

(6)—*Proprietary rights in private ferry—Running another ferry on same line—Dispossession regarding ferry. Meaning of*—Proprietary rights in a private ferry do not admit of another ferry being run within such a distance as to be practically on the same line. Preventing persons from crossing in a person's ferry and driving his men away amount to dispossession. KISHOREE LALL ROY v. GOKOOL MANEE CHOWDHRAIN, 16 W.R. 281.

(7)—*Ferry—Right to ply ferry, what it includes, suit for possession of ghat—Right to recover possession of ferry—Frame of suit.* The right to ply a ferry includes a right to ply it even when, owing to the effects of season and increase of water, there may be occasion to start from, or land on, a part of the river bank not included in the land taken for the ferry. In a suit framed for the recovery of possession of a ghat, plaintiff may recover possession of a ferry of which he has been dispossessed, where the case of the plaintiff was really for the ferry and was



**Ferry—continued.**

so understood by all who had to do with the case until the objection was taken in second appeal. *BROJO KISHORE CHOWDHRAIN v. BILASH MONEE CHOWDHRAIN*, 5 W.R. 195.

(8)—*Suit to re-open ferry—Maintainability.*—A suit to re-open a ferry included in an estate obtained from the Government, is not maintainable where the ghat near which plaintiff desires it to be re-opened is within two miles of where a public ferry was established. *DEWAN RAM JEWAN SINGH v. THE COLLECTOR AND MAGISTRATE OF SHAHABAD*, 15 W.R. 132.

(9)—*Stipulation in lease deed that no ferry shall be established to the prejudice of lessor.*—A lessor, when granting a lease of his land may stipulate that no ferry shall be established thereupon to the prejudice of his own ferry (existent or possible). *JUGGUT CHUNDER CHOWDHRY v. BHURUT CHUNDER CHOWDHRY*, 23 W.R. 237.

(10)—*Right of private ferry recognised in India—Bengal Act I of 1866—Acquisition of such right by prescription—Period—Effect of admitting such right—User.*—The right of establishing a private ferry and levying tolls is recognised in British India. (S D.A. 1854, p. 153 ; 16 W.R. 281, 22 W.R. 296, R.) [Not F., 18 C. 652.] The shortest period for the acquisition of such a right of ferry by user is twenty years.—*Per Garth, C.J. and White, J.* (9 W.R. 91, 2 B.H.C. 354, R.) *Semole.*—(*Per Mitter, J.*) :—Such a right cannot be established as an indefeasible right by long user. (6 B.L.R. 85, R.) Where the existence of a private right of ferry between the lands of two parties is admitted by one of them, no question of user arises.—*Per Mitter, J.* *PERMESHARI PROSHAD NARAIN SINGH v. MAHOMED SYUD*, 6 C. 608 = 7 C.L.R. 504.

(11)—*Ferry rights, how acquired—Limitation Act (XV of 1877), Part IV—Extinction of the ferry right—Limitation—Beng. Reg. XIX of 1816—Limitation Act, 1877, s. 23.*—Either in the law as it was before the acquisition by the British Government, or in the Regulations before or after the year 1793, there is no indication that any person is entitled to claim a right of ferry, that is to say, to a monopoly, by prescription or by any means other than a grant from the Crown. Since then, the only law under which a person can acquire ownership by prescription is that in Part IV, Act XV of 1877; but that portion of the law is not applicable to a right to the exclusive monopoly of a ferry, which is not a right merely to land or water or air, nor a right to ask payment for ferrying a traveller across a river, but an additional right, viz., a right to a monopoly, a right to prevent other people from exercising a right which, they would ordinarily possess. So far therefore, as mere prescription is concerned the claim must fail unless it is supported by evidence sufficient to justify a jury in holding that there has been a grant from the Crown. Although a ferry franchise is not necessarily appurtenant to land, yet, looking at the language of Reg. XIX of

**Ferry—continued.**

1816, it is a matter for consideration whether a ferry franchise, claimed as appurtenant to certain villages, is not subject to the 12 years' limitation. But whether this is so or not, the right is not destroyed by mere non-user without waiver. Nor does the running of an opposition ferry extinguish the right. The franchise continues so long as the grant continues, and until the person, who set up an opposition ferry, can show a Crown grant, or give evidence from which a Crown grant is presumed, the cause of action remains. In England, the disturbance of a market, and apparently also of a ferry right, is looked upon more or less in the nature of a nuisance. So, too, in India, the violation of a ferry right is a continuous wrong falling within s. 23 of Act XV of 1877. *NITYHARI ROY v. DUNNE*, 18 C. 652.

(12)—*Right to establish new ferry—Right to cross river or jhil in other way than by ferry.*—A stream, if navigable, is of itself a public highway. In the case of a stream, therefore, a riparian proprietor might start in a boat from any point on his own side and proceed to any point at which he would have a right to land on the other side. But in the case of a jhil, the soil and freehold of which is probably vested in some particular individual, persons might be in the habit of crossing it from point to point by means of a ferry boat belonging to the owner, and indeed might have a right to do so. But such right, if it existed, would not lead to any inference that any proprietor of lands on the banks of the jhil would have any right to cross either way to the terminus of a public highway in any other manner than between the ascertained points and by the accustomed means, viz., the owner's ferry boat. *HUNOOMAN DOSS v. SHAMCHURN BHUTTA*, 1 Hay. 426.

(13)—*False imprisonment—Preventing intending passenger of ferry boat to return from wharf through turnstile without payment—Reasonable condition.*—The plaintiff, with a view to take the defendant Company's ferry boat, paid the usual charge of a penny on entering the defendant Company's wharf, then changed his mind and wanted to return through a turnstile provided by the Company for exit, but, having refused to pay the penny which he was asked to do to be allowed to go through the turnstile, was by force prevented from going through it, there being no complaint of any excessive violence having been used. *Held* that there was no false imprisonment, as the defendant Company was entitled to impose a reasonable condition before allowing the plaintiff to pass through their turnstile from a place to which he had gone of his own free will, and which he had contracted to leave by a different exit. The payment of one penny was a quite fair condition, and if the plaintiff did not choose to comply with it, the defendant was not bound to let him through. *Held*, further, that the question whether the attention of the plaintiff had been sufficiently drawn to the Company's notices saying that the fare must be paid was



**Ferry—continued.**

immaterial for the decision of the case. ARCHIBALD NUGENT ROBERTSON v. THE BALMAIN NEW FERRY COMPANY, LTD., 14 C.W.N. 410, P.C. = 5 Ind. Cas. 842.

(14)—*Ferry—Suit for possession—Easement—Nature of easement—Adverse possession—Limitation Act (XV of 1877), ss. 26, 28.*—The plaintiff sued to establish his right to certain ferries, for *khas* possession of the *ghats*, and for an injunction to the defendants not to obstruct him. Neither the plaintiff nor the defendant had any interest in the bed or banks of the river over which the ferries were said to ply, and the plaintiff did not ask for any monopoly, nor claim to stop competition of any kind. According to the plaintiff's allegations, his lessee was turned out nearly 12 years before suit: *Held*, that, the right of the plaintiff was not an easement within the meaning of the Limitation Act, nor could it be said that the plaintiff had acquired any right by 12 years' adverse possession, but that the plaintiff may succeed on the ground that he had acquired the ferry right by user of 20 years independently of the limitation Act and that the interference being continuous, the question of limitation did not arise. ABDUL KHOYRAT v. HEM CHANDRA ROY CHOWDHRY, 9 Ind. Cas. 846. (19 C. 253, 19 I.A. 48, 6 C. 608, 7 C.L.R. 504, 6 C. 394, 7 I.A. 240, 7 C.L.R. 529, *Rel. on.*)

(15)—*Public ferry—Right of Magistrate to grant exemptions from payment of tolls—Bengal Regulation VI of 1819—Act XVII of 1878 (Northern India Ferries), s. 2.*—Cl. (2) of Reg. VI of 1819 having impliedly invested District Magistrates and Joint Magistrates with the power of granting exemptions from payment of tolls for the use of public ferries, an order made by a District Magistrate under that clause declaring certain persons to be exempt from payment of tolls for the use of a particular public ferry is a valid order under s. 2 of Act XVII of 1878. BUDHRAM RAI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, A.W.N. 1891, 135.

See ACT I OF 1894, s. 23, 25 C. 346.

License to collect—Charges in Malabar—Transfer of license—Prohibition against such transfer—Suit to recover amount due under terms of transfer—Maintainability—See CONTRACT—BREACH OF CONTRACT, 26 M. 156.

See CONTRACT ACT, 1872, s. 23, 2 A. 411, F.B.

See EVIDENCE—MAPS, 22 W.R. 296.

See FISHERY, 5 N.W.P. 95.

Loss of income of—Construction of Railway bridge—Compensation—See LAND ACQUISITION, 6 Ind. Cas. 843 = 12 C.L.J. 56.

Suit for rent of a—Jurisdiction—See PROVINCIAL SMALL CAUSE COURTS ACT, 1887, sch. II, art. 8, 14 C.W.N. 994 = 7 Ind. Cas. 553.

**Ferry—concluded.**

See BEN. REG. VI OF 1919, s. 3, B.L.R., Sup. Vol., 630 = 7 W.R. 191.

See RENT, SUIT FOR, Marsh 504 = 2 Hay 598, 27 C. 239.

See SPECIFIC RELIEF ACT, 1887, s. 9, 13 M. 54.

**Feudatory Chiefs.**

British subjects with delegated Judicial and Police powers—Whether—See ZAMINDARS, 16 C.W.N. 362, P.C.

**Fiduciary Relation.**

See TRUST.

(1)—*Burden of proof—Extent of relief.*—Where a fiduciary or quasi-fiduciary relation had existed, Courts of Equity will always place the burden of sustaining the transaction upon the party benefited by it, requiring him to show that it was of an unobjectionable character and one which it ought not to disturb. The exercise of such beneficial jurisdiction stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another, and is not confined to cases of guardian and ward, attorney and client, or father and son, or of any of the more commonly recognized relations, which involves such consequences. SITAL PRASAD v. PARBHU LAL, 10 A. 535.

(2)—*Mortgage—Position of mortgagee in possession—Redemption by one of several mortgagors—Right of account—Jumabundee papers—Practice.*—Certain property was mortgaged to B to secure the principal sum and interest and possession was given to him. The mortgage deed did not specify the extent of the shares of the mortgagors in the mortgaged estates. Subsequent to the mortgage, D acquired by purchase at auction and by private sale the shares of certain of the mortgagors, and on the strength of the title so acquired redeemed the whole property and obtained possession thereof. The proprietors or their descendants whose rights were not acquired by D., brought this suit to recover their shares in the estates against D. *Held* that it was incumbent on the plaintiffs to prove that they possessed a title to the extent of the interests claimed by them. It would not make any difference in the proof required from the plaintiffs whether D was in possession as a co-sharer who had redeemed or as a mere mortgagee. A mortgagee in possession occupies a fiduciary position towards all persons interested as proprietors in the mortgaged estate, and to all he is answerable for whatever moneys profits he may receive in excess of the amount which he is entitled to receive by law or agreement. When some only of the proprietors assert claims and assert such claims on behalf of themselves alone, he is justified in requiring the claimants to establish the extent of such claims. When one of several mortgagors redeems the mortgaged property he does not thereby deprive his co-mortgagors of their



**Fiduciary Relation—concluded.**

right to account, and while he cannot be made responsible for mesne profits received before he obtained possession, he is responsible for all such profits as have come to his hands since he acquired possession. It is the practice of the Courts to accept the Jamabundi papers which are filed by the putwarees under the zamindar's supervision as *prima facie* evidence of the profits of the estate, it being open to the mortgagee in possession to show that the amounts entered could not with due diligence be collected. **RAJAH DEO NARAIN SINGH BAHADOOR v. NAEK PERSHAD**, 2 N.W.P. 217.

(3)—*Fiduciary relationship—Client—Solicitor—Managing clerk.*—The relationship existing between a client and the managing clerk of a solicitor, who introduces and conducts his business, is a fiduciary one. **HARIVALLABHDAS v. BHAI JIVANJEE**, 4 Bom. L.R. 469 = 26 B. 689.

Relation of trustee and beneficiary between Collector and Zamindar—See ACT XXIII OF 1861, s. 11, 6 M.H.C. 293.

Suit for cancellation of instrument—Gift to spiritual adviser—Undue influence—See BURDEN OF PROOF—DECREEES AND DEEDS, SUITS RELATING TO, 12 A. 523 = A.W.N. 1890, 56.

Gift to persons in a fiduciary relationship—Burden of proving absence of undue influence—See BURDEN OF PROOF—DECREEES AND DEEDS, SUITS RELATING TO, 18 C. 545 = 18 I.A. 144, P.C.

Transaction between director of a Company and shareholders—Absence of fiduciary relationship—See COMPANY—POWERS AND LIABILITIES OF DIRECTORS, 18 A. 56 = A.W.N. 1895, 158.

See EXECUTION, 14 B.L.R. 276, P.C. = 23 W.R. 6 = 2 I.A. 18.

The general rule of viewing with disfavour transactions between two persons standing in—will not apply where no wrongful advantage has been secured to one of them at the expense of the other—See HINDU LAW—RELIGIOUS ENDOWMENT, 29 M. 1.

See LEGAL PRACTITIONERS—ATTORNEY AND CLIENT, 3 C. 473, 1 N.W.P. 1.

Solicitor and client in England—Vakil and client—Fiduciary relationship—See LEGAL PRACTITIONERS—PLEADER AND CLIENT—GENERAL, 20 B. 677.

Assignment by married woman—See TRUSTEE, Bourke, O.C., 292.

See VENDOR AND PURCHASER—INVALID SALES, 2 N.W.P. 153, 1 B.L.R.A.C. 95 = 10 W.R. 128.

**Fieri-facias, Writ of.**

Writ of elegit—Writ of Fieri-facias—See SALE—SALE FOR ARREARS OF RENT—SETTING ASIDE SALE AND ITS EFFECT, 1 B.L.R. A.C. 56 = 10 W.R. 154.

See SALE—SALE IN EXECUTION OF DECREE—PURCHASERS, RIGHT OF, 1 Ind. Jur. N.S. 359.

**Fieri-facias, Writ of—concluded.**

See SALE—SALE IN EXECUTION OF DECREE—RIGHT OF PURCHASE ON SETTING ASIDE SALE, 1 C. 55 = 24 W.R. 372.

Sale by Sheriff under writ of fieri facias—Warranty—Eviction of purchaser—Purchaser's remedy—See SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 3 C. 806 = 5uth. P.C. 519 = 5 I.A. 116, P.C.

See SALE—SALE IN EXECUTION OF DECREE—WRONGFUL AND INVALID SALES, 8 C.L.R. 4, 8 W.R. 210.

**Final Decree.**

Meaning of—See APPEAL TO PRIVY COUNCIL—CASES WHERE APPEAL LIES OR NOT, 15 B. 155, P.C. = 18 I. A. 6.

Order of Recorder of Rangoon—Final decree—Original civil jurisdiction—See PROBATE—MISCELLANEOUS, 24 C. 30 = 1 C.W.N. 8.

**Final Order.**

Meaning of the term—Character of finality when can be claimed—See CIV. PRO. CODE, 1908, s. 109, cl. (a), 13 C.L.J. 688.

**Financial Commissioner.**

See AWARD, 7 O.C. 218.

**Financial Commissioner, Punjab.**

Authority of, over litigation in which Government is concerned—See CIV. PRO. CODE, 1908, O. XXIII, r. 11, 104 P.R. 1908 = 160 P.W.R. 1908.

When would interfere in revision—See REVISION—GENERAL, 2 P.R. 1910, Rev. = 6 Ind. Cas. 735 = 101 P.L.R. 1910.

**Findings of Fact.**

See PRACTICE AND PROCEDURE.

See PRIVY COUNCIL, PRACTICE OF.

See SPECIAL OR SECOND APPEAL—PRACTICE AND PROCEDURE IN SPECIAL APPEAL.

(1)—*Findings of fact based on conjecture—Powers of High Court.*—Findings of fact not based on evidence, but upon conjectures made by the Lower Courts, are, strictly speaking, legal inferences and the expression of their legal views; and the High Court can, in second appeal, decide whether such inferences and such views are correct under the Law. **SANKER LAL v. SUKHRANI**, 4 A. 462 = A.W.N. 1882, 106.

(2)—*First and second appeals—Findings of fact and conclusions of law.*—Although the findings of fact of a Court in first appeal must, when there is evidence on the record in support of them, be accepted as final by a Court hearing an appeal from an appellate decree, yet the correctness of the conclusion of law from the facts found can be considered in second appeal. **WUTZBEER v. SHARPE**, 15 A. 270 = A.W.N. 1893, 151.



**Findings of Fact—concluded.**

(3)—*Practice of High Court as to findings of Lower Court.*—Although the High Court is not limited to the express findings of the Courts below, but is justified in assuming inferences of fact clearly intended; yet, when the judgment of the Lower Court shows that it did not intend to express any opinion on a particular point, the High Court cannot infer that the Lower Court did determine that point. Thus when the Sub-Judge said that he decided the case "without regard to the question of limitation," the Court could not suppose him to have intended to determine that there was no possession by plaintiff. *GHUNESSAM SINGH KOOR v. LALLA KALEE PERSHAD*, 18 W.R. 149.

(4)—*Appellate Court—Finding of fact by Lower Court*—A Court of second appeal is bound by a finding of fact of the Lower Court. *FAKIR LAL GOSWAMI v. W.C. BONNERJI*, 4 C.W.N. 324.

Distinguished from inferences or conclusions of law—Second appeal—See CIV. PRO. CODE, 1908, ss. 100, 101, 20 C. 93, P.C.=19 I.A. 228.

See CIV. PRO. CODE, 1908, O. XLI, r. 23. 15 A. 413=A.W.N. 1893, 178.

See LETTERS PATENT HIGH COURT, 1865, N.W.P. 17 A. 475=A.W.N. 1895, 104.

Remand order, appeal against—High Court bound by findings of fact of lower appellate Court—See REMAND, 20 A. 42=A.W.N. 1897, 195.

Finding of fact in judgment not necessary for the decree, effect of—See RES JUDICATA — ADJUDICATIONS, 17 A. 174=A.W.N. 1895, 47.

Civ. Pro. Code, s. 584—Second appeal—Grounds impugning findings of fact—See Special or second appeal—Errors of Law or Procedure, 7 A. 649, F.B.=A.W.N. 1885, 151.

Alternative reliefs in plaint—Partition—Findings of fact unaccompanied by reasons—Not conclusive in second appeal—Practice—Procedure—See VARIANCE BETWEEN PLEADINGS AND PROOF, 19 B. 323.

**Findings of Law.**

See CIV. PRO. CODE, 1908, O. XLI, r. 23, 15 A. 413=A.W.N. 1893, 178.

**Fine.**

See IMPRISONMENT.

See PENALTY.

(1)—*Compensation to complainant paid out of fine—Order refunding fine on reversal of conviction—Remedy for recovery by accused of amount paid by him.*—An order of a Court reversing a conviction and directing refund of the fines levied from the accused implies an order that the fines in whosoever hands they might be, should be repaid to the accused. For recovering, therefore, any portion of the fine which might have been given away as compensation to the complainant, the accused is not to be

**Fine—concluded.**

driven to have recourse to a civil suit against the complainant. It is doubtful even, whether, in a Civil Court, the accused can have any remedy in the matter against the complainant, as it was from the Magistrate and not from the accused person that the complainant has received the compensation money. *MUTASADDI v. MANI RAM*, 19 A. 112=A.W.N. 1896, 182. [R., 29 P.R. 1903=2 P.L.R. 1904.]

Appeal against "orders as to fines" under Civ. Pro. Code—Inapplicable to penalties under Stamp Act—See APPEAL—ORDERS, 5 C. 311.

Fine—Agreement to supply funds for appeal in consideration of getting a portion of the fine if refunded not illegal—See CONTRACT ACT, 1872, s. 23, L.B.R. 1872—1892, 132.

District Munsiff's Court—Power to—Karnam—See KARNAM, 3 M. 405.

See PARTITION—SUITS FOR PARTITION—JURISDICTION OF CIVIL COURT IN, 2 B.L.R. App. 40 (b).

Levied on pleader for refusing to act for client—Appeal by pleader—Reference by appellate Court to High Court—Dispute between litigant parties in suit essential to justify reference—See REFERENCE TO HIGH COURT, 12 B. 78.

Sale of land to recover fine imposed by Collector—Title of purchaser—See MAD. REG. IX OF 1822, s. 5, 9 M. 247.

Religious institution—Power to fine subordinates—Strict proof—See RES JUDICATA. COMPETENCY OF COURT, 10 M.L.T. 133=21 M.L.J. 730.

See SALE — SALE FOR ARREARS OF REVENUE AND CESS—SETTING ASIDE SALE AND ITS EFFECT, 8 S.L.R. 230=17 W.R. 21.

See WITNESS—DEFAULTING WITNESSES, 1 B.L.R., A.C. 186=10 W.R. 233.

**Fines by Magistrates Act.**

See ACT II OF 1839.

**Fire.**

See ACT III OF 1865, s. 9, 24 C. 786=1 C.W.N. 200, 26 C. 398, P.C.=26 I.A. 1=3 C.W.N. 145.

Loss of goods by—Exception in bill-of-lading—See BILL OF LADING, 4 C. 736=3 C.L.R. 585.

See CARRIERS, 6 B.H.C. O.C. 71.

Railway Company—Statutory powers—Fire caused by sparks from engine—Suits for damages—Proof of negligence—Liability of the Company — See RAILWAY COMPANY, 14 B.L.R. 1.

**Fire and Marine, Policies of Insurance Assignment Act.**

See ACT V OF 1686.



**Firm.**

See PARTNERSHIP.

(1)—*Suit by firm*.—A suit by a firm should not be brought in the name of the firm but in the names of the members who constitute the firm. *PULIN BEHARI v. WATSON*, B.L.R. Sup. Vol. 904=9 W.R. 190.

(2)—*Debt due to firm—Suit by Gumastah*.—A gumastah of a firm cannot sue as representing the firm. *THAKUR DASS v. GOLAM MOHYUDDIN*, 20 P.R. 1882. [R., 8 P.R. 1886; Cons., & Disc., 156 P.R. 1889.]

Execution of decree against firm—Attachment of property as belonging to firm—Claim by partner to property as private property—Order disallowing claim—Appeal—See APPEAL—DECREES AND EXECUTION OF DECREES, 4 A. 190.

Firm—What it means—Its nature—See ARBITRATION—GENERAL, 4 S.L.R. 196=9 Ind. Cas. 712.

Suit against person carrying on business in firm's name—Person living outside but carrying on business within jurisdiction of High Court—Jurisdiction—Contract signed by manager of—Authority of manager—See CIV. PRO. CODE, 1908, O. XXX, r. 10, 10 Ind. Cas. 895.

Suit on a contract made by a—Maintainable against some members only—See CONTRACT ACT, 1872, s. 43, 6 B. 700.

See CONTRACT ACT, 1872, s. 242, 6 C.W.N. 429.

Suit to declare the membership of a firm—No further relief—Maintainability—See DECLARATORY DECREE, SUIT FOR—WHEN DECLARATORY SUITS LIE, 93 P.R. 1884.

Partnership—Joint Hindu family—Suit by one member for debt due to firm—See HINDU LAW—JOINT FAMILY, 8 A. 264=A.W.N. 1886, 89.

Cutchi Memons—Position with regard to family property, governed by rules of Hindu Law and custom—Family firm—Onus on member of family to show he is no partner—See HINDU LAW—JOINT FAMILY, 14 B. 189.

See JOINDER OF PARTIES, 140 P.R. 1889.

See LETTERS OF ADMINISTRATION, 17 M. 147.

Assignment of business of firm—Liability of assignee for debt not shown in books of firm—See NOVATION, A W N. 1881, 52.

See PARTIES TO SUITS—GENERAL, 2 Agra, 101, 2 Agra, Mis. 4, 21 M. 256.

One alone of several surviving partners, whether can sue for firm's outstandings—See PARTIES TO SUITS—ADDING PARTIES TO SUITS, 14 A. 524=A.W.N. 1892, 104.

Suit by manager of—Adding of other partner as co-plaintiff, on objection taken by defendant—See PARTIES TO SUITS—ADDING PARTIES TO SUITS, 17 B. 413.

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Suit on behalf of firm—Suit in the name of firm—Plaint signed and verified by one of the partners—See PLAINT—VERIFICATION AND SIGNATURE, 103 P.L.R. 1902.

Acquisition of occupancy rights by—See RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT, 4 C. 957, 11 C. 501.

Agent authorised to sign on behalf of the firm—Liability—See STAMP ACT, 1879, ss. 58, 61, 64, 27 C. 324.

Exclusively managed by Gomastha—Right of creditors—Insolvency—See ST. 11 AND 12, VIC. C. 21, 23 C. 26=22 I.A. 162, P.C.

Claims of European assistants and Native establishment and workman of insolvent—See ST. 11 AND 12 VIC. C. 21, s. 42. 6 B.L.R. App. 144.

See SUCCESSION CERTIFICATE ACT, 1889, s. 4, 17 M. 108.

**Fisheries, Burma Act.**

See BUR. ACT VII OF 1875.

**Fisheries Protection, Private, Ben. Act.**

See BEN. ACT II OF 1889.

**Fishery.**

(1)—*Jalkar right, immoveable property*—S.3, Act I of 1868 (General Clauses Consolidation)—S. 106, Act IV of 1882 (Transfer of Property).—A jalkar (right of fishery) right is immoveable property within the definition of immoveable property as set out in the General Clauses Act; it is a benefit arising out of land covered by water. It is so, for purposes of s. 106, Act IV of 1882 (Transfer of Property). *RAM GOPAL BYSACK v. NURUMUDDIN*, 20 C. 446. (19 C. 514, F.)

(2)—*Right to Jalkur, extent of*.—The right to a Jalkur by no means involves a right to the soil when the Julker is either dried or filled up by accumulation of soil. *RADHA MOHUN MUNDUL v. NEEL MADHUB MUNDUL*, 24 W.R. 200. [R., 3 C. 276, 9 C. 183, 2 B. 19, 8 C.W.N. 804, 31 C. 937.]

(3)—*Jalkar, Settlement of—Right in soil*.—It cannot be broadly stated that the settlement of a jalkar does not imply any right in the soil. *RAKEAL CHURN MUNDUL v. WATSON & CO.*, 10 C. 50.

(4)—*Patni of jalkar—Interest in land—District Road Cess Act (Bengal Act X of 1871)*.—A jalkar does not import any interest in the soil itself and a patni of a jalkar is not "an interest in land" within the meaning of the definition in the District Road Cess Act. *DAVID v. GRISH CHUNDER GUHA*, 9 C. 183=11 C.L.R. 305. [R., 31 C. 938=8 C.W.N. 804.]

(5)—*Rights of Zemindar—Jalkar*.—Where both water and land have been found to be the property of the Zemindar as such, the two rights should not be separated. *BABOO CHUNDER COOMAR ROY v. RAJAH BURDOA KANT ROY*, W.R. 1864, 63. [R., 2 B. 19.]



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(6)—*Drying up of jalkar—Rights of holder.*—When a *jalkur* dries up, its holder is not necessarily entitled to the land below the water. *BISSEN LAL DAS v. RANEE KHYRUNNISSA BEGAM*, 1 W.R. 78. [R., 2 B. 19, 31 C. 937=8 C.W.N. 804.]

(7)—*Drying up of jhil.*—By pottah certain land was leased, and a right of *jalkar* on fishery in a *bhil* or lake was granted on payment of certain *jumma*. The *bhil* became permanently dried up. *Held* that the grant being merely of the fishery, the lessee acquired no interest in the soil, and the lessor was entitled to re enter on the land formerly covered with the water of the *bhil*. *SUROOP CHUNDER MOZOOMDAR v. JARDINE, SKINNER & CO.*, Marsh 334=2 Hay 468.

(8)—*Lands formed by alluvion—Julkar.*—If a river merely changes its course, the old dry course of the river must be taken to have become private property; and as incident to, and part of, the same, the owner of the soil is entitled to all *bheels* or ponds, *gulis* or *damoores* in which water remains, but which do not communicate with the river except in the time of floods, and he can claim a settlement with the Government in respect of any *julkur* in the same. *MR. J. J. GREY v. ANUND MOHUN MOITRO*, W.R. 1864, 108. [F., 21 W.R. 27, 17 C. 963; R. l. on, 9 C.W.N. 934; R., 33 C. 15. 12 C.W.N. 559.]

(9)—*Villages on opposite banks of river—Right of owners to julkur whether includes right of ferry also.*—A right to *julkur* (that is water produce of half a river) which applies ordinarily to the produce of water, such as fish of water-nute and lotus-seeds or the revenue assessed thereon, does not necessarily carry with it a right of ferry. *GOPEL THAKOORAE v. SHEO DEVUD MISSER*, 5 N.W.P. 93.

(10)—*Navigable river—Jalkar or right of fishing in—River changing its course.*—If a navigable river simply changes its course, it does not affect the *jalkar*, or right of fishing in it. *TARINI CHURN SINHA v. WATSON & CO.*, 17 C. 963. (W.R. 1864, 108, F.; 1 W.R. 88, D.) [R., 9 C.W.N. 934=33 C. 15]

(11)—*Co-proprietors with joint right of fishing in julkar.*—*Running of course of stream on plaintiff's land—Action for trespass not maintainable against co-proprietor fishing in water on such land.*—The plaintiff in this case, the defendant and certain others were joint proprietors of the *julkur* of a river. The lands were divided under a *butwarrah* but not the *julkur*. The river subsequently changed its course so that a portion of it came over land which formerly was the joint land to the parties. Under these circumstances it was *held* that the plaintiff was not entitled to sue one of the co-proprietors in an action for a trespass in coming on defendant's land and taking the fish. Plaintiff was only one of the joint proprietors of the *julkur*, and if one of the joint proprietors took the fish out of the fishery, the plaintiff might have had an action against him to account for the profits

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of the fishery, but he could not sue him for coming and fishing in the fishery in which he and the other proprietors were entitled to fish. Nor can the plaintiff obtain a share of the fish on the ground that he had a share in the *julkur*. *GOVIND CHUNDER SHAHA v. KHAJA ABDUL GUNNIE*, 6 W.R. 41. [D, 12 W.R. 16.]

(12)—*Right of—Channel, an arm of the river.*—One who has a right of fishery in a public navigable river is entitled to such right also in a channel, which is connected with it like an arm of the river system and flows in the bed from which the river has shifted. *RAJA JOGENDER NARAIN ROY v. M. M. CRAWFORD*, 2 C.L.J. 569=32 C. 1141. [R., 12 C.W.N. 559.]

(13)—*Public navigable river, fishery in—Arm of the river ceasing to be an arm of a flowing river, Effect of.*—When, on account of a change in the course of a public navigable river, an arm of the river ceases to be an arm of the flowing river, the person who had a right of fishery in the river ceases to have any right to it; it becomes the property of the adjacent owner. *ISHAN CHANDRA DASS SARKAR v. UPENDRA NATH GHOSH*, 12 C.W.N. 559. (21 W.R. 27, 32 C. 1141=2 C.L.J. 569, W.R. 1864, 108, R.)

(14)—*In navigable river—Dobas left by recession of river—Grantees of fishery, Rights of—Communication with main channel at all seasons.*—If a navigable river shifts its course leaving lakes, *dobas* or sheets of water, in its old bed, the grantee of the exclusive right of fishery in the river retains that right over such lakes, *dobas*, &c., so long as these latter remain in communication with the main channel at all seasons of the year. *HEM CHANDRA CHOWDHURY v. JAGADINDRA NATH ROY*, 9 C.W.N. 934=33 C. 15. (W.R. 1864, 108, Rel. on; 21 W.R. 27, 17 C. 963, R.)

(15)—*Fishery right in tidal and navigable river when the river changes its course—Right of Government.*—When a tidal and navigable river shifts its course, fishery rights continue to subsist in the river in its new course. Government has the right to lease fishery rights in tidal and navigable rivers. *AYUB ALI CHOWDHURY v. DAYA BIBI*, 12 C.W.N. 103 (10 C.W.N. 540=4 C.L.J. 51, D.)

(16)—*Rights of Jalkar—Presumption as to grant—Government—Evidence.*—Although no evidence is forthcoming of an express grant of a right of fishery in a navigable river, a grant may be presumed from long continued user and from the orders passed by the Revenue authorities from time to time in respect to the *Jalkar*, and positive evidence of a grant by Government is not absolutely necessary. *SARAT CHANDRA ROY v. KALARAM MALO*, 33 C. 1349. (11 C. 434, R.)

(17)—*Independent julkar—Proof—Navigable river—Survey map—Map for private purposes—Comparative value.*—Unless a person can



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establish his right to a fishery, independent of his right to his estate, he can have no title to any such right in a navigable river, or any part thereof lying outside the boundaries of his estate. What evidence is necessary to prove the grant of an independent right of fishery in a navigable river discussed. Upon the documentary evidence it was held that the lower appellate Court was in error in finding that plaintiff had proved an independent julkar. The presumption of law is that, in the absence of evidence to the contrary, survey maps prepared for public purposes by responsible officers of Government are entitled to more reliance than maps prepared for private purposes in a private suit. **MATHURA NATH v. SIB CHANDRA BOSE**, 12 C.W.N. 334.

(18).—*Fishery rights on certain portions of land—Transfer of land by sale certificate—Whether fishery rights can exist separate from the land.*—Fishery rights in water in certain burrow-pits cannot exist separate from the land, and such rights would not remain after the transfer of such land to a stranger. **SARAT CHUNDER ROY CHOWDHRY v. JATINDRA NATH MUKERJEE**, 35 C. 614.

(19).—*Grant merely of right of fishery—Lessee's interest.*—Where the grant is merely a right of fishery, the lessee acquires no interest in the sub-soil, and is not entitled to retain possession, when the water dries up. **MAHANANDA CHAKRAVARTI v. MONGALA KEOTANI**, 31 C. 937=8 C.W.N. 804. (1 W.R. 79, 11 W.R. 272, 24 W.R. 200, 9 C. 183, R.)

(20).—*Fishing in tank—Proof of ownership.*—The mere act of fishing in a tank is no proof of ownership. **SYUD ERTZAH HOSSEIN v. HUREE PERSHAD SINGH**, 3 W.R. 281. [R., 20 M.L.J. 699=8 M.L.T. 399=2 Ind. Cas. 427.]

(21).—*Fishery rights—Accretion.*—Where the lower appellate Court reverses a decree establishing a right of fishery in a river, on the ground that it was possible that the narrow inlet connecting the river with the disputed body of water which occupied what was once its bed, might silt up later in the year, its decision is wrong in law. When a flowing stream dries up, and defendants acquire a right to the land by the law of accretion, the right will be subject to the exercise by plaintiffs of their prior right of fishery. **KALEE SOONDUR ROY v. DWARKANATH MOJOMDAR**, 18 W.R. 460. [F., 21 W.R. 27; R., 2 B. 19.]

(22).—*Right of fishery—Source of supply of water not material—Diversion of water flowing in channels Effect of.*—Defendants in this case were previously in occupation of the fisheries in a river M, the main portion of which having since diverted, the water flowing in the previous channel was derived from the waters of another stream B, to the fisheries in which plaintiff had the right. Under the above circumstances, plaintiff claimed the right of fishery in the course of the old channel on the ground that the water of the stream B, which was his,

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flowed through it. Plaintiff's claim was held to be unsustainable. It was a matter of no sort of concern whatever to the plaintiff whence the water in which the defendants had a right of fishery came and the defendant's right was not lessened, nor plaintiff's right increased, because a portion of the water that formerly flowed in the channel of the river M, had been diverted from it. **NOBIN CHUNDER ROY CHOWDHRY v. RADHA PEAREE DEBIA**, 6 W.R. 17. [R., 2 B. 19.]

(23).—*Flooded lands—Julkar rights when can be acquired in—Reg. XI of 1825.*—Where a taluq is flooded by imperceptible degrees, the taluqdar may lose his rights of ownership in that portion of it which is covered with water, and the owner of the adjoining julkar may acquire rights of fishery therein. But, if the flooding is caused by a sudden irruption of the river, so that a definite and ascertainable area is submerged at once, then that area does not become lost to the taluqdar, nor does the owner of the adjoining julkar become entitled to extend his fishery rights over it. **MAHARANEE SIBESSURY DABEE v. LUKHEY DABEE**, 1 W.R. 88. [R., 2 B. 19; D., 17 C. 963.]

(24).—*Julkar rights—Restrictions.*—Persons who are the owners of the bed of a river, when dry, cannot use that bed in such a manner as to injure the julkar rights which others have in that bed when full of water, by restricting the area over which the water may flow. **SRIKANT BHUTACHARJEE v. KEDAR NATH MOOKERJEE**, 6 C.L.R. 242.

(25).—*Julkar—Not easement—Adverse user.*—A julkar is not an easement within the meaning of s. 27 of Act IX of 1871, but is an interest in immoveable property within the meaning of sch. II, art. 145 of the Act=Art. 144 of Act XV of 1877. Where the defendant had been exercising a right of fishing in certain water adversely to the plaintiff for more than twelve years, the plaintiff's exclusive right of fishing in such water was barred. **PARBUTTY NATH ROY CHOWDHRY v. MUDHO PAROL**, 3 C. 276=1 C.L.R. 592. [D., 9 C. 698=12 C.L.R. 382; R., 19 C. 544, F.B.]

(26).—*Limitation—Act IX of 1871, art. 145.*—When a person exercises the right of fishing in a tank adversely for twelve years, his right to fish becomes absolute and indefeasible. **LUCKIMONI DAS v. KORUNA KANT MOITRO**, 3 C.L.R. 509.

(27).—*Right of fishery, Acquisition of—Dispossession, what could not constitute—Unreasonable custom—Limitation Act, 1877, s. 26.*—The mere fact of an undefined and fluctuating body of the tenants in a village of a zamindari having, on many occasions extending over more than twelve years, carried away fish from the zamindar's tank, would amount, at the most, only to trespasses and acts of misappropriation and not to dispossession, so as to bar the zamindar's right of maintaining a suit against such tenants to restrain them from fishing



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therein. No prescriptive right of fishery can be acquired by virtue of a custom which is unreasonable, e.g., where there is no limitation to the number of persons entitled to enjoy it, an unlimited number of persons taking away the profits of a private property and leaving nothing to the owner. *LUTCHMEEPUT SINGH v. SADAULLA NUSHYO*, 9 C. 698 = 12 C.L.R. 382. [*F.*, 31 C. 397; *Expl.*, 14 B. 213, 23 B. 666 = 1 Bom. L.R. 170, 6 C.L.J. 213; *R.*, 1 Bom. L.R. 499, 8 C.W.N. 425 = 31 C. 503, P.C.]

(28)—*Fishery right—Easement—Limitation Act (XV of 1877). s. 26—Lost grant—Suit for declaration of fishery right. Maintainability—Injunction—Limitation Act (XV of 1877), sch. II, arts. 142, 144—Right to extra territorial fishery, is immoveable property—Interest in immoveable property.*—Under s. 26, Limitation Act, 1877, a *profit a prendre*, such as a right of fishing in another's water, falls within the description of easement. (5 C. 945, 6 C.L.R. 269, *R.*) If any person claims any such statutory right of easement, it is necessary for him to prove that the right has been exercised within two years before the commencement of the suit. There is a substantial difference between isolated acts of trespass which amount to disturbance of the exercise of a right of fishery, and complete exclusion of the party who sets up the right, from entry upon the land when covered by water with a view to the exercise of his right. In a case of the latter description, the party aggrieved may sue in ejectment. The scope of art. 144, Limitation Act, is wider than that of art. 142; the latter refers to suits for possession of immoveable property, the former includes in addition interests in immoveable property. A right to extra territorial fishery is not immoveable property for all purposes, but it is an interest in immoveable property. (21 W.R. 178, 13 B.L.R. 254, 1 I.A. 34, *R.*; 20 C. 446, *Commented on.*) A suit for possession of a several fishery is governed by art. 144, Limitation Act. *LOKENATH BIDYADHAR MAHAPATRA v. JAHANIA BIBI*, 14 C.L.J. 572.

(29)—*Julkar—Fishery—Rights of occupancy.*—The right of occupancy which accrues to tenants, who have occupied or cultivated land for twelve years or upwards, does not arise in respect of the right called *julkar* or fishery. That is a right which may be let out by *ijaradars* under the landlord, and may be enjoyed under them so long as their *ijara* continues, but is liable to be determined at the expiration of the *ijara*. *JUGGOBUNDHOO SHAHA v. PROMOTHONATH ROY*, 4 C. 767.

(30)—*Occupancy rights in julkar.*—A lessee of a *julkar* cannot acquire occupancy rights therein. *BOLLYE SATEE v. ACRAM ALLY*, 4 C. 961.

(31)—*Right of tenant-at-will in occupancy of julkur, not preferential to that of lessee landlord—Inapplicability of Act X of 1859.*—This was a suit to recover possession of a certain *julkur*,

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the plaintiff alleging that he had obtained a lease of the fishery from the zemindar on the death of the former tenant, and held it until the defendant illegally caught and appropriated the fish and so ousted plaintiff from possession. The defence was in possession from the time of the defendants great-grand-father at a certain yearly rent. It was objected on second appeal that the question to be determined was, whether the defendant had any hereditary right to hold the *julkur*, and that not having been decided, the judgment of the lower appellate Court was incomplete, but the High Court held that the defendant was not holding under any lease from the zemindar, and his mere occupancy of the *julkur* for a series of years would give him no preferential right against his landlord's nominee. He was a mere tenant-at-will and could be ousted at any time by the proprietor of the *julkur* and the first Court should not have applied the provisions of Act X and decided that he was entitled to retain possession so long as he paid a fair rent. *WOOMA KANT SIRCAR v. GOPAL SINGH*, 2 W.R. Act X, Rul. 19.

(32)—*Person exercising fishery right from part-owner, not trespasser.*—Persons who exercise a right to fish in a *julkur* mehal under a lease from part-owners, are not trespassers in relation to other parties holding a similar lease from co-sharers. *RAJ KRISTO KOEBUTTO DOSS v. KALA CHAND MANJHEE*, 20 W.R. 362.

(33)—*Right of fishery. Acquisition of Incorporeal Hereditaments and Act XV of 1877.*—When Act IX of 1871 (Limitation) was re-cast in 1877, incorporeal hereditaments were reduced to the position of easements not only for the purposes of limitation, but also in regard to their nature and mode of acquisition. *FADU JHALA v. GAUR MAHAN JHALA*, 19 C. 544, F.B. [*Appl.*, 20 C. 446; *R.*, 13 C.W.N. 451 = 9 C.L.J. 336.]

(34)—*Right of fishery—Bund.*—A person has no right to erect a bund on his own land with the result of intercepting the passage of fish in a natural stream and thereby render another's right of fishery therein less profitable, unless the bund has existed for many years without objection. *RAM DAS SURMAH v. SONATUN GOOHOO*, W.R. 1864, 273 [*D.*, 23 W.R. 298.]

(35)—*Right of—Julkur rights of a Pergunnah.*—Held that a proprietor of the entire *julkur* rights of a whole *pergannah* is entitled to catch fish in any natural water course or in any *jheel* or pond not made by any human agency. *KOORONAMAYEE CHOWDRAIN v. JOY SUNKER CHOWDHRY*, W.R. 1864, 267. [*R.*, 12 W.R. 16, 2 B. 19.]

(36)—*Right to fish in tank—Ownership. Proof of.*—When a person is found to have been in possession from of old of a tank in respect of which the right of fishing is the subject of dispute, it is not necessary to show (in order to constitute him the owner of the fish also) that



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he had been in the habit of catching or eating or selling the fish, as he was fully competent to preserve them if he thought proper to do so. **HUB PERSHAD ROY v. MUHUNT BUDREE NARAIN GIR**, 1 N.W.P. 14.

(37)—*Right of person owning fishery rights from the time of permanent settlement—Closed channel.*—A person who owns the right of fishery in a river from the time of the permanent settlement may exercise the right in the open channels, as also in all closing or closed channels up to the time when they are finally closed at both ends. **KRISHENDRO ROY CHOWDHURY v. MAHARANEE SURNA MOYEE**, 21 W.R. 27. [R., 33 C. 15=9 C.W.N. 934, 12 C.W.N. 559.]

(38)—*Dispute about julkurs — Title-deeds vague—Possession.*—In disputes about julkurs between the proprietors of adjoining estates, where the title-deeds do not specify the parcels of land or water in dispute, the title must depend on the fact of possession. **SHAMA SOONDUREE DEBIA v. THE COLLECTOR OF MALDAH**, 12 W.R. 164.

(39)—*Possession—Evidence of—Title—Suit for possession—Jurisdiction—Rights in navigable river—Possession and enjoyment for a series of years are cogent evidence of title if unrebutted.*—Suits for possession can be maintained in Civil Courts where forcible dispossession is not alleged. An exclusive julkar right in a navigable river set up against the ordinary rights of the state and the community must be made out by clear and strong evidence. **MR. J.G. BAGRAM v. THE COLLECTOR OF BHULLOOA**, W.R. 1864, 243. [D., 9 W.R. 259; R., 22 C. 252, 2 B. 19.]

(40)—*Right of fishing not public property—Grant to private individual—Prescription—Presumption of grant.*—The right of fishing in a navigable river, as it does not belong to the public, the Government may grant it to an individual. Prescription is founded on the presumption of a grant from long continued uninterrupted user and enjoyment as of right. **CHUNDER JALEAH v. RAM CHURN MOOKERJEE**, 18 W.R. 212. [R., 11 C. 434, 22 C. 252, 2 B. 19.]

(41)—*Fishery, Right of—Navigable river—Julkur-ejectment, Suit for—Rent—Es'oppel.*—In this country, the Government can have an exclusive right of fishery in navigable rivers. The purchaser of a Julkur mahal at a sale for arrears of Government revenue sued to eject the defendants from the julkur. The defendants who had paid rent to the plaintiff and his predecessors, contended that as the river was navigable, the public had a right to fish therein, and the Government was not at liberty to grant to the plaintiff an exclusive right of fishing there. *Held* that the true light in which to regard the defendants was to regard them as licensees, and that they could not acquire a right of occupancy in a julkur, and that, in the absence of a special contract, they were as licensees liable to have their license determined, and, having

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also paid rent to the plaintiff, were precluded from setting up that special defence. **GOUR HARI MAL v. AMIRUNNESSA KHATOON**, 11 C. L.R. 9.

(42)—*Private rights of fishery in tidal rivers—Jalkar—Presumption.*—Any private right of fishery in a tidal navigable river must, if at all, be derived from the Crown and must be established by very clear evidence. The presumption would be against any such private right. [R., 11 C. 434, F.B., 22 C. 252, 12 C.W.N. 334.] The mere use of the word 'Jalkar,' in a deed of permanent settlement, would not give a right of fishery in a public tidal river. This word may be satisfied by applying it to the right of fishing within enclosed water. *Quære*:—Whether it is possible for the Crown to create a private right of fishery? **PROSUNNO COOMAR SIRCAR v. RAM COOMAR PAROOLY**, 4 C. 53. (2 B. 19, R.; 11 C. 434, F.B.)

(43)—*Tidal river—Prescription.*—The common and general right of the public to fish in tidal waters, may be restrained or regulated by the Legislature, and may be limited to the exclusive privilege acquired, either by grant or prescription, by certain persons within certain limits. As an infringement of the general right of the public, such exclusive right can be acquired by a period of enjoyment which would suffice for the acquisition of an easement against the Crown. **VIRESA v. TATAYYA**, 8 M. 467. [R., 12 M. 43, 14 M.L.J. 248=27 M. 551=1 Weir 405.]

(44)—*Exclusive fishery rights in tidal navigable rivers—Grant by the Crown—Necessity for proof of grant in the absence of title by prescription—Julkars, grant of—Evidence as to nature and extent—No special rules—Payment of rent by fishermen to ijaradars of a fishery—Evidentiary value—Grant of Jalkar—What it ordinarily includes.*—Exclusive rights of fishery in tidal navigable rivers can be granted to private individuals, or to certain classes of persons, by the Crown. [R., 22 C. 252, 27 M. 551=14 M.L.J. 248=1 Weir 386.] In the absence of proof of title by prescription, the rights to such a fishery cannot be established without proof of a direct grant from Government. [R., 33 C. 1349.] The grant of a Jalkar should be construed like any other grant, and there are no special rules of construction which are applicable to grants of Julkars, as distinguished from other grants; and in ascertaining what the boundaries of a jalkar are, or what rights of fishery are contained within those boundaries, whether the subject of the grant be in a tidal navigable river or not, the same rules of evidence should guide the Courts as in ascertaining the nature and extent of any other grant. [R., 12 C.W.N. 334.] The mere payment of rent by fishermen to former ijaradars of a fishery would, in the absence of title by grant or prescription in the alleged holders of a jalkar, *certainly not estop them from disputing the rights of the latter, though such payment would be strong evidence*



**Fishery—continued.**

against the fishermen of the existence of that right and of acquiescence in their title. Unless the boundaries in a grant of a jalkar clearly indicate the contrary, the mere use of the word jalkar would not ordinarily include rights of fishery in tidal navigable rivers.—*Per Prinsep and Pigot, JJ.* **HORI DAS MAL v. MAHOMED JAKI, 11 C. 434, F.B.**

(45)—*In tidal stream—Right based on custom.*—For the purpose of establishing a customary right to catch fish in a tidal stream, by fixing stake nets across it at a particular spot, it not being necessary for the person claiming such exclusive right to prove user by him for a period extending to sixty years, evidence as to such user for a period of thirty years was held to be sufficient. **NARASAYYA v. SAMI, 12 M. 43.**

(46)—*Right of fishing in a navigable river—Right of Government in such rivers.*—On the side of Bengal in India, the bed of a tidal and navigable river is vested in the Crown; and the right of jalkar (fishery) in such river, as also the bed of the river itself, may be granted by Government (whether it be in the exercise of that prerogative as the Crown, or as representing the public) to private individuals to be held by them as private property, subject, of course, to the right of navigation and such other rights as the public have in such rivers. **SATCOWRI GHOSH MONDAL v. SECRETARY OF STATE FOR INDIA IN COUNCIL, 22 C. 252. (6 M.I.A. 267, S.D.A. 1859, p. 1357, W.R. 1864, 243, 15 W.R. 212, 2 B. 19, 4 C. 53, 11 C. 434, R.)**

(47)—*Injury to rights of fishery—Damages—Special injury—Custom regulating right of fishing in sea—Right of fishing in navigable river—Property—Grant from Government—Fishing in the sea—Rights of fishing distinguished.*—Any person who, as a member of the public, fishes in the sea, must do so in a fair and reasonable manner, and not so as to obstruct others from doing the same. If any person so obstructs another, and special injury results therefrom, such person will be liable to pay damages. But if no special injury is alleged, a suit cannot lie in the Civil Courts. [**R., 12 M. 43.**] Where a custom prevails in certain portions of the sea regulating the exercise of the right of fishing by the public, the Courts will recognise that custom. [**R., 8 M. 467.**] The right of fishing in a tidal navigable river, as also the bed of the river itself, may be granted by Government to private individuals to be held by them as private property, subject, of course, to the right of navigation and such other rights as the public have in the river. But the right of the public to fish in the sea, whether it and its subjacent soil be or be not vested in the Crown, is common, and is not the subject of property. *N.B.*—The rights of the Crown and of the public in the waters and the subjacent soil of the sea and tidal rivers discussed with reference to Roman, English and Indian Laws. [**R., 8 M. 467, 4 C. 53, 11 C. 434, F.B., 22 B. 252.**] In a *several fishery*, a person has the exclusive right of fishing in water covering land which does

**Fishery—concluded.**

not belong to himself. In a *common of fishery*, all persons of a certain class, as all the tenants of a manor, or the dwellers of a parish, have equal rights of fishing in the same water. In a *free fishery*, several specified persons have equal right of fishing in the same water. In *territorial fishery*, the ownership of the soil and the right of fishery are associated in the same person. In a *common fishery*, all the subjects of the realm have equal rights, as in the case of the sea or tidal navigable rivers. **BABAN MAYACHA v. NAGU SHRANUCHA, 2 B. 19. [R., 12 B. 221, 1 S.L.R. 145.]**

(48)—*Claim to a jalkar by two persons—Onus probandi.*—Where a jalkar is claimed by two persons severally, and one of them is in possession of it under an Act IV award, the onus lies on the other person of proving his title to the whole or any portion of it. If the latter furnishes any evidence of his title, the Court must then go into the former's title, and decide which of the two persons had the superior title to the disputed jalkar. **NOBIN CHUNDER BOSE v. KUTTE KAUNT BOSE, 1 W. R. 215.**

Settlements of fisheries to be reported to the Board for confirmation; what report should contain. **Rev. Cir. No. 3, 21 W.R., Rev. Cir., p. 1.**

Rights, whether land within meaning of Land Acquisition Act—Whether a right to be acquired under the Act—See **ACT I OF 1894, 7 C.L.J. 445=12 C.W.N. 569=35 C. 525.**

See **ACT I OF 1894, s. 23, 23 C. 152=5 C.W.N. 349.**

Suit for rent of—Or jalkar tenure—See **BEN. ACT X OF 1859, ss. 6, 23, 31 C. 937=8 C.W.N. 804.**

Right, grant of, independently of interest in land—See **BEN. ACT VIII OF 1885, ss. 144, 184, 193, sch. III, art. 2, 7 C.L.J. 152.**

**Fish.**

Selling of, on the Chowpatti foreshore—See **BOM. ACT III OF 1888, s. 410, 7 Bom. L.R. 726.**

See **BUR. ACT VII of 1875, L.B.R. 1872—1892, 602.**

Right of—Rights of stranger—Effect of change in course of river—See **BOUNDARY, 12 C.L.J. 216=7 Ind. Cas. 140.**

See **CO-SHARERS—SUIT BY CO-SHARERS, 4 C.L.R. 63.**

See **JURISDICTION—CAUSES OF JURISDICTION, 24 C. 449=2 C.W.N. 169.**

See **JURISDICTION OF CIVIL COURTS, 2 B. 19.**

Right of, in navigable river if may be acquired as easement—Possession in exercise of common right not adverse—See **LIMITATION ACT, 1908, s. 26, 15 C.W.N. 972.**

See **LIMITATION ACT, 1908, s. 26, 5 C. 945=6 C.L.R. 269.**



**Fish—concluded.**

Damages for catching fish when may be recovered—See MESNE PROFITS—SUIT FOR MESNE PROFITS, 10 Ind. Cas. 117.

Specific Relief Act, 1877, s. 9—Suit for possession of exclusive right of fishing in creek—Right of fishing, whether immoveable property within s. 9—See PARTIES TO SUITS—SUITS BY REPRESENTATIVES OF CLASS, 12 B. 221.

See SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 5 N.W.P. 24.

Private right of—Whether immoveable property—See SPECIFIC RELIEF ACT, 1877, s. 9, 19 C. 544.

See SPECIFIC RELIEF ACT, 1877, s. 9, 18 C. 80.

**Fixture.**

Projecting verandah supported by beams of the house, if a—See BEN. ACT III OF 1899, s. 341, 15 C.W.N. 730.

Erected by tenant—Ownership as to meaning of—See LANDLORD AND TENANT—MISCELLANEOUS, 29 B. 323.

Meaning of the term—See LEASE—MISCELLANEOUS, 6 Bom. L.R. 1073=29 B. 323.

**Flag.**

Right to hoist a—Suit of civil nature—See CIV. PRO. CODE, 1882, s. 9, 7 A.L.J. 830=7 Ind. Cas. 314.

**Flint and Steel.**

Flint and steel, mere possession of, is no offence under the Forest Act, 1878—See ACT VII OF 1878, s. 25 (c), 4 Bom. L.R. 935.

**Flour.**

Contract to supply — See CONTRACT — BREACH OF CONTRACT, 2 Bom. L.R. 351.

**Fodder.**

See ATTACHMENT—SUBJECTS OF ATTACHMENT, 93 P.R. 1904.

**Force.**

Coercion—And undue influence—Burden of proof—See EVIDENCE ACT, 1872, s. 111, 1 O.C. 63.

**Foreclosure.**

See MORTGAGE—FORECLOSURE.

**Foreshore of Chowpatti.**

Foreshore of Chowpatti is within the purview of the City of Bombay Municipal Act, 1888—See BOM. ACT III OF 1888, s. 410, 7 Bom. L.R. 726.

**Foreign Carrying Company.**

(1)—*Foreign Carrying Company*—Place of contract—S. 151 of the Contract Act.—Where a contract to carry a passenger was made by a foreign Company in Calcutta, they were bound by the provisions of s. 151 of the Contract Act. MACKILLICAN v. THE COMPAGNIE DES MESAGERIES MARITIMES DE FRANCE, 6 C. 227=7 C.L.R. 49.

**Foreign Company.**

(1)—*Right of, to sue in British Court.*—A corporate body under the law of a foreign country can undoubtedly sue as such, under its corporate name, in British Courts throughout the world, but it must give some proof that it is duly incorporated under the law of such country. LEONG AH FOON v. THE ITALIAN COLONIAL TRADING COMPANY, 3 L.B.R. 261.

Right of foreign corporation to sue without being registered—Verification of plaint—See CIV. PRO. CODE, 1908, s. 83, O. XXIX, r. 1, 30 C. 103.

Not incorporated in India—Suit by—Signing and verification of plaint—See CIV. PRO. CODE, 1908, O. VI, r. 14, O. XIX, r. 1, 150 P.L.R. 1911.

**Foreign Country.**

Fraud practiced in—See FRAUD—EFFECT OF FRAUD, 26 C. 891=3 C.W.N. 670.

**Foreign Court.**

1.—GENERAL.

2.—JUDGMENT OF.

3.—JURISDICTION OF.

**—1.—General.**

See FOREIGN STATE.

(1)—*Jurisdiction of foreign Courts—Submission to jurisdiction—Judgment of foreign Court against British subject—Territorial legislation giving jurisdiction to Foreign Court—S. 13, Civ. Pro. Code, 1882—Scope—Submission to jurisdiction to foreign Court when arises.*—A foreign Civil Court has no jurisdiction or at least no jurisdiction which a Civil Court in British India recognises over a person who has never resided within the territorial jurisdiction of such foreign Court, either at the time when a suit is brought against him or previously and has never subjected himself by any acts of his to the authority of such Court, but is a British subject domiciled in British India. A Court in British India will not give effect to a decree passed by a foreign Court against such a person. If, in such a case, there is any special territorial legislation giving jurisdiction to a foreign Court, such legislation will not be recognised by a British Court. S. 13, Civ. Pro. Code, 1882, relates to matters of *res judicata*, and there is a distinction between a case in which a defendant puts forward a foreign judgment as a bar to a suit and a case in which a plaintiff seeks to enforce a foreign judgment. In the former it may fairly be supposed that the party submitted to the jurisdiction of the Foreign Court. E. CHRISTIAN v. P. J. DELANNEY, 26 C. 931=3 C.W.N. 614. (22 C. 222, P.C., F.)

No objection taken as to jurisdiction—Right of defendant to plead want of jurisdiction after passing of decree—See ESTOPPEL—ESTOPPEL BY CONDUCT, 8 M.H.C. 14.



**Foreign Court—continued.****—1.—General—concluded.**

Decree of foreign Court based upon decree in British India—Execution of original decree—See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 7 C. 82.

See FARIDKOT, 112 P.R. 1894, 191 P. R. 1888.

What is a—Power to restrain person from proceeding with suit in—See INJUNCTION—SPECIAL CASES, 13 C.W.N. 346=36 C. 233=1 Ind. Cas. 927.

Non-payment of costs of suit in foreign Court—No ground for staying proceedings between parties in India Court—See PRACTICE AND PROCEDURE, 8 B. 571.

**—2.—Judgment of.**

See CIV. PRO. CODE, 1908, ss. 12, 14.

(1)—*Personal action—Judgment of Foreign Court pronounced in absentem, nature of—Territorial jurisdiction of each separate State in personal actions—Courts of Faridkote—Jurisdiction of Courts of Native States.*—In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced in *absentem* by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by International Law, an absolute nullity. He is under no obligation of any kind to obey it. Not to the Courts of the State in which the cause of action has arisen, nor, in cases of contract, to those of the *locus solutionis*, should resort be had by the plaintiff, but to the Courts of the State in which the defendant resides, the Courts of the latter State having jurisdiction in all personal actions. [*F.*, 20 M. 112=7 M.L.J. 76, 26 C. 931=3 C.W.N. 614; *R.*, 20 B. 133, 18 M. 327, 28 C. 641=5 C.W.N. 741, 29 C. 509, 19 M.L.J. 457=32 M. 469=3 Ind. Cas. 190.] The judgments of the Courts of Faridkote are, and ought to be regarded in Her Majesty's Courts in British India as foreign judgments. [*F.*, 20 M. 112=7 M.L.J. 76, 26 C. 931=3 C.W.N. 614; *R.*, 20 B. 133, 18 M. 327, 28 C. 641=5 C.W.N. 741, 29 C. 509, 29 M. 239.] Judgments of the Courts of Native States having independent civil, criminal and fiscal jurisdiction, must be regarded as foreign judgments; and suits can be brought upon them to British Courts. GURDYAL SINGH v. RAJA OF FARIDKOT, 22 C. 222, P.C.=21 I.A. 171=4 M.L.J. 267=6 Sar. 503, (6 B. 292, *Not F.*) [*R.*, 19 A. 450=A.W.N. 1897, 98, 24 B. 86, 25 B. 528, 2 L. B.R. 47.]

(2)—*Foreign judgment, suit on—Submitting to jurisdiction—Ex parte decree—Prospective damages decreed in foreign Court—Disallowance in suit.*—Where a defendant (resident in British India) in a personal action in a foreign Court employed a vakil, but on the case coming on for hearing, the latter stated he had no instructions, and a decree was passed in *absentem*, and a petition by the defendant to have the *ex parte*

**Foreign Court—continued.****—2.—Judgment of—continued.**

decree set aside, was dismissed as barred by time, it cannot be said that he had submitted himself to the jurisdiction of the foreign Court. He can plead want of jurisdiction in a suit based on such a foreign judgment. [*R.*, 32 M. 469=19 M. L. J. 457.] Where the foreign judgment awarded damages, which were prospective at the time of the institution of the suit and as to which there was no evidence adduced, the claim can be disallowed in a suit on the said judgment. SIVARAMAN OHETTI v. IBURAM SAHEB, 18 M. 327.

(3)—*Foreign judgment not for ascertained sum of money—Suit in British India on such judgment—Maintainability.*—Plaintiff obtained a decree in the Province of Mysore for foreclosure and for a declaration that the proceeds of a crop of coffee for certain years should belong absolutely to him. In execution, he asked for an account of the crop gathered in the first year. The petition having been refused, he sued in British India for an account of the proceeds of the same year. *Held*, that the action was on a foreign judgment. The judgment, not having been for an ascertained sum of money, afforded no foundation for an action. SMITH v. COELHO, 22 M. 382.

(4)—*Jurisdiction—Suit on foreign judgment—When liable to impeachment.*—The Civil Courts in British India, may entertain suits, brought upon foreign judgments, including those of the Courts of the Native States. A foreign judgment, may always be impeached on the ground of fraud or collusion, or for want of jurisdiction, or that the defendant had no notice of the suit, or that the Judge was an interested party. SAMA v. ANNAMALAI, 7 M. 164, (6 B. 292, *Diss.*) [*Appr.*, 24 B. 86.]

(5)—*Foreign judgment—Misjoinder of causes of action.*—A suit, based on a foreign judgment, can lie only against persons, who were parties to that judgment. A suit based upon a foreign judgment and against persons, some of whom were not parties to that judgment, on the ground that all of them were members of one firm, is bad for mis-joinder of causes of action, even assuming that, as against those not parties, a suit would lie on the original cause of action. LAKSHMANAN v. KARUPPAN, 6 M. 273, [*R.*, 24 B. 77.]

(6)—*Suit on foreign judgment—Cause of action—Jurisdiction.*—A suit will lie in a British Indian Court, against a British Indian subject, on a foreign judgment obtained against him in the Court of a Native State, where the cause of action arose in that State, and he took no objection to jurisdiction, until the cause had reached the stage of appeal. KALIYUGAM v. CHOKALINGA, 7 M. 105. [*R.*, 24 B. 86.]

(7)—*Small Cause Court—Jurisdiction to entertain a suit on foreign judgment.*—A Small Cause Court has no jurisdiction to entertain a suit on a foreign judgment. KRISHNAN v. PILO, 6 M. 191.



**Foreign Court—continued.****—2.—Judgment of—continued.**

(8)—*Foreign judgment—Suit on—Jurisdiction—Partner of firm—Constructive residence—Possession of immoveable property.*—A Court in Kandy has no jurisdiction in a personal action against a defendant who is not resident there but in British India at the time of the institution of the suit, and who has not appeared and thus submitted himself to its jurisdiction. The fact that the defendant was carrying on business in Kandy through his partners is no reason for holding that he was constructively residing there. Nor again does the possession of some immoveable property within the jurisdiction of the Court give that Court jurisdiction over the absent defendant in a personal action. No suit can lie on a judgment of the Kandy Court, being a foreign Court, passed under the above circumstances. *NALLA KARUPPA SETTIAH v. MAHOMED IBURAM SAHIB*, 20 M. 112=7 M.L.J. 76. [Appr., 24 B. 86; R., 29 M. 239, Note.]

(9)—*Civ. Pro. Code, s. 14—Foreign judgment, suit on, in British Court—Power of Court to go into merits.*—The paragraph added to s. 14 of the Civ. Pro. Code, by s. 5 of Act VII of 1888 declares that when a suit is instituted in a British Indian Court on the basis of a foreign judgment, that Court is not precluded from inquiring into the merits of the case if the judgment is that of certain Asiatic and African Courts specified in the section. By the enactment of that paragraph, the finality of the judgments of the above foreign Courts has been taken away by the Legislature when a suit is brought on the basis of such judgments. *THE COLLECTOR OF MORADABAD v. HARBANS SINGH*, 21 A. 17=A.W.N. 1898, 183. [F., 24 B. 86.]

(10)—*Civ. Pro. Code (XIV of 1882), s. 17—Suit on foreign judgment—Business carried on within jurisdiction by member of defendant's family, whether and when amounts to carrying on business, within s. 17—French law.*—Plaintiff brought this suit in a District Court on a foreign judgment obtained by him against the defendant in the Court at Pondicherry. The ground on which the plaintiff urged that the District Court had jurisdiction over the defendant was that he carried on business within its jurisdiction. One K who was said to be the managing member of the defendant's family was carrying on business, and it was alleged that since defendant was a member of K's family, the defendant also was "carrying on business" within jurisdiction within the meaning of s. 17 of the Civ. Pro. Code. The facts in evidence negatived the view that the defendant had any interest in the alleged family business, much less that he assisted in carrying it on. The defendant could not under the circumstances be regarded as coming within the jurisdiction of the District Court and the suit therefore failed. Further, the French judgment under which the suit had been brought was, under the French law, null and void by reason of an order of the Pondicherry Court

**Foreign Court—continued.****—2.—Judgment of—continued.**

having adjudicated the defendant as an insolvent. So long as the adjudication remained in force no suit could be brought against the insolvent in French territory and his position must consequently be taken to be the same outside such territory as well. *Quære*.—Whether s. 17, Civ. Pro. Code, should be construed so as to exclude non-resident foreigners from its operation, even though they carry on business in British India through agents, and, if such construction be inadmissible, whether the section should be held to be *ultra vires*, with reference to such foreigners. *MURUGESA CHETTI v. ANNAMALAI CHETTI*, 23 M. 458=10 M.L.J. 39. [Confirmed on appeal, 26 M. 544=7 C.W.N. 754=30 I. A. 220, P.C.]

(11)—*Foreign judgment, Suit on—Objection to jurisdiction—Of Foreign Court—S. 14—Limitation Act.*—Where objection to the jurisdiction of a foreign Court, was taken, but was disallowed, there was no voluntary submission to the jurisdiction of the foreign Court, and hence the foreign judgment will give rise to no cause of action in a British Court. (2 M. 400, D.) [R., 32 M. 469=3 Ind. Cas. 1.] S. 14 of the Limitation Act does not apply to a case of litigation in a foreign Court, which, according to its own law, had ample jurisdiction. *PARRY & Co. v. APPASAWMI PILLAI*, 2 M. 407.

(12)—*Foreign judgment, Suit on—Costs—Personal liability—Foreign decree—Execution of.*—A defendant is bound by the judgment in a foreign Court against him, as representative of his father. He is personally bound to pay the costs awarded against him in that suit. In a suit, in a British Court, on that judgment, the defendant was made personally liable for those costs and also for all the costs in the British Court, as he contested plaintiff's right throughout. In giving effect to a foreign judgment, it is to be executed according to the rules and procedure of British Courts, which, in the absence of proof of assets received by a representative of a deceased, only gives a decree against the defendants as representatives to be levied from the assets of the deceased. *KANDASAMI v. MOIDIN SAIB*, 2 M. 337. [F., 7 M. 164; R., 13 B. 224.]

(13)—*Suit on judgments—Courts in Native States—Foreign judgments—Judgment of British Indian Court—Suit in High Court on judgment of Court of Small Causes—Civ. Pro. Code, 1877, s. 434.*—A suit founded upon the judgment of any Court in the Native States cannot be entertained by a Court in British India. Under s. 434 of Civ. Pro. Code, the decrees of certain Native Courts are declared to be enforceable as if they have been made by the Courts of British India. A suit not being maintainable on the judgment of a British Indian Court itself, there is no reason to hold that it will lie upon the judgment of even one of the privileged Native Courts notified under s. 434. The decrees of the Courts so notified have to be enforced by execution in the ordinary manner, and not by a suit



**Foreign Court—continued.****—2.—Judgment of—continued.**

on the judgment. Suits are generally permitted to be brought in the High Court on judgments of the Court of Small Causes, in order to obtain execution against immoveable property. This is however a peculiar exception to the settled rule that no suit could be maintained as upon the judgment of a British Indian Court. Also, the Court entertaining a suit on a foreign judgment cannot institute an enquiry into the merits of the original action or the propriety of the decision. **BHAVANISHANKAR SHEVAKRAM v. PURSADRI KALIDAS**, 6 B. 292. [Diss., 7 M. 164; Not F., 22 C. 222=21 I.A. 171=4 M.L.J. 267; F., 8 B. 593; R., 8 B. 1, 24 B. 86.]

(14)—*Cause of action—Foreign judgment. Execution of.*—If the cause of action is the taking of money, it arises at the place where the money is taken. The rule laid down in a case where foreign judgments are sought to be executed in British Indian Courts. **SREEHUREE BUKSHEE v. GOPAL CHUNDER SAMUNT**, 15 W.R. 500. [R., 28 C. 641, 5 C.W.N. 741, 6 B. 292.]

(15)—*Suit on foreign judgment—Applicability of limitation under foreign law—Foreign judgment, conclusive effect of, in absence of fraud or want of jurisdiction.*—This suit was brought by the present appellants on a foreign judgment and a decree passed in their favour by the first Court was reversed on appeal. The defendants had objected that the French Court at Chandernagore had no jurisdiction and its judgment, and decree were therefore of no effect. The first Court was of opinion that the foreign judgment having been pronounced after a full investigation and in the presence of both parties must be accepted as conclusive. The lower appellate Court, however, held that inasmuch as the defendant, residing within the British territories, had been sued in the French Court, no special grounds of jurisdiction being disclosed either by the record of the proceedings in the foreign Court, or by any evidence adduced in this suit, the judgment of that Court should be deemed to have been passed without jurisdiction. On the point of limitation, it was held that, if the Court at Chandernagore had jurisdiction over the defendant, plaintiffs were fully entitled to sue there within the period prescribed by the French Law, notwithstanding that their remedy by suit in the British Courts was barred. The law of limitation which merely bars the remedy by suit does not extinguish the contract or other cause of action, and the contract remaining in force, the remedy by suit in the foreign Court continues open for the period prescribed by the law of that Court without reference to British Indian Law of Limitation. The suit was remanded to the first Court for making the material inquiry which the Court should have made but did not, with regard to the defendant's allegations that the suit was fraudulently instituted in the French Court and the decree obtained by fraud. If it be found that there was no reason to question the judgment upon the ground of

**Foreign Court—continued.****—2.—Judgment of—continued.**

fraud or want of jurisdiction, it should be accepted as conclusive between the parties irrespective of the merits of the case or the propriety of the decision. **BOLORAM GOOY v. KAMEENEE DOSSEE**, 4 W.R. 107. [R., 8 W.R. 32, 6 B. 292, 24 B. 86=1 Bom. L.R. 539.]

(16)—S. 13, *Expl. VI, Civ. Pro. Code, 1882*—*Ex parte judgment of foreign Court against defendant—No submission to foreign jurisdiction—Sovereign, both of British India and British Colony, subject of.*—The Supreme Court of Mauritius is a foreign Court. Judgments of that Court are foreign judgments. Such judgments passed *in absentem* against a person who, at the time of the suit or judgment, was neither permanently nor temporarily resident in, nor the subject of the same country, cannot be enforced against him in a Court in British India. **KASSIM MAMJEE v. ISUF MAHOMED SULLIMAN**, 29 C. 509=6 C.W.N. 829. (22 C. 222, R.) [R., 2 L.B.R. 47, 31 C. 474=8 C.W.N. 207; D., 75 P.R. 1909=99 P.L.R. 1909.]

(17)—Ss. 2, 13, *Expl. 6, Civ. Pro. Code, 1882*—*English Court. "a foreign Court" and judgment, "foreign judgment"—Residence within territorial limits—Jurisdiction of English Court over British subjects residing in British India—Order XI, Rule 1 (e) under the Judicature Act—Decision of foreign Court—Effect on absentee defendant having no knowledge of suit—Decree of foreign Court—Prima facie evidence of jurisdiction—Foreign judgment, plaintiff's right under—Act XXXII of 1839—Application of the Act to debt due on a foreign judgment.*—An English Court is a "foreign Court" within the meaning of s. 2, and its judgment is a foreign judgment. (22 C. 222, P.C., R.) [R., 31 C. 274=8 C.W.N. 207.] As a general rule, a Court can exercise jurisdiction over a foreigner only if he is a resident within the limits of its territorial jurisdiction. (22 C. 222, P.C., R.) Natives of British India, though foreigners, owe allegiance to the common sovereign of England and British India, and are subject to the supreme legislative authority in the British Empire. (22 C. 222, P.C., R.) If, therefore, the supreme legislature in the British Empire authorises an English Court, in any class of cases, to exercise jurisdiction over a non-resident foreigner, by reason of the cause of action arising within its jurisdiction, and that foreigner is a native of British India, he cannot treat judgment passed as a nullity, merely because he did not reside within the jurisdiction of the Court which passed it. (22 C. 222, P.C., R.) Order XI, Rule 1 (e) under the English Judicature Act constitutes a Legislative Act of the Sovereign Power regulating the jurisdiction in the case of a British subject resident in British India and outside the ordinary territorial jurisdiction of the English Courts, and gives the English Courts jurisdiction over such British subjects in a case which falls within the order. But it is open to a



**Foreign Court—continued.****—2.—Judgment of—continued.**

defendant to show that this is not so and that the English Court had in fact no jurisdiction. [R., 2 L.B.R. 47, 2 S.L.R. 51, 19 M.L.J. 457 = 32 M. 469.] When the absentee defendants had no knowledge of the suit, a foreign Court's decision will not be binding. (15 W.R. 500, 13 M. 496, 11 B. 241, R.) The judgment of a foreign Court can be regarded as *prima facie* evidence of jurisdiction of that Court. In a suit based on a foreign judgment, the plaintiff cannot recover more than appears on the face of the judgment. Act XXXII of 1839 does not apply to a debt on a foreign judgment; when a judgment given in England is silent as to interest, the plaintiff cannot make the defendants liable for interest, as the English statutes as to judgments carrying interest do not apply to India. *MOAZZIM HOSSEIN KHAN v. RAPHAEL ROBINSON*, 28 C. 641 = 5 C.W.N. 741. [F., 75 P.R. 1909 = 99 P.L.R. 1909.]

(18)—*Foreign judgment—Ascertained sum of money.*—A suit cannot be brought on a foreign judgment when the judgment is not one for an ascertained sum of money. *SIDNEY SMITH v. COELHO*, 9 M.L.J. 62.

(19)—*Submission to jurisdiction of Bustar Court—Reference to arbitration—Invalidity of the award—Second reference without consent—Validity of second award—Foreign judgments—Jurisdiction of British Courts—S. 520, Civ. Pro. Code.*—The first defendant appeared as a party and submitted to the jurisdiction of the Bustar Court. The Court thereupon referred the matter to arbitrators, whose award became void according to the rules of procedure adopted by that Court. Subsequently, the Court, of its own motion, referred the matter to a second set of arbitrators, without the first defendant's consent. The first defendant did not make any objection to the filing of the award. *Held*, that the first defendant was not competent to raise objection to the decision of the Bustar Court based on the award, in the Courts of British India, on the ground of his want of consent. Foreign judgments are binding upon the parties thereto in British Courts, even though the formalities of procedure, which ought to have been observed by the foreign Court, were not observed. *GUDARU LEE LA KRISHNAYYA NAIDU v. MARADU GALA VENKATARATHNAM*, 2 M.L.T. 269 = 30 M. 292.

(20)—*Foreign judgment—Defendant resident of British India—'Ex parte' trial—Whether binding.*—A foreign judgment obtained *ex parte* against a defendant described as a resident of British India cannot bind the defendant. *R.M.A. SAMINATHA PILLAY v. N. A.K. ABDUL GAFOOR SAHIB*, 8 M.L.T. 287 = 7 Ind. Cas. 810.

(21)—*Foreign judgment, Suit on—Judgment passed ex parte, whether can be enforced in the forum of another country subject to the same Sovereign—Private International Law, rules of—Authority of British Parliament recognising*

**Foreign Court—continued.****—2.—Judgment of—continued.**

*jurisdiction must be clear and express—Charter of 1833 (Ceylon), s. 24—Ceylon Ordinance II of 1889, ss. 9, 704—"Appear or defend the action", meaning of—Obtaining of leave to defend action whether amounts to voluntary submission to the jurisdiction of the Court—Decision of the foreign Court otherwise than on the merits of the case—Effect on its enforcement in a Court in British India.*—Appellant obtained a decree against the respondent, in a suit instituted by him in a Court in Ceylon, on a pro-note. The suit having been instituted under the summary procedure provided by Chapter LIII of the Ceylon Ordinance II of 1889 (analogous to s. 532 of Act XIV of 1882), defendant appeared by an attorney and applied for leave to defend the suit. Leave was granted to him on condition of his furnishing security. The respondent did not furnish security, and did not appear at the trial, when judgment was passed against him during his absence. The respondent having left Ceylon and settled in British India, appellant brought the present suit against him in a British Indian Court. The respondent pleaded want of jurisdiction, as (1) under the rules of private International Law, the judgment of a foreign Court passed *in absentem* could not be enforced in a British Indian Court, (2) the respondent did not appear at the trial and there was no decision on the merits. *Held*, (1) that though Ceylon and British India owed allegiance to the same Sovereign, the enforceability of the judgments of the Courts of either country on those of the other was guided by the rule of private International Law, *viz.*, that the judgment of a foreign Court passed against the defendant *in absentem* cannot be enforced against him in a Court in British India. (22 C. 222 = 21 I. A. 171, 28 C. 641, D.; 29 C. 509, R.) (2) That neither by s. 23 of the Charter of 1833, nor by s. 9 of Ordinance No. II of 1889 (Ceylon Legislative Enactments, Vol. II, p. 576), are the Ceylon Courts empowered by the British Parliament to adjudicate in a matter, in which the cause of action arose within their jurisdiction, so as to bind by their decree a defendant who is a resident of British India and a subject of the British Crown, although he never resided in Ceylon at the time of the action or submitted himself to the jurisdiction of the Ceylon Court. Such jurisdiction, having regard to the principles of International Law, would only be recognised in British India, if it was conferred by the Supreme Legislature, by express and clear words. (22 C. 222 = 21 I. A. 171, R.) (3) That a decree based on a contract imposing personal obligation upon an absent foreigner is not countenanced by the comity of nations, only because the defendant entered into the contract in the territory of the forum which passed the decree. (22 C. 222 = 21 I. A. 171; 29 M. 69, 29 M. 239, 1 M.L.T. 71, 16 M.L.J. 238, R.) (4) That the defendant, though he was *ex parte* at the trial, must be deemed to have voluntarily



**Foreign Court—continued.****—2.—Judgment of—continued.**

submitted to the jurisdiction of the Ceylon Court, has he applied for leave to defend the action. (5) The words "*appear or defend*" in s. 704 of the Ceylon Ordinance II of 1889 are the equivalent of "*appear and defend*" and clearly refer to appearance for the purpose of defending the action in accordance with the leave granted, and do not imply that appearance for the purpose of obtaining leave is not to be deemed appearance in the action at all. (6) It is not even necessary that the submission must be by an act done in the course of the action, itself, for it can be constituted by a contract to that effect entered into between the plaintiff and the defendant previously to the action. (2 M. 407, 10 M. 327, R.) A judgment of a foreign Court, which does not decide upon the merits of the dispute, for instance, if a suit is dismissed as being barred by the law for limitation of suits prevailing in that Court, cannot be pleaded as a bar to a suit instituted in the Court of the plaintiff's domicile on the same cause of action. **SHAIK ATHAM SAHIB v. DAOUD SAHIB**, 3 Ind. Cas. 190 = 19 M.L.J. 459 = 32 M. 469.

(22)—*Foreign judgment—Ex parte decree, suit based on—Onus—Civ. Pro. Code (Act XIV of 1882), applicability of—Limitation Act (XV of 1877), s. 14—'Res judicata.'*—The plaintiff brought a suit in the Ludhiana District. The plaint was returned for presentation in the Court of Nabha Native State. The plaintiff subsequently obtained an *ex parte* decree. He then brought the present suit in the Ludhiana District on the basis of the *ex parte* decree obtained by him. The first Court held that it was for plaintiff to prove (i) that the suit based on an *ex parte* foreign judgment was maintainable, (ii) that defendant could not object to the jurisdiction of the Nabha Court, (iii) that the Nabha Court had jurisdiction; and it found the plaintiff had not proved these things, and so dismissed the suit. The Divisional Judge set aside the dismissal and remanded the case for retrial, holding that the suit was based on the plaint in the first suit. *Held*, that the suit was not based on the plaint in the first suit. If the present suit failed, the plaintiff could bring a suit on the original cause of action asking the Court to exclude, in computing limitation, the years spent in prosecuting his claim in Nabha. *Held*, also that it was not permissible to apply s. 14 of the new Civ. Pro. Code, in the circumstances; under the old Code the burden of proof lay upon plaintiff to show that Nabha Court had jurisdiction, and it would be unfair to treat the matter of *onus* as it is treated in the new Code and so give the new Code this sort of retrospective effect. The initial *onus* was on plaintiff, but this *onus* was shifted when plaintiff shewed that, when the case was before Ludhiana Court, all the parties were present and the question of jurisdiction was somehow raised, probably at the instance of defendant or then a co-defendant, and the plaint was returned without any protest by any

**Foreign Court—continued.****—2.—Judgment of—continued.**

person present. *Held* also that the Nabha Court had jurisdiction, that the fact of the decree being *ex parte* was in the circumstances immaterial and that the decision, was obviously on the merits. **UDHE SINGH v. PURAN CHAN**, 41 P.L.R. 1910 = 165 P.W.R. 1909.

(23)—*Suit on judgment of Nahan Court—Defences to such suit—Merits not gone into in the foreign Court—Procedure.*—Want of jurisdiction in the Foreign Court on whose judgment a suit is based is a good ground of defence when it is found that the cause of action did not arise within its jurisdiction. It is also a good defence in such a suit to plead that the foreign judgment was not given on merits. If the latter defence is set up, the Court should make a full enquiry on the merits and give a decision thereafter as if the suit had originally been brought in the British Court. **MR. F. R. JONES v. ZAHRU MAL**, 66 P.R. 1889.

(24)—*Suit on a foreign judgment—Jurisdiction of British Courts to entertain such suits—Civ. Pro. Code, s. 14—Act VII of 1888 (Civ. Pro. Code Amendment Act), s. 5.*—There can be no doubt that under s. 14 of the Civ. Pro. Code as amended by s. 5 of Act VII of 1888, the Courts of British India are competent to entertain suits on foreign judgments. **SETH SAMIR MAL v. KALYAN MAL**, A.W.N. 1890, 148.

Rent suit not under Ben. Act VIII of 1869—Execution of decree of foreign state—Limitation—*See* BEN. ACT VIII OF 1869, s. 58, 14 C. 570.

Foreign judgment—Enquiry into merits—*See* CIV. PRO. CODE, 1908, s. 11, 102 P.R. 1892.

*See* CIV. PRO. CODE, 1908, s. 11, 2 P.R. 1899.

Foreign judgment—Validity—Jurisdiction—*See* CIV. PRO. CODE, 1908, s. 13, 3 S.L.R. 81 = 3 Ind. Cas. 892.

*See* DEBTOR AND CREDITOR, 16 M. 85 = 3 M.L.J. 30.

*See* ESTOPPEL—ESTOPPEL BY CONDUCT, 15 M. 82.

Decree obtained in Native State, nature of—Civ. Pro. Code, 1882, s. 229-B—Want of jurisdiction in Court which passed decree—*See* EXECUTION OF DECREE—NATIVE STATES, DECREES OF COURTS OF, 15 B. 216.

*See* EXECUTION OF DECREE—NATIVE STATES, DECREES OF COURTS OF, 13 C. 95.

*See* GUARDIAN—MISCELLANEOUS, 37 P.R. 1889.

*See* JURISDICTION—GENERAL, 5 B. 42.

In a suit on a—No interest can be awarded where it is silent as to interest—*See* JURISDICTION—CAUSES OF JURISDICTION, 75 P.R. 1909 = 99 P.L.R. 1909 = 92 P.W.R. 1909 = 3 Ind. Cas. 522.



**Foreign Court—continued.****—2.—Judgment of—concluded.**

See LIMITATION ACT, 1908, art. 117, 8 W.R. 32=2 Ind. Jur. N.S., 233.

See LIS PENDENS, 19 M. 257.

**Res judicata**—"A Court of jurisdiction competent to try such subsequent suit" meaning and scope of expression—Judgment of Native Court, how far can be relied on by British Indian Courts—See RES JUDICATA—COMPETENCY OF COURT, 13 B. 224.

**Assignment of foreign judgment**—Right of assignor to whole amount of judgment-debt—Transfer of Property Act, IV of 1882, s. 135, cl. (d), foreign judgment whether covered by—See TRANSFER OF PROPERTY ACT, 1882, s. 135, 23 M. 449=10 M.L.J. 77.

**—3.—Jurisdiction of.**

(1)—**Judgment of foreign Court—Jurisdiction**—**Notice—Competent forum—'Locus solutionis.'**—The principle upon which actions on foreign judgments rest is that the judgment of a Court of competent jurisdiction imposes a duty on the defendants to pay the sum for which the judgment has been given. The question of jurisdiction depends on the consideration whether the defendant owed, at the time the suit was brought, allegiance to the law administered by the foreign Court, either permanent or temporary, or voluntarily submitted to the foreign jurisdiction. The mere going to foreign territory to purchase goods there will not give jurisdiction to the foreign Court. [R., 24 B. 86.] The general rule is that a personal judgment based solely on extra territorial service of notice, when, as a matter of fact, the defendant (who is not domiciled within the jurisdiction) had no actual notice, is internationally invalid, and one State cannot in this way obtain jurisdiction over a person domiciled in another State. [R., 28 C. 641, 5 O.W.N. 741.] As a general rule, the debtor's domicile indicates the competent forum, but in certain cases, the *locus solutionis* may become material. BANGARUSWAMI v. BALASUBRAMANIAN, 13 M. 496.

(2)—**Cause of action arising in British Court**—**Foreign Court—Jurisdiction.**—Where a cause of action in a suit in a foreign Court, did not arise in the foreign Court and the defendant did not reside in the foreign territory, (no circumstance appearing in the case which, in a proper view of International law, could give the foreign Court jurisdiction), there is no duty upon the defendant to attend the foreign Court or subsequently to obey the judgment passed by it. HINDE & CO. v. PONNATH, 4 M. 359.

(3)—**Heirship Certificate Act (XXVIII of 1860)**—**Certificate issued by Resident at Cochin, suit maintainable only in Court of Native Cochin for setting aside.**—Plaintiff instituted this suit in British Cochin for a declaration, as against the defendant to whom the British Resident had issued a certificate under Act

**Foreign Court—continued.****—3.—Jurisdiction of—continued.**

XXVIII of 1860, enabling him to collect the debts due to his deceased karnavan, that he, the plaintiff, was entitled to such certificate in preference to the defendant and to receive the interest due on certain Government promissory notes of the deceased. Both parties having been domiciled in Native Cochin, the suit was held to be maintainable only in the proper Court in Native Cochin which a one could decide who was the legal representative of the deceased, plaintiff or defendant. Also, as a suit to set aside a certificate of heirship granted by the Political Resident of Cochin, the Secretary of State was a necessary party to the suit. AMMUNNI v. KRISHNA, 16 M. 405.

(4)—**Jurisdiction—Objection to—Foreign judgment—Impugning of—Irregularity—Limitation.**—Where a party submits to the jurisdiction of a Foreign Court, without taking any objection and allows a judgment to be passed against him, he is afterwards estopped from denying the jurisdiction. (8 M.H.C. 14, F.) [Not F., 3 M. 96; Appr., 7 M. 164; R., 23 M. 437=15 M.L.J. 236; D., 2 M. 407.] It is not a sufficient ground for impugning the judgment of a Foreign Court, which ordinarily proceeds in accordance with the recognized principles of judicial investigation, to show that in a particular instance its procedure may have been irregular. Where limitation is merely prohibitive of the remedy and not destructive of the right, the judgment of a foreign Court is not open to objection on the ground that a suit on the contract would be barred by the law of limitation applicable in the country in which the contract was made. NALLATAMBI v. PONNUSAMI, 2 M. 400.

(5)—**Contract in foreign state.**—A foreign judgment is conclusive in an action upon that judgment, if the defendant was a subject or resident of the country in which the judgment was rendered. But the mere making of a contract within the jurisdiction of a foreign Court does not necessarily render that Court competent to adjudicate on all the obligatory relations which flow directly or indirectly from it. (Per Holloway, J.). MATHAPPA CHETTI v. CHELLAPPA CHETTI, 1 M. 196. [F., 13 M. 496; R., 7 M. 164, 29 M. 69.]

(6)—**Civ. Pro. Code, 1882, s. 14—Foreign Court, judgment of—Suit on a foreign judgment—Court can inquire into the merits.**—A suit can be instituted in a Court in British India on the basis of the judgment of a foreign Court in Asia; and the Court in which the suit is instituted shall not be precluded from inquiry into the merits of the case in which the judgment was passed. MAYARAM v. RAVJI, 1 Bom. L.R. 539=24 B. 86.

See COMPANY—WINDING UP OF COMPANY, 8 B.H.C., O.C., 200.

See EVIDENCE—SECONDARY EVIDENCE, 27 O. 639, P.C.=27 I.A. 1=4 O.W.N. 429.



**Foreign Court—concluded.****—3.—Jurisdiction of—concluded.**

Notification by Deputy Commissioner of Cooch Behar regarding certified copies of judicial records—Compliance with the Evidence Act—See EVIDENCE ACT, 1872, s. 86, 14 C. 546.

See SUCCESSION CERTIFICATE ACT, 1889, ss. 4, 17, 17 M. 14.

**Foreign decree.**

Kurichit conducted in British India Chit-holder a foreign subject—Sale of rights under Kuri in execution of decree of foreign Court—See INTERNATIONAL LAW, 10 M.L.T. 570.

**Foreigners.**

See ACT III OF 1864.

(1)—*Meaning of.*—A person is no less a "foreigner" because he is the subject of the common Sovereign of the country in which the judgment was passed, and the country in which it is sought to be enforced. KASSIM MANIJE v. ISUF MAHOMED SULLIMAN, 29 C. 509=6 C.W.N. 829.

(2)—*Suit by foreigner—Condition for entertaining suit—Costs of defendant.*—A suit by a foreigner should not be entertained without payment of all costs that may be incurred by defendant, even though the latter is also a foreigner. KAROONA MOYEE DEBIA v. OOMA CHURN DEB, 12 W.R. 465.

Jurisdiction of Civil Courts in suits against absent—See CIV. PRO. CODE, 1908, s. 20, O. V, rr. 25, 26, 2 L.B.R. 47.

See JURISDICTION—CAUSES OF JURISDICTION, 20 B. 133.

See JURISDICTION OF CIVIL COURTS, 10 C. 878.

Kuri Chit conducted in British India—Foreigner a chit holder—Pledge of receipt in foreign territory—Sale of pledged interest by foreign Court—Validity—See KURI CHIT, 2 M. W.N. 1911, 249.

Suit against—Jurisdiction—See LETTERS PATENT, HIGH COURT. 1865, art. 12, Madras, 17 M.L.J. 301=30 M. 432.

**Foreigners Act.**

See ACT III of 1864.

**Foreign Judicial Records.**

See EVIDENCE—SECONDARY EVIDENCE, 27 C. 639, P.C.=27 I.A. 1=4 C.W.N. 429.

Certified copies of, presumption as to—See EVIDENCE ACT, 1872, ss. 65, 66, 86, 2 Bom. L.R. 562.

**Foreign Laws.**

(1)—*Laws of foreign countries — Judicial notice.*—The law of a foreign country and the contracts made by sailors on board a foreign ship are facts which must be proved like any other

**Foreign Laws—concluded.**

facts ; and unless they are so proved in the British Court in the regular way, the Judge has no means of giving effect to them. FRITZ OLNER v. LAVEZZO, 10 C. 878.

(2)—*Foreign law—Burden of proof.*—It lies on him who asserts it to prove that the law of a foreign state differs from ours, and in the absence of such proof it must be held that no difference exists except possibly so far as the law here rests on the specific acts of the legislature. RAGHUNATHJI v. VARJIWANDAS, 8 Bom. L.R. 525=30 B. 578.

**Foreign Property.**

Foreign property, suit regarding—See JURISDICTION—CAUSES OF JURISDICTION, 2 Bom. L.R. 47=24 B. 407.

**Foreign Sovereigns, Etc. Agents of Bombay Act.**

See BOM. ACT XV OF 1840.

**Foreign State.**

See FOREIGN COURT.

See NATIVE STATE.

(1)—*Land of foreign State in British India—Succession Act, 1865, s. 5.*—Foreign State, a quasi corporation.—There is nothing to prevent a foreign or feudatory State from holding land in British India ; such property is not governed by the British law of succession, as laid down in s. 5 of the Indian Succession Act. [R., 24 B. 149.] The State must be regarded as a quasi corporation, which continues to exist as a State, so long as it is recognised as such by His Majesty, whatever the rule of succession to it may be, and whatever may be its form of government. HAJON MANICK v. BUR SINGH, 11 C. 17. [R., 24 B. 149.]

Property bequeathed to idol—Deposition of high priest—Act of State—Foreign power—Effect on property situated outside foreign State—Power of appointment under will—See HINDU LAW—RELIGIOUS ENDOWMENT, 17 B. 600.

Act of State of foreign power, how affects the property in British India—See HINDU LAW—RELIGIOUS ENDOWMENT, 17 B. 620, Note.

Suit to enforce *Timmis Pansare* right—Jurisdiction—See JURISDICTION—CAUSES OF JURISDICTION, 11 Bom. L.R. 352=33 B. 373=2 Ind. Cas. 489.

See RIGHT OF SUIT—CONTRACTS, SUITS ON, 17 M. 262.

**Foreign Territory.**

Award affecting property out of British India—Convertibility into decree in British India—See AWARD, 11 P.W.R. 1910=34 P.R. 1910=5 Ind. Cas. 597=183 P.L.R. 1910.

Order of excommunication passed in—Cause of action in—Defendant residing in British



**Foreign Territory—concluded.**

India—Suit for defamation whether maintainable in British India—See JURISDICTION—CAUSES OF JURISDICTION, 7 M.L.T. 42=5 Ind. Cas. 513.

Service of summons by post—See SUMMONS, 2 B.L.R. A.C., 59=10 W.R. 349.

**Foreign Vessels.**

Jurisdiction—Collision—Collision between, at sea—Jurisdiction of High Court, Calcutta—See JURISDICTION—ADMIRALTY AND VICE ADMIRALTY JURISDICTION, 1 Hyde 275.

**Forest.**

See ACT VIII OF 1878.

This circular explains Circular Order No. 2 of March 1873 as to how receipts from "forest tracts" are to be entered. Rev. Cir. No. 1, 22 W.R. Rev. Cir. 10.

Khoti Vatani land—Right of Khot to forest produce—Rights of Government—Grants by State to subjects—Construction of such grants—See KHOTI TENURE, 12 B. 534.

Sanad granted to inamdars by Peshwa's Government—Right of grantees to soil of forest, timber and junglewood—See LAND TENURE IN BOMBAY, 11 B. 688, Note=P.J. 1881, 276.

Zemindar's right to a tract of hill and—Proof of—Construction of *istemrar sanad* of 1803 as to lands granted—See OWNERSHIP, 15 M. 101=18 I.A. 149 P.C.

Right of inferior proprietors over village—And waste lands—See SETTLEMENT—EFFECT OF SETTLEMENT, 2 C.P.L.R. 25.

**Forest Act.**

See ACT VII OF 1865.

See ACT VII OF 1878.

See BUR. ACT IV OF 1902.

See MAD. ACT V OF 1882.

**Forest Madras (Validation) Act.**

See MAD. ACT XXI OF 1882.

**Forest Lands.**

(1)—South Canara—Government ownership, presumption of—'Kumri' cultivation, meaning of—Waste lands, right of State to—Hindu Law—Mahomedan Law—'Warg' meaning of—Madras Boundary Marks Act (XVIII of 1860), s. 25—'Kumaki' or 'Nettikat' privileges—Mulputta—Copy of a copy—Secondary evidence—Evidence Act, s. 63.—The appeal arose out of decisions of the Forest Settlement Officer rejecting the claims made by certain *wargdars* or landholders in South Canara to tracts of forest land, which Government proposed to reserve as Government Reserved Forest under the above Act of 1882. The point for decision was, whether there is a general presumption that forest and waste lands in the South Canara District, not exclusively occupied

**Forest Lands—continued.**

by any person or body of persons, are the property of Government, or whether such lands belong to some private person or family as in Malabar? Held, that, in the case of the large tracts of immemorial forest on the *ghats* and, elsewhere in the District of South Canara, there is a presumption of fact that they are Government forests, though, of course, such presumption may be rebutted by proof of private ownership in regard to any particular part of the forest. In South Canara, land which has once been forest and has been cleared for cultivation, very rapidly reverts to forest, if left uncultivated. In the case of such land, the presumption is that it belongs to some private owner, but this may be rebutted by showing that it is part of a *warg* that was abandoned or forfeited or escheated to Government, or by showing that it was not part of a *warg* but was cultivated as '*kumri*.' '*Kumri*' is cultivation of land outside a *warg* by felling and burning a patch of the forest, the ashes acting as manure. The entry of '*kumri shist*' (i.e., assessment for *kumri* cultivation) in the patta of an estate or *warg* gave no validity to a claim to a proprietary right over the forest in which the '*kumri*' was carried on, or even over the spots which had been actually cultivated. (3 B. 452, Appr.) Under the Hindu Common Law, the immemorial waste lands of the country generally belonged to the Ruling Power. Under the Mahomedan Law, all the waste lands remained the property of the State. (12 B.H.C., App., 53, R.). The general presumption in the District of South Canara is in favour of Government ownership of any immemorial waste lands to which no private person can show a title by grant, or by such user and occupation as is inconsistent with the proprietary right of Government. What acts prove such user and occupation must be determined according to the circumstances of each case separately. A man's *warg* was simply the account of the assessments payable by him for his lands, which were not necessarily all adjacent, but might be situated at a distance from each other and even in different villages. To make the survey made by the Government binding on a certain person, it must be proved that the procedure prescribed by the Boundary Marks Act of 1860 was followed. In the absence of any such proof, the survey would not bar the private rights under s. 25 of the Act. By '*Kumaki*' or '*Nettikat*' privilege, is meant the enjoyment of forests adjacent to the *warg* lands by a *wargdar* to the extent of 100 yards all round each part of *warg* land, by making use of the leaves, twigs, etc., in the forest as an aid to the cultivation of the *warg* land. A *mulputta*, granted by Collector to the *wargdar* conveys a title to all lands within their boundaries, subject, of course, to the right of Government to assess them. A copy of a copy of a *mulputta* is not admissible even as secondary evidence of the contents of the original s. 63 of the Evidence Act). THE SECRETARY OF STATE FOR INDIA v. MANJESHWAR KRISHNAYYA, 15 M.L.J. 147=28 M. 257.



**Forest Lands—concluded.**

(2)—*Malabar — Presumption as to.*—In the district of Malabar, and in the tracts administered as part of it, there is no presumption that forest lands are the property of the Crown. SECRETARY OF STATE v. VIRA RAYAN, 9 M. 175. [R., 13 M. 89, 15 M. 315; D., 28 M. 257 = 15 M.L.J. 147.]

See LEASE—GENERAL, 3 C.P.L.R. 18.

**Forest Mehal.**

Person employed to sell timber in, and credit proceeds to his employer is not an "agent"—See BEN. ACT VIII OF 1869, s. 30, 10 C.L.J. 106 = 2 Ind. Cas. 205.

**Forest Officer.**

Not a Revenue officer—See BOM. ACT V OF 1879, s. 3, 20 B. 803.

Liability of District Forest Officer to be assessed by Municipal Council—See MAD. ACT IV OF 1884, sch. A. 25 M. 747.

Not Revenue Officer—See JURISDICTION OF CIVIL COURTS, 20 B. 764.

**Forest Rights.**

Suit to recover money payable in respect of—Three years' rule of limitation laid down in sch. III, art. 2, cl. (b) of the Bengal Tenancy Act—Money payable in respect of—Not rent under s. 3 of the Bengal Tenancy Act—See BEN. ACT VIII OF 1885, ss. 144, 184, 193, sch. III, art. 2, 7 C.L.J. 152.

See KHOTI TENURE, 4 B. 264, P.C. = 7 I.A. 55.

**Forest Settlement Officer.**

Second appeal from District Judge's decision on appeal from Forest Settlement Officer—See MAD. ACT XXI OF 1882, s. 10, 11 M. 309, F.B.

**Forest Timber.**

Wrongful conversion of forest-timber—See DAMAGES—MEASURE AND ASSESSMENT, 4 C. 116, P.O. = 5 I.A. 130.

**Forfeiture Act.**

See ACT XXV OF 1857.

See ACT IX OF 1859.

**Forfeiture Clause.**

Forfeiture clause in a consent decree, effect of—See CONSENT DECREE, 8 Bom. L.R. 813 = 31 B. 15 = 1 M.L.T. 370.

**Forfeiture of Property.**

See CONFISCATION.

See LANDLORD AND TENANT—FORFEITURE.

See TRANSFER OF PROPERTY ACT, 1882, s. 114.

(1)—*Dismissal of a Ghatwal for forfeiture of tenure.*—The dismissal of a ghatwal for

**Forfeiture of Property—continued.**

misconduct will carry with it the forfeiture of his tenure. THE SECRETARY OF STATE v. PORAN SINGH, 5 C. 740, [D., 9 C.W.N. 663.]

(2)—*Attachment against forfeited property—Act XXV of 1857—Priority to Government.*—Judgment-creditors having bona fide attachment upon property at the time that the property of their debtors become forfeited to Government under Act XXV of 1857 are entitled in priority to Government. OODIT DASS v. GOVERNMENT, Marsh 259 = 2 Hay 117.

(3)—*Right of decree-holder.*—A decree-holder is not entitled to have his decree satisfied by sale of the judgment-debtor's properties which have been confiscated by Government for rebellion, unless he can show that they were attached in execution of his decree before the confiscation. An attachment cannot be presumed to have existed or continued from the fact that there was a proclamation of sale before confiscation. RADHA BIBEE v. GOVERNMENT, 2 Hay 562.

(4)—*Forfeiture of land subject to rent—Act XXV of 1857—Right to arrears of rent due at time of forfeiture.*—Where land forfeited to Government by a conviction of the owner of an offence within Act XXV of 1857 is subject to the rent, the person entitled to the rent is not entitled to recover arrears due at the time of the forfeiture, either from the heirs of the owner or from the Government; but the Government is liable for the rent which may subsequently accrue. NEELMONEY SINGH DEO v. GOVERNMENT, Marsh 308 = 2 Hay 226.

(5)—*Suit by ultimate reversioner.*—The ultimate reversioner cannot enforce a forfeiture, which the immediate reversioner does not insist upon. BHUJENDRO BHUSAN CHATTERJEE v. TRIGUNANATH MOOKERJEE, 8 C. 761.

(6)—*Act XXI of 1850—Loss of caste—Forfeiture of rights of property.*—Since Act XXI of 1850 came into force, mere loss of caste does not occasion a forfeiture of rights or property. HONAMMA v. TIMANNABHAT, 1 B. 559. (4 B. H.C. A.C. 25, F.) [R., 23 M. 171.]

(7 & 8)—*Act XXV of 1857 (Forfeiture of property)—Act IX of 1859 (Claims to property seized as forfeited)—Limitation for bringing suit under Acts—Seizure within s. 20, Act IX of 1859.*—A party bringing a suit under Act XXV of 1857 or Act IX of 1859, must bring it within a year of the seizure and attachment complained of. A seizure within the meaning of s. 20, Act IX of 1859, defined. BYJNATH SINGH v. SOLANO, 14 W.R. 114.

(9)—*Act X of 1858, s. 9—Confiscation, effect of, on encumbrances, under-tenures, etc.*—The effect of confiscation under Act X of 1858 is to cancel all under-tenures in the village, to authorize the ejectment of all tenants or cultivators of land therein, and to make void all incumbrances. Assuming that the order of confiscation was "of a village under s. 1 of the



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Act," the Government, after such confiscation, would possess ample powers of clearing the estate of incumbrances, of under-tenures and of cultivatory rights which are thus conferred. But it does not follow that such rights ceased to exist when the Government became the proprietor, without any act done by the Government to indicate its intention, and even notwithstanding acts done from which a contrary intention might be inferred. **DOORGA PERSHAD v. ZORAWUR, 2 N.W.P. 75.**

(10)—*Act X of 1858, s. 9—"Under-tenure," meaning of—Holdings, not void but only voidable.*—The Legislature has not intended to include in the term "under-tenures" in s. 9 of Act X of 1858 the holdings of ryots, but has employed the term in the sense in which it is commonly used as applying to tenures of a proprietary character inferior to the zemindari, but superior to the kashtkarees tenures, and consequently, the effect of the section is to render such tenures only voidable and not absolutely void, the power of avoiding such holdings having expired with the Act. **SYUD BASIT ALI v. MAN SINGH, 2 N.W.P. 140.**

(11)—*Sale on landed property escheated by Government—No conditions in original deed of sale—Subsequent imposition of conditions—Sale of rebels' property not act of state—Position of Government—Suit against Government for possession.*—Where a sale of landed property which had been escheated by the Government was made by Government without any restriction being attached to the original notice of sale, which stated that the highest bidder was to be the purchaser, it was held that the Government could not, subsequent to the bid and the deposit of the earnest-money, impose any condition, but was bound to make over possession irrespective of the character of the highest bidder. In selling the property of rebels which it had confiscated, the Government does not perform an act of State, but stands in the situation of an individual selling his property by auction; and a suit may, therefore, be properly brought against the Government by the purchaser, if the Government refuses to give up possession or transfer the possession. **SHEO LALL BOHRA v. SHEIKH MAHOMED, 13 W.R.P.C., 4.**

(12)—*Purchaser from Government—Property of rebel—Rights of—Subsequent transfer by Government to third party, effect of.*—The defendant purchased from the Government a plot of land which formerly belonged to a rebel and which was confiscated. Subsequently the rights of the Government in the plot of land thus sold to the defendant and afterwards assessed were transferred to the plaintiff by the Government in exchange for certain lands in the village. *Held*, that the rights which the defendant acquired by purchase could not be defeated or lessened by any subsequent act of the Government, and the transfer by the Government of its rights to the plaintiff could not prejudice or detract from any rights previously acquired by purchase by the defendant, and the transfer could not confer on the plaintiff a

**Forfeiture of Property—continued.**

right to regard this land as a part of his village and therefore subject to all the rights which he enjoyed over the land in his village. **PUNDIT ESHREE PERSHAD v. DEBEE CHURN, 2 N.W.P. 470.**

(13)—*Suit by widow of convicted person for his property—Order of confiscation interpolated subsequent to judgment, legality of.*—When a person was brought before, tried and convicted by the Court of a Special Commissioner, it was then and then only that an order of confiscation of his property should have been made, and not subsequently. The widow of such convicted person is his lawful heir and she can maintain a suit for the recovery of his property in the hands of a mortgagee whose mortgage debt has been paid off out of the usufruct. **MUSST. IZZUT-OOL-NISSA BEEBEE v. MUSST. HUSNA KOOUR, 1 N.W.P. 151.**

(14)—*Confiscation by independent chief—British Courts to respect it—Proof.*—Confiscation of property within his own territories by an independent chief must be respected by the English Courts. **SHOAY ATT v. SHOAY DOANG, 14 W.R. 218.**

(15)—*Judgment-debtor's property attached between commission and conviction of offence—Act XI of 1857—Act XXV of 1857, s. 3—Relating back of forfeiture.*—Property of judgment-debtor attached between the commission and conviction of an offence under Act XI of 1857 is property forfeited to the Crown. Such forfeiture relates back to the time of commission. **GUNNESHLOLL v. AMEER KHAN, 17 W.R. 80.**

(16)—*Reg. XI of 1796 (Bengal)—Confiscation and sale of property of absconded offender.*—Reg. XI of 1796 (Bengal) is a highly penal statute and should be construed strictly. Reg. XI of 1796 (Bengal) makes no express provision for the case of joint proprietors of land, or persons jointly holding a sudder form of land. So in the absence of clear words indicating such an intention, it cannot be assumed that the Legislature intended to authorise the confiscation of the property of any person other than the delinquent. A sale under this Regulation does not carry with it the consequences of a sale for arrears of public revenue, by sweeping away all sub-tenures made by the defaulter. **JUGGOMOHUN BUKSHEE v. ROY MOTHORANATH CHOWDHRY, 7 W.R. 18, P.C. = 11 M.I.A. 223.**

(17)—*Reg. XI of 1796 (Confiscation)—Joint Hindu family—Ancestral property—Widow.*—Under Reg. XI of 1796, the Governor-General in Council could pronounce an order of confiscation in cases of persons charged with offences of a criminal nature, who should abscond or conceal themselves, so that, upon process issued against them, they could not be found. After the issuing of the attachment by the Court and the subsequent declaration of forfeiture, all things previous to the attachment must be presumed to have been regularly and legally



**Forfeiture of Property—continued.**

done, unless there is sufficient evidence to rebut that presumption. Forfeiture of ancestral and other property, under Bengal Regulation, XI of 1796, for acts committed by the sons of A, held not to affect the rights of A's widow, and that she was entitled to maintenance out of the whole estate which was ancestral. **MUSSAMUT GOLAB KOONWAR v. THE COLLECTOR OF BENARES**, 7 W.R. 47, P.C.=4 M.I.A. 246.

(18)—*Act XXV of 1859, ss. 2, 7—Rebellion—Property of rebel consisting of annuity—No proceedings taken under Act—Annuity withheld under authority of official empowered—to make attachment—Effect of withholding—Act IX of 1859, s. 18.*—Plaintiff joined with the rebels in the Grand Mutiny and took a leading part with them. A reward was set upon him as a rebel leader and after a time he was captured. No formal proceedings were taken under ss. 2 and 7 of Act XXV of 1859 for adjudicating his property, which consisted of little more than an annuity, to be forfeited. The property charged with the annuity was in the hands of the Collector as the manager under the Court of Wards. The annuity was withheld and was no longer regarded as a charge on the estate but was treated as merged. *Held*, that the mere withdrawal of the payment of annuity by those who had the management of the estate which was charged with the payment was an illegal act in no way affecting the plaintiff's right, but as the withholding of the payment was under the authority and direction of the official who was authorized to make attachment of rebel's property, it was, with reference to the nature of the property, equivalent to an attachment or seizure, and could not be questioned except under the provisions of s. 18 of Act IX of 1859, notwithstanding that there had been no adjudication of forfeiture. **RANEE CHUNDAL v. KOONWER ROOP SINGH**, 3 Agra 281.

(19)—*Act X of 1858—Confiscation—Effect on rights of tenants permitted to retain holding on rent—Revival of rights.*—The confiscation of a village under Act X of 1858 cancels the rights of the tenants; and the circumstance that they have been permitted to retain their holding on rent, and to enjoy the produce of the trees for some years subsequent to the confiscation, does not revive the rights which were absolutely avoided by the confiscation. Their position is merely that of tenants-at-will. **TEEKUM SINGH v. MUSST. DULLO**, 2 Agra 324.

(20)—*Disclaimer of landlord's title, what amounts to—Raiyati tenancies—Cause of action, antecedent to suit.*—A refusal, on the part of a tenant, to pay rent to a person, who claims to be his landlord (as a transferee from the original landlord) until satisfied as to his title, is not such a disclaimer as would effect a termination of the tenancy. To constitute a disclaimer, there must be a direct repudiation of the relation of landlord and tenant or a distinct claim to hold possession of the estate on a ground wholly inconsistent with the existence of that relation. An assertion by a tenant

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that the person claiming to be his landlord is not entitled to the whole rent but as co-sharers, who must join in an action for rent, is not such a disclaimer as would effect a forfeiture of the tenancy. The doctrine of forfeiture by disclaimer of landlord's title does not apply to *raiya* tenancies governed by the Bengal Tenancy Act and the principle of estoppel cannot be applied to make the doctrine of forfeiture indirectly applicable to such tenancies. (17 C. 196, 20 C. 101, F; 2 C.W.N. 755, 6 C. W.N. 575, D. & Doubtful.) As the cause of action must be based on something which accrued antecedent to the suit, the denial, by a defendant, of his landlord's title in the written statement, would not entitle the plaintiff to a decree in that suit for ejectment on the ground of forfeiture. **MALLIKA DAS v. MAKHANLAL CHOWDHURY**, 2 C.L.J. 389=9 C. W.N. 928. (13 C. 96, F.) (F., 34 C. 922, 12 C.W.N. 525; R, 17 M.L.J. 287; D., 3 C.L.J. 201.)

(21)—*Transfer of holding, effect of.*—A transfer either of an absolute occupancy holding or of an ordinary occupancy holding does not operate as a forfeiture or give a right of re-entry to the malguzar. **BHAGWANGIR v. NARAIN BABA-JEE GOOSEY**, 12 C.P.L.R. 134. [Diss., 12 C.P.L.R. 158.]

(22)—*Forfeiture—Deed of grant—Various alienations of property—Re-vesting of property in original grantee—Delay.*—Where property was granted under a deed which provided for forfeiture of the grant in case the grantees alienated the same by way of sale, mortgage, etc., and in spite of such provision the grantee made various alienations of the property, and the grantor took no steps to enforce the forfeiture clause until the various alienations resulted in replacing the property in the grantees, the Court would not give effect to the forfeiture clause in the grant. **RAMANNA PRARHU v. SRINIVASA GADIYARA**, 9 M.L.J. 11.

(23)—*Leaning of Courts against forfeiture.*—The Courts both in England and in India lean strongly against a forfeiture; so that, if a plaintiff comes into Court relying upon a forfeiture he must prove his rights strictly. **CHHABILDAS v. KRISHNARAO**, 3 Bom. L.R. 1016.

(24)—*Abetting waging of war against Queen—Forfeiture—Conviction—Attachment—Act XXV of 1857, s. 3—Act XI of 1857.*—The property of a judgment-debtor convicted of an offence under Act XI of 1857, which has been attached intermediately between the time of commission of the offence and the time of conviction, his property forfeited to the Crown under s. 3, Act XXV of 1857. The forfeiture relates back to the time of commission of the offence. The words of s. 3, Act XXV of 1857, "such an offence as aforesaid" refer to the offences mentioned in s. 2 as well as to the offence of mutiny mentioned in s. 1. **GANESH LAL v. AMIR KHAN**, 8 B.L.R. 83=17 W.R. 80.



**Forfeiture of Property—continued.**

Under the Forest Act—See ACT VII OF 1878, s. 56, 2 Bom. L. R. 675.

See BEN. ACT X OF 1859, s. 23, cl. 5, s. 78, 12 B.L.R. 439.

For non-payment of assessment—See BOM. ACT V OF 1879 s. 56, 1 Bom. L.R. 505=24 B. 34.

Forfeiture—Surrender—Difference between—See BERAR LAND REVENUE CODE, s. 56, 7 N.L.R. 2.

Non-payment of rent by tenant—Compromise decree providing forfeiture—Power of executing Court to relieve against forfeiture—See CIV. PRO. CODE, 1903, s. 47, 24 M. 265.

Relief against—Of the deposit for the due performance of a contract when to be granted—See CONTRACT—GENERAL, 16 M.L.J. 37=29 M. 118.

Bail bond for accused—of—Suit recovery of amount by surety against principal—See CONTRACT ACT, 1872, s. 23, 1 P.R. 1899.

See CONTRACT ACT, 1872, s. 74, 2 C.W.N. 687.

Joint lessors—Breach of covenant—Forfeiture of property—See CO-SHARERS—SUIT BY CO-SHARERS, 7 C. 470=9 C. L. R. 260

Effect of forfeiture of ancestral property of a criminal, subject to Punjab Customary Law, for absconding or committing a crime, on right of inheritance of his male lineal descendants or collaterals—Extent of interest thus forfeited—See CRIM. PRO. CODE, 1898 ss. 87 and 88, 19 P.W.R. 1908, F.B.=18 P.R. 1908=156 P.L.R. 1908.

See ESTOPPEL—ESTOPPEL BY CONDUCT, 1 C. L.R. 293.

On apostacy—Abrogation by legislation—Suit to enforce forfeiture—Limitation—See HINDU LAW—CONVERSION, 15 C.W.N. 545 P.C.=8 A.L.J. 552=13 Bom. L.R. 427.

See HINDU LAW—MAINTENANCE, 17 M. 392, 15 A. 382=A.W.N. 1893, 149, 1 B. 559.

See HINDU LAW—WIDOW, 2 A. 171.

Relief against, when not allowable—See LANDLORD AND TENANT—GENERAL, 21 M.L.J. 916.

See LEASE—CONSTRUCTION OF LEASE, 20 C. 273.

See LIMITATION ACT, 1908, s. 10, 8 M. 525=12 I. A. 120.

Of rebels' property purchased from Hindu widow—Suit by reversioner for recovery after widow's death—Limitation applicable to suit—See LIMITATION, ACT, 1908, art. 181, 13 A. 108.

See MALABAR LAW—MORTGAGE, 27 M. 26.

When equity will relieve against—See SALE—SALE IN EXECUTION OF DECREE SETTING ASIDE SALE, 6 O.L.J. 176.

**Forfeiture of Property—concluded.**

Of service tenure—Repudiation of landlord's title—Suit for ejectment—Necessity for notice to quit—See SERVICE TENURE, 3 C.L.J. 274=33 C. 329.

In suit tenure—See SUIT TENURE, 5 Bom. L.R. 1016.

Enlargement of time fixed for payment—Payment a few days after day fixed—Forfeiture not to be enforced—See TRANSFER OF PROPERTY ACT, 1882, s. 87, 2 C.P.L.R. 29.

Denial of title by one of several joint lessees—Forfeiture—Receipt of rent from tenant after denial of landlord's title—Effect—See TRANSFER OF PROPERTY ACT, 1882, s. 111, 12 C.W.N. 587=7 C.L.J. 648.

Lessee's failure to renew lease—See TRANSFER OF PROPERTY ACT, 1882, s. 111, 4 M.L.T. 315.

See WILL—CONSTRUCTION, 20 C. 15.

**Forged Attestations.**

Forged attestations, effect of—See WILL—ATTESTATION, 7 M. 302.

**Forgery.**

(1)—*Debt—Forged pro-note—Suit for recovery of debt.*—Where the suit is one brought by the plaintiffs for a sum of money which, according to the plaint allegations, the defendant borrowed from them, on executing a promissory note in favour of one of the plaintiffs held, that even if the promissory note be a forgery, the plaintiffs are entitled to a decree for the amount so borrowed if they could prove the loan by independent evidence. MOTI LAL SAHA v. MONMOHAN GOSSAMI, 5 C.W.N. 56, (23 C. 851, F.) [Rel. on. 6 O.C. 16; R., 9 O.C. 315; D., 3 C.L.J. 363=10 C.W.N. 788=33 C. 812.]

(2)—*Allegation that document is forged—Practice of Privy Council.*—A document being impeached as being forged on the face of it, the case was directed to stand over for the original document to be transmitted from India for inspection at the hearing of the appeal. RANEE SURNOMOYEE v. MAHARAJAH SUTTEESCHUNDER ROY BHADOOR, 10 M.I.A. 123.

(3)—*Charges of fraud, forgery, etc.—Costs—Practice.*—Charges of fraud forgery and perjury, having been made by the respondents against the appellant, the party who propounded the will, costs of the Court in India, and upon appeal to England, were, upon the reversal of the decree of the Sudder Court, ordered to be paid by the respondents. NANA NURAIN RAO v. HUREE PUNTH BHAB, 9 M.I.A. 96.

(4)—*Forgery of copy of document.*—The forgery of a copy of a document comes within the definition of forgery as contained in s. 463 of the Penal Code. A Court has power to send a case for investigation to a Magistrate, under s. 7 of the Code of Criminal Procedure where,



**Forgery—continued.**

no particular individual has as yet been accused. *ESSAN CHUNDER DUTT v. BABOO PRANNATH CHOWDHRY*, W.R. F.B. 71=Marsh 270=2 Hay 236.

See BEN. ACT VIII of 1869, Marsh 496.

Striking out names of witnesses from subpoenas and putting other witnesses' names by solicitor after informing responsible officials—Whether—See CONTEMPT OF COURT, 16 O.W.N. 386, P.C.

See CURRENCY NOTES, 7 B.H.C. O.C., 1.

See DECLARATORY DECREE, SUIT FOR — SUITS CONCERNING DOCUMENTS; 7 B.L.R. 614=15 W.R. 421.

Forged bond—Suit for cancellation—Parties—See DEED—CANCELLATION OF DEEDS, A.W.N. 1888, 209.

See DEED—PROOF OF DEEDS, 3 W.R. 50, P.C.=7 M.I.A. 224, 16 W.R. P.C., 16=8 B.L.R. 490, P.C.

Document, unregistered — Suspicion of—See EVIDENCE—MISCELLANEOUS, 6 B.L.R. 501, P.C.=15 W.R. P.C. 12.

See EVIDENCE—MISCELLANEOUS, 8 B.L.R. 490, P.C.=16 W.R. P.C. 16, 10 M. I.A. 165, 5 W.R. 3, P.C.=7 M.I.A 207.

See HIGH COURT, JURISDICTION OF, B.L.R. Sup. Vol. 426=5 W.R. Mis., 24.

Suit to declare—Of kabuliati—Jurisdiction of Civil Court—See JURISDICTION OF CIVIL COURTS, A.W.N. 1884, 5.

See MASTER AND SERVANT, 6 C.W.N. 429.

See NEGOTIABLE INSTRUMENTS — BILL OF EXCHANGE, 28 P.R. 1884.

Payment on forged cheque—Discharge of banker—See NEGOTIABLE INSTRUMENTS—CHEQUE, 31 C. 249.

See NEGOTIABLE INSTRUMENTS—HUNDIS, 5 C.W.N. 313.

See OFFENCE, 5 W.R. Cr., 8, 1 Ind. Jur. N.S., 97.

Probate under forged will—Mortgage—See PROBATE AND ADMINISTRATION ACT, 1881, ss. 6, 18, 19, 84, 6 C.W.N. 787.

Unregistered document, admissibility in evidence—Plea of forgery—See REGISTRATION ACT, 1908, s. 49, A.W.N. 1881, 138.

See RES JUDICATA—RES JUDICATA IN EXECUTION PROCEEDINGS, 4 C. 209=2 C.L.R. 573.

For—Of document filed in Court, when refused—See SANCTION TO PROSECUTE, 29 C. 887=7 C.W.N. 112.

Registrar—Registration of document when execution admitted—Necessity for sanction for prosecution for forgery—See SANCTION TO PROSECUTE, 2 M.L.J. 286.

See SANCTION TO PROSECUTE, 16 B. 729.

**Forgery—concluded.**

Suit on bond for interest amounting to less than Rs. 500—Bond for Rs. 1,000—Plea of — See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF GENERAL, 2 M.H.C. 469.

**Forgery Act, Bengal.**

See BEN. ACT I OF 1848.

**Fraud.**

1.—GENERAL.

2.—EFFECT OF FRAUD.

3.—FRAUD, ELEMENTS OF, PROOF OF.

4.—PLEADINGS AS TO FRAUD.

5.—MISCELLANEOUS.

**—1.—General.**

See BURDEN OF PROOF—FRAUD.

See COLLUSION.

See CONTRACT ACT, 1872, s. 16.

See LIMITATION ACT, 1908, s. 18, ART. 95.

See TRANSFER OF PROPERTY ACT, 1882, s. 53.

(1)—*Decree—Suit to set aside decree on ground of fraud—What plaintiff should prove—Fraud practised upon Court—Dishonesty of claim.*—In a suit to set aside a decree on the ground of fraud, the plaintiff must prove that the decree was obtained by some fraud practised upon the Court. The dishonesty of a claim on which a plaintiff obtains a decree, after following strictly and honestly the procedure laid down for the trial of suits, cannot justify the setting aside of the decree in a subsequent suit. Therefore, if the plaintiff cannot prove that a decree was fraudulently obtained, he cannot succeed, whether the original claim against him was true or false. *MAROCHIN v. PURSURAM MAHARAJ*, 10 Ind. Cas 905.

(2)—*Fraud, plea of, by defendant—No suit brought to set aside transaction—Lapse of time—Suit for confirmation of possession—Decree for recovery of possession—Payment of ad valorem Court-fees.*—A defendant is entitled to resist a claim made against him by pleading fraud, and he is entitled to urge that plea though he may not himself have brought a suit to set aside the transaction. He is not under certain circumstances precluded from urging that plea by the lapse of time. (6 Bom. L.R. 592, 28 B. 639, F.) Where, although a suit is in form for confirmation of possession, yet in substance it is for recovery of possession and ad valorem Court-fee has been paid upon the plaint which sets out facts constituting dis-possession, a decree for recovery of possession can be given. *KALI KUMUR VIDYANRANTA v. KASHI CHANDRA MITRA*, 11 Ind. Cas. 882.. (16 W.R. 27, 11 C.L.R. 443, Rel. on.)

(3)—*Fraud—Suit for declaration that decree is void for fraud practised on the Court—Ponna burial ground—Suppression of existence of Hindu Temple on land — Effect of such suppression on the validity of the decree—What constitutes fraud—Setting aside—Whole or part*



**Fraud—continued.****—1.—General—continued.**

**—Decree—Consent of the Poona community—Custom—Observance of Ponnas—Sanctity of burial ground—Conservation—Removal of dead body.**—Two contractors purchased from the Trustees of the Poona community a burial ground promising to give the Ponnas another piece of land for burying purposes and to pay for the removal of the remains of the dead buried at the old cemetery to the new place, and the Court in a suit at the instance of four members of the community settled a scheme for carrying out the said transfer. After this, some Ponnas sued for a declaration that the decree in the above suit was void, making the trustees, the plaintiffs in the first suit, and the contractors, all defendants. On the date fixed for the hearing of this second case, some Madras Hindu were also made parties as the decree and transfer would affect a temple of theirs on the land. It was contended that the decree was obtained by practising a fraud on the Court when it was led to believe that the exchange of the burial ground with the contractors was made known to, explained to and accepted by, the whole Poona community. *Held*, that, on the evidence, it was proved that the scheme was duly explained to the community and the minutes of the meeting of the community properly represented what occurred. It was further contended that the Court was not informed of the existence of a Madras temple on part of the land and of the fact that the Madras had an interest in it and that the facts material for the Court to know were kept deliberately from the Court. *Held*, that, if the Court had been informed of the temple, it must have issued notice to the Madras, who would have strenuously opposed the scheme, and then the Court would have either declined to entertain the scheme at all or might have sanctioned the scheme except in so far as it affected the Madras, or would at any rate have called upon the trustees to prove that they had the right to have the temple removed at will. *Held*, further, that as there was a suppression of material facts which it was essential that the Court should have before it and which might, and probably would, have caused it to arrive at a different decision, the decree passed in the previous suit for settling the scheme must be set aside so far as it affected the land occupied by and for the Madras temple. (30 C. 718, *Rel. on.*) Among Ponnas, cremation is considered the better way of disposing of their dead, and even if the dead are buried, no sign is maintained of where the graves are. No custom exists requiring the relatives to go to the cemetery to invite their dead to feasts, nor does any peculiar reverence attach to the graves or the remains. The cemetery is not consecrated and a body once interred can be disinterred and then cremated or removed to another place. **MAUNG AUNG MYAT v. MA YWET**, 10 Ind. Cas. 780. (26 B. 198, 17 W.R. 765, D.)

(4)—**Fraud—Party cannot take advantage of his own fraud—Fraud of his predecessors pre-**

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**Fraud—continued.****—1.—General—continued.**

**cludes the party from setting it up—Practice.**—Sabinibibi received from her husband the property in dispute as dower in 1829. She sold it in 1863 to Sardarkhan, who died in 1873. Two years later. Mahmaddkhan, the brother of Sardarkhan, made a gift of the property to Shabsahab. In execution of a decree against Shabsahab, the property was sold at a Court sale to Ramohandra, who sold his right to the plaintiff. The property was in possession of Shabsahab's sister and brothers (defendants Nos. 1-3). The plaintiff sued to recover possession. *Held*, that the plaintiff was entitled to succeed, for if the transaction from 1829 to 1875 were genuine and valid, the defendants had no case at all; and if they were fraudulent and collusive, the defendants were precluded as parties by descent to the alleged frauds, from setting up their own inequity to avoid the legal consequences of those transactions. **SAYAD NAHANNU PACHHASAHEB v. SABINIBIBI**, 13 Bom. L.R. 1011.

(5)—**Fraud, suit to set aside decree for—Allegation that case false and proved by false evidence, suit if maintainable on.**—A decree on a promissory note was passed *ex parte* by the Court at Akyab against the defendant who, though duly served with notice, was unable to appear and defend the suit. *Held*, on a review of the authorities, that a suit was maintainable by the defendant to establish that he had never been to Akyab, had never received any money from the plaintiff, had never executed the promissory note, and that the decree was based on no cause of action, and that the whole proceeding leading up to it was fraudulent. (21 C. 612, 14 C.W.N. 695, *Not F.*) The jurisdiction of the Court, in trying a case of this nature, is not limited to an investigation merely as to whether the plaintiff was prevented from placing his case before the Court at the prior trial by the fraud of the defendant. **LAKHMI CHURN SHAHA v. NUR ALI**, 15 C.W.N. 1010.

(6)—**Equitable defence—Plea by defendant of his own fraud.**—Where a contract or deed is made for an illegal or immoral purpose, a defendant, against whom it is sought to be enforced, may show the turpitude of both himself and the plaintiff, and a Court of justice will decline its aid to enforce a contract thus wrongfully entered into. It is not for his own sake, however, that the objection is ever allowed, but is founded on general principles of policy, which the defendant has the advantage of. **LUCKMI-DAS KHIMJI v. MULJI CANJI**, 5 B. 295. [*R.*, 10 M. 17, 18 M. 378, 20 M. 326, 32 M. 323 = 5 M.L.T. 77 = 2 Ind. Cas. 616.]

(7)—**Mortgage—Infant—Fraudulent misrepresentation as to age—Written statement by way of replication—Art. 95, Limitation Act, 1877—S. 115, Evidence Act.**—Where the defendant in a suit sets up the plea of infancy, it is competent for the plaintiff to put in a replication setting up fraud in answer. (24 O. 265, *Expl.*)



**Fraud—continued.****— 1. — General—continued.**

Where an infant, by his fraudulent misrepresentation as to his age, induces a person to advance money on the security of a mortgage, the person so defrauded is entitled to a mortgage decree for the amount, but without interest. The amount is to be realised only from the mortgaged property. In a Court of equity, the disability of a party, whether arising from infancy or coverture, cannot be successfully used in defence of fraud. *SREEMUTY MOHUN BIBI v. SARAL CHIND MITTER*, 2 C.W.N. 18. [Affirmed, 2 C.W.N. 201=25 C. 371.] (*Watts v. Cresswell*, 9 Vin. Ab 414; *Savage v. Foster*, 2 Wh. & Tud. L.C., 6th Ed., 678; *Teynham v. Webb*, 2 Vesay, Sr. 198; *Evans v. Bicknell*, 6 Vesey 181; *Cory v. Gertcken*, 2 Maddock 40; *Davies v. Hodgson*, 25 Beav. 137; *Lush's Trust* L.R. Ch. App. 591; *Cahill v. Cahill*, L.R. Ch. 87, Ca. 437; *Vaughan v. Vanderstegen*, 2 Drew. 363, R.)

(8)—*Judgment obtained by fraud not conclusive 'inter partes.'*—A party to a proceeding is never disabled from showing that a judgment or order has been obtained by the adverse party by fraud. *MANCHHARAM v. KALIDAS*, 19 B. 821. [Appr., 3 C.W.N. 660=27 C. 11; Appl., 27 G. 11.]

(9)—*Contract—Fraud—Fraud between vendor and purchaser, effect of—Contract Act, 1872, s. 19—Jurisdiction of Small Cause Court—Suit for damages after avoiding sale on the ground of fraud—Small Cause Court Act, 1887, sch. II, art. 15.*—The defendant, a horse-dealer, sold a mare to the plaintiff which he knew had a cracked hoof. He filled up the crack with some substance in such a way as to defy detection. Shortly after the purchase the mare having to walk a short distance was found to be lame and on enquiry being made the defect was discovered. The plaintiff brought an action to avoid the purchase on the ground of fraud and to recover damages; held, that he was entitled to avoid the sale and recover back the purchase money from defendant. Held also, that the suit was one for damages after avoiding the agreement on the ground of fraud and as such was cognizable by a Court of Small Causes. *ABDULLA KHAN v. GIRDHARI LAL*, 49 P.R. 1904. (41 P.R. 1886, D.)

(10)—*Whether fraud can be considered for the first time in appeal.*—In a case where the plaint made no charge of fraud and collusion, and no issue was framed on it, and the lower Court did not make mention of it, the Court of appeal refused to take it into consideration. *IMDAD HUSAIN v. AZIZ-UN-NIZZA*, 6 M.L.J. 48, P.C.=23 C. 483=23 I.A. 68=6 Sar. 669. [R., 2 N.L.R. 49.]

(11)—S. 18, *Limitation Act—When applicable.*—A plaintiff in order to bring himself under the provisions of s. 18 of the Limitation Act must substantiate specific acts relied upon in his plaint as constituting the fraud practised upon him. *ATMA RAM v. MEHARDIL KHAN*, R. 1902.]

**Fraud—continued.****— 1. — General—continued.**

Or specific error in account, allegation of—*See ACCOUNT—SUIT FOR ACCOUNTS*, 2 Ind. Jur. N.S. 333.

Fraudulent accounts—Limitation—*See BEN. ACT X OF 1859, s. 33, 2 B.L.R. A.C. 270, Note=9 W.R. 329.*

*See BEN. ACT X OF 1859, s. 33, 2 B.L.R. A.C. 269=11 W.R. 163.*

*See BEN. ACT XI OF 1859, s. 36, 2 C.W.N. 433.*

*See BEN. ACT VIII OF 1885, ss. 73, 183, 8 C.W.N. 172.*

Whether action of several co-sharer landlords in bringing a joint suit for rent against intermediate tenant, will amount to—*See BEN. ACT VIII OF 1885, s. 88, 3 C.L.J. 379.*

Suit to set aside revenue-sale — Fraud—Limitation—*See MAD. ACT II OF 1864, s. 59, 12 M. 168, F.B.*

Suit to set aside sale for revenue arrears, on ground of fraud—*See MAD. ACT II OF 1864, s. 59, 3 M.L.J. 255.*

In partition proceedings—*See U.P. ACT XIX OF 1873, s. 241, 25 A. 19.*

*See APPELLATE COURT — OBJECTIONS FIRST TAKEN IN APPEAL*, 15 M. 50.

*See ATTACHMENT—ALIENATION DURING ATTACHMENT*, A.W.N. 1881, 77.

*See AWARD*, 1 Ind. Jur. O.S. 12.

Surprise or mistake or such other grounds, meaning of—*See BELCHAMBERS RULES AND ORDERS*, Rules 615, 617, 29 C. 272=5 C.W.N. 337.

Not carried into effect—Right of beneficial owner in a *benami* transaction to show real nature of the transaction—*See BENAMI TRANSACTION—GENERAL*, 10 C.W.N. 650=4 C.L.J. 22=33 C. 967.

Distinction between fraud attempted and fraud accomplished—*See BENAMI TRANSACTION—GENERAL*, 23 C. 962, 962 Note.

Benami transaction fraudulently entered into—Fraud accomplished—Effect—*See BENAMI TRANSACTION—GENERAL*, 27 C. 231=4 C.W.N. 289.

Benami transfer—Transfer in—Of creditors—Benamidar's suit for possession—Plea of transfer being benami—*See BENAMI TRANSACTION—GENERAL*, 8 C.W.N. 620.

*See BENAMI TRANSACTION — CERTIFIED PURCHASERS*, 4 B.L.R. App., 32.

Intended—Wholly or partially carried into effect—Practice of Courts—*See BENAMI TRANSACTION—MISCELLANEOUS*, 28 C. 370.

*See BUILDING*, 3 B.L.R. A.C., 18=11 W.R. 547.



**Fraud—continued.****—1.—General—continued.**

See BURDEN OF PROOF — DECREEES AND DEEDS, SUITS RELATING TO, 5 W.R. 25, P.C.=1 M.I.A. 1.

See BURDEN OF PROOF — HINDU LAW, 5 C. 363=5 C.L.R. 374.

Suit by one or two joint endorsees of a hundi for a declaration that half the consideration was payable to himself—Allegation of fraud in writing the endorsement made by the other joint endorsee—See BURDEN OF PROOF — MISCELLANEOUS, A.W.N. 1901, 17.

See CIV. PRO. CODE, 1859, s. 272, 6 B.L.R. 174=14 W.R. 363.

See CIV. PRO. CODE, 1908, 5 M. 217.

See CIV. PRO. CODE, 1908, ss. 2, 47, 26 C. 539=3 C.W.N. 403.

Suit to set aside sale on the ground of—Maintainability of—Third party auction purchaser—See CIV. PRO. CODE, 1908, s. 47, 26 C. 326, Note=3 C.W.N. 395, 15 C. 179.

Decree tainted with — alleged — Suit to set aside sale in execution of *ex parte* decree—See CIV. PRO. CODE, 1908, s. 47, 27 C. 197.

Suit for cancellation of sale held in execution on ground of fraud—Maintainability—See CIV. PRO. CODE, 1908, s. 47, 24 A. 239=A.W. N. 1902, 49.

See CIV. PRO. CODE, 1908, s. 47, 18 C. 139, 4 C.W.N. 538, 5 C.W.N. 265, 8 C.W.N. 230.

Payment to decree-holder before date of sale—Fraud in conduct or publication of sale—Second appeal—See CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 90, 10 Ind. Cas. 625.

Application to set aside — See CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 90, 2 C.W.N. 691, 26 C. 324=3 C.W.N. 399.

See CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 90, 17 C. 769, 19 C. 341.

In execution of decree—Evasion of warrant amounts to—Fraud of one judgment-debtor—Effect on others—See CIV. PRO. CODE, 1908, s. 48, 2 M.W.N. 1911, 434.

Execution of decree evaded for 12 years—Conduct of judgment-debtor amounting to fraud — See CIV. PRO. CODE, 1908, s. 48, O. XXI, rr. 10, 21, 9 B. 318.

—In connection with a petition of compromise, is good ground for review of the decree—See CIV. PRO. CODE, 1908, s. 114, O. XLVII, r. 1, 10 C.W.N. 286.

Suit to set aside *ex parte* decree and sale on the ground of—Refusal of application to set aside *ex parte* decree—See CIV. PRO. CODE, 1908, O. IX, r. 13, 28 C. 475, P.C.=5 C.W.N. 757.

See CIV. PRO. CODE, 1908, O. IX, r. 13, C.W.N. 468.

Fraudulent execution of satisfied decree—See CIV. PRO. CODE, 1908, O. XXI, r. 2, 10 B. 288.

**Fraud—continued.****—1.—General—continued.**

See CIV. PRO. CODE, 1908, O. XXI, r. 2, 1 B.L.R. A.C. 76=10 W.R. 104.

See CIV. PRO. CODE, 1908, O. XXI, rr. 6, 90, 20 M. 10.

Fictitious transfer—Obstacle to execution—See CIV. PRO. CODE, 1908, O. XXI, rr. 10, 21, s. 48, 4 M. 292.

See CIV. PRO. CODE, 1908, O. XXI, rr. 10, 21, s. 48, 8 M.L.J. 203.

Transfer of decree—Execution by transferee—Validity of decree questioned by judgment-debtor—Fraud—See CIV. PRO. CODE, 1908, O. XXI, r. 16, 15 B. 307.

Settlement — Attachment—Claim — Sale — Purchase of settlor's right—Right to set aside deed—Suit on behalf of all creditors—Limitation Act, art. 95—See CIV. PRO. CODE, 1908, O. XXI, rr. 60, 63, 16 B. 1.

Suit to set aside on the ground of—A decree against a minor on compromise by guardian, maintainability of — See CIV. PRO. CODE, 1908, O. XXXII, r. 7, s. 114, O. XLVII, rr. 1, 2, 3 C.L.J. 119.

Appeal filed beyond time—Fraud—Objection at hearing — Power of Judge—See CIV. PRO. CODE, 1908, O. XLI, r. 9, 4 B.L.R. App., 103=13 W.R. 351.

Compromise decree by guardian—*Ad litem*—Suit based on allegation of—Subsequent suit for the purpose on the ground of want of Court's sanction—Res judicata—See COMPROMISE—GENERAL, 21 M. 91=8 M.L.J. 28.

Mistake as to material fact—Equitable—See COMPROMISE—SETTING ASIDE COMPROMISE 6 C. 687=8 C.L.R. 169.

See COMPROMISE—SETTING ASIDE COMPROMISE, 2 M.I.A. 181.

Suit for declaration — Non-registration of decree—Effect —See COMPROMISE DECREE, 4 C.L.R. 52.

Consent decree against minor—Suit by minor to set aside decree—Burden of proof as to minor having been properly represented—And collusive—See CONSENT DECREE, 6 M.L.J. 131, P.C.

—Of sale of goods—Parol evidence—Bought and sold notes—See CONTRACT—GENERAL, 31 C. 614, P.C.=31 I.A. 132=8 C.W.N. 489=6 Bom. L.R. 498=14 M.L.J. 196.

Bond—Endorsement of payment—Fraudulent alteration—Effect—Suit on bond—Maintainability—See CONTRACT — ALTERATION OF CONTRACTS, A.W.N. 1885, 269.

Suit upon fraudulently altered bond—Relief upon bond in original state not allowable—See CONTRACT—ALTERATION OF CONTRACTS, 7 C. 616=9 C.L.R. 257.

See CONTRACT — MISCELLANEOUS, 2 C.P.L.R. 23.



**Fraud—continued.****—1.—General—continued.**

See CONTRACT ACT, 1872, ss. 13, 18, cl. (2), 3 B. 242.

Voluntary alienation by the debtor—Good faith—Fraud against creditor—See CONTRACT ACT, 1872, s. 25, 2 A. 891.

See CONTRACT ACT, 1872, s. 23. L.B.R. 1893—1900, 477.

Pledged goods obtained by fraud, owner's right to recover—See CONTRACT ACT, 1872, s. 178, 3 C. 264.

Wilful default of co-sharer in paying revenue—Fraud—Silence when fraudulent—See CO-SHARERS—GENERAL, 15 C.L.J. 132.

See CUSTOMS — PUNJAB — PRE-EMPTION, 15 P.L.R. 1902=16 P.R. 1902.

See DAMAGES—DAMAGES, SUITS FOR, A.W.N. 1881, 107.

See DAMAGES—MEASURE AND ASSESSMENT. 1 Agra 69.

See DEBTOR AND CREDITOR, 1 Agra 79, 2 Agra 411, 10 C. 616, P.C.=11 I.A. 10, 16 M. 397=3 M.L.J. 197.

See DECLARATORY DECREE, SUIT FOR—MISCELLANEOUS, 7 A. 884=A.W.N. 1886. 281, 14 M. 167=1 M.L.J. 338.

See DECREE—GENERAL, 25 C. 649.

Effect of setting aside decree on ground of fraud or collusion—See DECREE—MISCELLANEOUS, 10 B. 338.

See DEED—RECTIFICATION OF DEEDS, 13 C.P.L.R. 65.

Grant due to fraud practised on revenue authorities—Grant, whether binding on Government—See DHARKHAST, 13 M.L.J. 137.

See ESTOPPEL—GENERAL, 7 C.W.N. 596.

Sale by minor falsely stating that he was of age—Suit for cancellation of sale-deed—Estoppel by—See ESTOPPEL—ESTOPPEL BY CONDUCT. 21 B. 198.

Estoppel—Owner of land standing by—*Bona fide* possessor—Improvement on faith of good title—See ESTOPPEL—ESTOPPEL BY CONDUCT, 3 C.L.R. 1.

See ESTOPPEL—ESTOPPEL BY CONDUCT, 12 C.L.R. 64.

Fraud—Claim to relief from effects of—*In pari delicto potior est conditio possidentis*—See ESTOPPEL—ESTOPPEL BY DEEDS, 1 A. 403.

See ESTOPPEL—ESTOPPEL BY DEEDS, 17 M. 304.

Admission in a former written statement may be proved to have been made owing to—Of a third party—See ESTOPPEL—STATEMENTS AND PLEADINGS, 15 W.R. 14, P.C.=13 M.I. A. 551.

**Fraud—continued.****—1.—General—continued.**

See ESTOPPEL—MISCELLANEOUS, 99 P.R. 1895.

See EVIDENCE — MISCELLANEOUS DOCUMENTS, L.B.R. 1893—1900, 212.

Evidence of contemporaneous oral agreement—Fraud—Evidence Act, s. 92—See EVIDENCE—PAROL EVIDENCE, 10 C. 649.

See EVIDENCE ACT, 1872, s. 115, 30 C. 539, P.C.=30 I.A. 114=7 C.W.N. 441=5 Bom. L. R. 421.

Execution in British India of decree of Native State—Fraud—Discretion and duty of Court—See EXECUTION OF DECREE—NATIVE STATES, DECREES, OF, COURTS OF, 15 B. 216.

Fraudulent execution of decree after adjustment out of Court—Adjustment not certified under s. 258 of the Civ. Pro. Code, 1882—Proof of payment otherwise than by certificate—See EXECUTION OF DECREE—MISCELLANEOUS, 14 C. 376.

Judgment-debtor's obstruction to execution of decree—No proof of fraud—Operation of provisions—See EXECUTION OF DECREE—MISCELLANEOUS, 12 M.L.J. 24.

Plea of—And collusion—Maintainability of suit—See GUARDIAN—DUTIES AND POWERS OF GUARDIANS, A.W.N. 1884, 316.

Suit to set aside decree of Mofussil Court, on ground of—See HIGH COURT, JURISDICTION OF—CALCUTTA, 30 C. 369=7 C.W.N. 353.

See HINDU LAW—ADOPTION, 12 C. 18, P. C.=12 I.A. 137, 7 C. 178=8 C.L.R. 401.

See HINDU LAW—ALIENATION, 3 C.P.L.R. 64.

Fraudulent contract between manager of joint family and third party, right of defrauded member to rescind—See HINDU LAW—JOINT FAMILY, 4 B. 29.

See HINDU LAW—MAINTENANCE, 23 B. 342, A.W.N. 1881, 12.

Right to question partition effected during minority of co-parcener—Validity—Fraud, undue advantage or gross inequality in distribution of property to be proved—See HINDU LAW—PARTITION, 2 M.H.C. 182.

See HINDU LAW—RELIGIOUS ENDOWMENT, 14 B.L.R. 450, P.C.=3 Sar. 449=23 W. R. 253=2 I.A. 145.

Fraudulent alienation by reversioner—Suit by next lower reversioner to set aside—See HINDU LAW—REVERSIONERS, 2 A. 41.

Trade marks, injunction to restrain use of—Fraudulent intention—See INJUNCTION—SPECIAL CASES, 3 B.L.R. App. 4 (a).

See INSANITY, 7 O.C. 287.

Application for insolvency by infant—Necessity of fraudulent representation—Withdrawal of application—See INSOLVENCY—GENERAL. 7 B. 411.



**Fraud—continued.****—1.—General—continued.**

Fraudulent concealment—See **INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE**, 7 A. 445=A.W.N. 1885, 108.

See **INSOLVENCY—VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR**, 2 Agra 71.

See **INSURANCE**, 20 B. 99.

See **INTEREST—SPECIAL CASES**, 25 A. 284=A.W.N. 1903, 44.

See **INTEREST—STIPULATION IN THE NATURE OF PENALTY**, 20 O. 366.

See **JURISDICTION OF CIVIL COURTS**, 5 B. 73.

See **LANDLORD AND TENANT—TENANT'S LIABILITY FOR RENT**, 7 C.W.N. 170.

Solicitor—Falsehood in deed—Presumption of fraud—Ous—See **LEGAL PRACTITIONERS—ATTORNEY**, 1 B.L.R. P.C., 55=10 W.R. 43, P.C.

See **LIMITATION ACT**, 1908, ss. 10, 18, art. 95, 5 A. 294=A.W.N. 1883, 40.

See **LIMITATION ACT**, 1908, art. 91, 15 C. 58, P.C.=14 I.A. 148, 11 B. 78.

Fraudulent sale in execution of decree—Application to set aside—Separate suit not maintainable—See **LIMITATION ACT**, 1908, art. 166, 9 B. 468.

See **LIMITATION ACT**, 1908, art. 181, 26 C. 324=3 C.W.N. 399.

Mortgage by mother—Decree against mother obtained by other heirs for their shares—Rights of mortgage—Collusion—See **MAHOMEDAN LAW—GUARDIANSHIP**, 8 A. 324=A.W.N. 1886, 101.

See **MALABAR LAW—JOINT FAMILY**, 5 M. 201.

Admission of execution by a person not appearing to be a minor—Fraud on registering officer, effect of—See **MINOR—CONTRACTS BY MINORS**, 21 C. 872.

Mortgage—Fraud—Priority—Lien—See **MORTGAGE—SALE OF MORTGAGED PROPERTY**, 3 B.L.R. A.C. 1=11 W.R. 286.

See **NEGOTIABLE INSTRUMENTS ACT**, 1881, s. 58, A.W.N. 1886, 34.

Discovery of document after judgment—No application for discovery before judgment—See **NEW TRIAL**, 6 C.W.N. 809, P.C.

Purda lady—Suit to set aside sale—Fraud—Parol evidence—See **PARDANASHIN WOMEN**, 1 B.L.R. O.C. 28.

Allegations of—In plaint—No specific instances—Plaint to be returned for amendment—Practice—See **PLAINT—AMENDMENT OF PLAINT**, 18 B. 144.

**Fraud—continued.****—1.—General—continued.**

Plaint alleging frauds within plaintiff's knowledge—Necessity of subscription and verification by plaintiff himself—See **PLAINT—VERIFICATION AND SIGNATURE**, 9 A. 505=A.W.N. 1887, 137.

Competence of Court to grant a decree where fraud proved is not identical with that alleged in the plaint—See **PLEADINGS**, A.W.N. 1894, 6.

Must be pleaded specially—See **PLEADINGS**, 10 Ind. Cas. 922.

Mortgagees—Joint owners—And collusion—Case made in lower Courts—Plaintiff changing case—Special appeal—See **PLEADINGS**, 2 C.L. R. 538.

See **PRE-EMPTION—GENERAL**, 1 O.C. 262.

See **PRE-EMPTION—CONSTRUCTION OF WAZIB-UL-ARZ**, 7 A. 482, F.B.=A.W.N. 1885, 97.

See **PRE-EMPTION—MISCELLANEOUS**, 34 P.R. 1904.

Principal and Agent—Fraud by agent—Effect—See **PRINCIPAL AND AGENT—DUTIES AND LIABILITIES OF PRINCIPALS**, 7 C. 199.

See **PRINCIPAL AND AGENT—DUTIES AND LIABILITIES OF PRINCIPALS**, 1 Ind. Jur. O.S. 103.

Vendee not taking possession from vendor—Effect—See **REGISTRATION ACT**, 1908, s. 50, 13 B. 229.

Priority of unregistered mortgage over subsequent registered sale—Notice—Fraud—See **REGISTRATION ACT**, 1908, s. 50, 11 C. 667.

See **BEN. REG. III OF 1793**, 7 M.J. 258.

Res judicata—Defence to plea of res judicata that the prior decree was obtained through fraud and collusion—Guardian and minor—See **RES JUDICATA—GENERAL**, A.W.N. 1894, 141.

See **RES JUDICATA—GENERAL**, 14 M.L.J. 485.

See **RES JUDICATA—MATTERS IN ISSUE**, 17 M. 384=21 I.A. 93=4 M.L.J. 139, P.C.

Suit by Official Assignee on behalf of insolvent's creditors—Fraud of defendant, brother of insolvent—Limitation Act, XV of 1877, s. 18, Civ. Pro. Code, 1882, ss. 13, 43—Person made party for purposes of inspection and discovery only, whether subject to *res judicata*—Several joint wrong-doers, judgment obtained against one a bar to action against the others—See **RES JUDICATA—PARTIES**, 14 B. 408.

*Bona fide* litigation by karnavan in representative capacity—Gross negligence in conduct of case—Non-production of necessary documents—No fraud or collusion—Operation of decision as *res judicata* on junior members—See **RES JUDICATA—PARTIES**, 13 M.L.J. 68.

See **REVERSIONER**, 1 M.L.J. 390.



**Fraud—continued.****—1.—General—continued.**

Decree — Proceedings to set aside decree obtained by—Review—Suit for declaration of right to set aside decree—Right of suit—See REVIEW—GENERAL, 13 B.L.R. App. 11=22 W.R. 213.

Judgment obtained by perjury may be set aside in a fresh suit on the ground of—See RIGHT OF SUIT—GENERAL, 16 M.L.J. 59=29 M. 179.

See SALE—SALE FOR ARREARS OF RENT—SETTING ASIDE SALE AND ITS EFFECT, 1 B. L.R. A.C., 84.

Revenue—Sale, setting aside, for—Act XI of 1859, s. 33—See SALE—SALE FOR ARREARS OF REVENUE AND CESS—GENERAL, 10 C. 63=13 C.L.R. 131.

See SALE — SALE FOR ARREARS OF REVENUE AND CESS—GENERAL, 16 C. 194.

See SALE—SALE FOR ARREARS OF REVENUE AND CESS—MISCELLANEOUS, 5 B. 73.

Allegation of — Proof — Essentials—Finding of fraud when justifiable—Innocent auction purchaser whether affected by fraud concerning the sale — See SALE—SALE IN EXECUTION OF DECREE—GENERAL, 15 C. W.N. 875.

Sale in execution of decree—Right of auction purchaser to recover purchase-money on sale being set aside—Fraud on the part of the decree-holder—Fraud on the part of auction-purchaser—Minor—Claim for costs of suit—See SALE—SALE IN EXECUTION OF DECREE—RIGHTS OF PURCHASER ON SETTING ASIDE SALE, 1 A. 568, F.B.

See SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 11 C. 376, 5 C. W.N. 559, 21 C. 605, 19 C. 683, 6 C.W.N. 283, 3 C.L.R. 17.

See SALE—SALE IN EXECUTION OF DECREE—WRONGFUL AND INVALID SALES, A. W.N. 1899, 180, 13 B. 297.

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Fraudulent practice in trade — Power of Court to punish criminally — See ST. 11 & 12, VIC., c. 21, c. 13.

See SUCCESSION CERTIFICATE ACT, 1860, 8 B.L.R. App., 14, Note=11 W.R. 153.

Judgment obtained by—, not conclusive *inter partes*—See SUCCESSION CERTIFICATE ACT, 1889, s. 18 (b & c.), 19 B. 821.

Evidence of—See TRADE MARK, 2 Hyde 185, 1 Hyde 270.

See TRANSFER OF PROPERTY, 1 C.P.L.R. 165.

**Fraud—continued.****—1.—General—concluded.**

Fraudulent assignment of an executory contract—See TRANSFER OF PROPERTY ACT, 1882, s. 3, 10 C.W.N. 755=33 C. 702.

Fraudulent transfer to defeat creditors—Sale of immoveable property in satisfaction of dower-debt—See TRANSFER OF PROPERTY ACT, 1882, s. 53, A.W.N. 1890, 15.

Gross negligence—Priority of mortgages—English law—See TRANSFER OF PROPERTY ACT, 1882, s. 78, 15 M. 268=2 M.L.J. 95.

Oral sale of land followed by unregistered sale-deed—Registered conveyance by defendant to plaintiff to defraud and defeat the third person's prior title under—Plaintiff concerned in the fraud and *in pari delicto* with the defendant—Not entitled to any relief against the defendant—See TRUSTS ACT, 1882, s. 84, 15 M.L. J. 478=29 M. 72.

See VALUATION OF SUITS, 7 M.H.C. 372.

See VENDOR AND PURCHASER—BILLS OF SALE, 1 Ind. Jur. N.S. 78.

Contract induced by fraud—Right to cancel—See VENDOR AND PURCHASER—FRAUD, 11 M. 419.

Sale by Hindu widow—Old and illiterate and near to her death—Fraud and undue influence—Inadequacy of consideration—Sale set aside — See VENDOR AND PURCHASER—INVALID SALES, 5 B. 450.

See VENDOR AND PURCHASER—INVALID SALES, 2 Agra 401.

**—2.—Effect of Fraud.**

(1)—*Decree obtained by fraud.*—A suit will lie to set aside a decree fraudulently obtained. MALAK SHAHBAB V. MOWAZ, 31 P.R. 1868.

(2)—*Contract of tenancy—Repudiation of part on the ground of fraud.*—A tenant, let into several plots of land under a kabuliati, cannot admit being in possession of certain plots only and relinquish the rest on the ground of fraud; the tenancy must be avoided, if it all, *in toto*, the lease being an entire contract. ANARULLAH SHAIKH V. KOYLASH CHUNDER BOSE, 8 C. 118.

(3)—*Fraud — Negotiable instruments — Advance of money on hundis—Misrepresentation.*—The principle that fraud vitiates all agreements is applicable to debts evidenced by hundis, promissory notes, or other negotiable instruments, if the facts show that the loans were contracted on the faith of fraudulent misrepresentations made by the debtor to a creditor. When a debtor obtains advances of money on hundis, on fraudulent misrepresentations made by him, the creditor will be entitled to rescind the contract, and to claim immediate repayment of the amount of the advances, before the due dates of the hundis. BABOO LALL V. JOY LALL, 24 C. 533.

(4)—*Sale benami in name of third person—Intention to defraud creditors of real purchaser*



**Fraud—continued.****—2.—Effect of Fraud—continued.**

— *Collusive decree obtained by benamidar whether could be set aside by real owner.*—

Plaintiff alleged that he was the real purchaser of the house in question, and that defendant was merely a *benamidar*, and sued for a declaration of his title to the house, stating that the sale-deed in the name of the defendant and the collusive decree obtained by him against plaintiff were collusive and fraudulent transactions intended to defeat the plaintiff's creditors. Finding the sale-deed to be a *benami* transaction and the decree to be a collusive one not intended to be operative between the parties, the lower Courts decreed the plaintiff's claim. On second appeal, the High Court reversed the decrees and rejected the plaintiff's claim, holding that, having been himself a party to the decree, he was bound by it. A decree fraudulently obtained may be challenged by a third party who stands to suffer by it either in the same or in any other Court. As to the parties themselves to a collusive decree, the general principle is, that neither of them can escape its consequences. A party to a collusive decree is therefore bound by it, except possibly when some other interest is concerned that can be made good only through his. Also, as is implied in s. 84 of the Indian Trusts Act, when the illegal purpose sought to be effected by means of a transfer of property has been accomplished, the transferee can no longer be treated as holding it for the benefit of the transferor. In cases, however, in which the transaction is still inchoate, or the transferor still retains a *locus penitentie*, the formal act might be relieved against with reference to the real intention of the parties. Apart from this, a man cannot confine the operation of his deed within the limits of an intended fraud. Where the illegal object in view has been once realised as by a defeat of a third person's rights asserted in Court, a claim by the *particeps criminis* to the reconveyance of the property to him would properly have to be dismissed. CHENVIRAPPA v. PUTTAPPA, 11 B. 708. [F., 3 L.B.R. 245; Appr., 27 B. 266, 33 C. 967=10 C.W.N. 650=4 C.L.J. 22; R., 18 M. 378, 23 C. 962, 20 M. 326; R., 20 M. 333, 1 O.C. 188, 23 B. 406; 27 C. 231, U.B.R. 1897—1901, Vol. II, 454, 3 P.R. 1906=109 P.L.R. 1906, 31 M. 485=18 M.L.J. 576=4 M.L.T. 331, 5 N.L.R. 146; D., 17 B. 23, 19 B. 372, 7 C.P.L.R. 50, 23 C. 460, 22 B. 463.]

(5)—*Valid and operative deed of gift—Res judicata.*—A deed of gift, valid and operative between the parties, cannot be avoided for the reason that, in another suit between different parties, it has been held to be fraudulent as against creditors. It is doubtful whether a donor can avoid his own deed of gift on the ground of his own fraud. RAMANUGRA NARAIN v. MAHASUNDAR KUNWAR, 12 B.L.R. 433=3 Sar. 277. [R., 33 C. 967=10 C.W.N. 650=4 C.L.J. 22.]

(6)—*Parties in pari delicto—Validity of decree—Fraud.*—Although, when a contract or deed

**Fraud—continued.****—2.—Effect of fraud—continued.**

is made for an illegal or immoral purpose, a defendant against whom it is sought to be enforced may—not for his own sake, but on grounds of general policy—show the turpitude of both himself and the plaintiff, it is otherwise when a decree has been obtained by the fraud and collusion of both the parties. In such a case, it is binding upon both VENKATARAMANNA v. VIRAMMA, 10 M. 17. [F., 11 B. 708, 31 M. 485=18 M.L.J. 576=4 M.L.T. 331; Cons., 18 M. 378; R., 20 M. 326, 20 M. 333.]

(7)—*Fraudulent conveyance—Collusive decree—Fraudulent objects carried out—Suit to set aside conveyance and restrain execution of decree—Suit by legal representative—Maintainability*—A merchant, having got into debt, executed, in collusion with the defendant, for the purpose of defrauding his creditors, a promissory note in his favour, without receiving consideration therefor, allowed the defendant to obtain a decree thereon and executed a sale-deed in part satisfaction of the amount alleged to be due under the said decree. In consequence, certain of his creditors remitted parts of their claim. On the death of the debtor, his widow and legal representative sued to set aside the decree and conveyance. Held, that the plaintiff was not entitled to set aside the decree, even though she was not personally a party to the fraud, inasmuch as she stood in the shoes of her deceased husband, through whom she claimed and by whose contrivance and collusion the defendant was enabled to obtain the decree sought to be set aside. Held, further, that the conveyance also could not be set aside as the illegal purpose had been at least partially carried into effect in a substantial manner. RANGAMMAL v. VENKATACHARI, 18 M. 378. (On Appeal 20 M. 328=6 M.L.J. 64) [R., 20 M. 326, 20 M. 333, 63 P.R. 1893, 27 C. 221, U.B.R. 1897, 1901, Vol. II, 544, 32 C. 967=10 C.W.N. 650=4 31 31 M. 97=18 M.L.J. 151=3 M.L.T. 246, M. 485=18 M.L.J. 576, 4 M.L.T. 331; D., 23 C. 460, 23 B. 406.] See also RANGAMMAL v. VENKATACHARI, 20 M. 323. [R., 4 N.L.R. 26, 33 C. 967=10 C.W.N. 650=4 C.L.J. 22, 3 P.R. 1906=109 P.L.R. 1906; D., 23 B. 406.]

(8)—*Agreement induced by fraud, voidable.*—A person, who is induced by fraud to relinquish a lien on immoveable property, in favour of an innocent subsequent purchaser in good faith, is entitled, when the true facts become known, to enforce the lien against such purchaser. SAFDAR ALI KHAN v. LACHMAN DAS, 2 A. 554.

(9)—*Equitable relief—False allegations of fraud.*—Where a party who, as the facts really stand, would be entitled to equitable relief, misrepresents his case, falsely charges the opposite party with fraud and collusion and does not rely on his equitable rights, he will be debarred by such conduct from obtaining any relief in a Court of equity. DULI CHAND v. MONOHUR LALL UPADHYA, 2 C.L.R. 18.



**Fraud—continued.****—2.—Effect of Fraud—continued.**

(10)—*Fraud—Decree obtained on fraud and collusion, maintainability of suit to set aside.*—On a suit to set aside a certain decree on the ground that the first defendant fraudulently obtained it, the second defendant having colluded with him, there could be no *res judicata* if the plaintiff could prove that the decree was obtained by fraud and collusion. KRISHNA BHUPATI v. RAMAMURTI, 16 M. 198. [R., 12 C.P.L.R. 82.]

(11)—*Civ. Pro. Code, 1882, s. 258—Adjustment of decree not certified to Court under, admissibility of evidence as to, on fraud by decree-holder.*—Where a decree-holder, after falsely representing to the judgment-debtor and his men that an adjustment of the decree made out of Court had been duly certified by him to the Court, fraudulently proceeded with the execution and sale, obtaining from the Court, leave to bid at the sale, the proviso to s. 258 of the Civ. Pro. Code did not preclude the judgment-debtor from relying on the uncertified adjustment, not as an adjustment, but only as a step in proving the fraud committed on himself and on the Court. RAMAYYAR v. RAMAYYAR, 21 M. 356. [Not F., 17 M.L.J. 527; Doubtful, 29 M. 312=16 M.L.J. 33.]

(12)—*Jurisdiction—Refusal to confirm sale—Right to appeal.*—It is competent to a Court to set aside and refuse to confirm an auction-sale in an execution application, on the ground of fraud. [R., 19 M. 230, 21 M. 356.] No appeal lies against an order refusing to confirm a sale on the ground of fraud. SUBBAJI RAU v. SRINIVASA RAU, 2 M. 264. [R., 10 C. 410, 7 A. 345.]

(13)—*Decree without fraud, strangers when bound by—Decree obtained on fraud of one of the parties, effect of, till set aside for fraud—Fraud and collusion of both parties to suit, decree obtained on, how far binding on other persons.*—Persons other than parties to a suit, in which a judgment or decree has been obtained, come under three classes with reference to their position as affected by such judgment. These classes are:—(a) Persons who claim under the parties to the suit. (b) Persons, who though not claiming under the parties to the former suit were represented by them therein. (c) Strangers, neither privies to nor represented by the parties to the former suit. The effect of a previous judgment on these three classes will have to be considered with reference to their capacity to dispute it. In the first place, the judgment may have been honestly obtained with good faith on the part of both parties. In such a case, it will be binding both on class (a) and class (b) above. Class (c), strangers to the former suit will be affected by the judgment only when it is a judgment *in rem* passed by a competent Court. In the second place, the judgment may have been obtained by the fraud of one of the parties as against the other. In this case also class (a) and class (b), and, as regards judgments *in*

**Fraud—continued.****—2.—Effect of Fraud—continued.**

*rem*, class (c), are in one and the same position, which is that of the parties themselves. Such judgment is binding on them so long as it is binding on them. But, it may be impeached for fraud and set aside on proof of the fraud. In the third place, the previous judgment may have been obtained by the fraud and collusion of both the parties to the former suits, and in such a case it is not competent to either of the parties to vacate it. The same rule will apply as between the privies of such parties, except probably where the collusive fraud has been in respect of a provision of the law enacted for the benefit of such privies. But any member of either class (b) or class (c) may, in any subsequent proceeding, whether as plaintiff or as defendant, treat such judgment as a mere nullity provided he clearly establish the fact of such fraud and collusion. In the last mentioned case, s. 13 of the Civ. Pro. Code, cannot apply as the parties do not claim under the parties to the previous suit, and as the charge of collusion could not have been a matter directly and substantially in issue in the former suit. But the said s. 13 however, is not exhaustive as to the effect of *res judicata*. It does not deal at all with the case of judgments *in rem*, nor with that of parties represented by though not claiming under the parties to the former suit. AHMEDBHOY HUBIBHOY v. VULLEEBHOY CASSUMBHOY, 6 B. 703. [F., 11 B. 708; Appr., 27 C. 11=3 C.W.N. 660 (R., 10 M. 17, 19 B. 821, 18 M. 378, 20 M. 326, 5 Bom. L.R. 885, 26 A. 272=A.W.N., 1904, 25, 29 M. 390=16 M.L.J. 307=1 M.L.T. 183.)]

(14)—*Fraudulent conveyance—Purchaser—Declaration of title.*—A declaration of title cannot be claimed by the purchaser under a *kobala* from two parties where the conveyance has been found to be fraudulent and collusive. ATTAMOONISSA BIBEE v. R.P. SAGE, 11 W.R. 385.

(15)—*Fraud by agent or member of mercantile firm—Liability of firm—Commission of fraud while acting for and in business of firm—Innocent partners equally responsible.*—An ordinary mercantile firm is responsible for frauds committed by one of its members, or by a *gomashta* or other similar agent, while acting for and in the business of the firm; and innocent partners cannot divest themselves of responsibility, on the ground that they never authorized the commission of the fraud. When such a person, acting within scope of his authority, as evidenced by the business of the firm, obtains money and misapplies it, the firm will be responsible. LUCKHEE KANT BONIK v. RAM CHUNDER BYSACK, 2 W.R. 186.

(16)—*Decree obtained fraudulently—Absence of notice to opposite party—Competency of judgment-debtor to claim re-hearing.*—Where on an *ex parte* decree having been passed against the defendants, they represented that the whole case was fraudulent and that they had no notice



**Fraud—continued.****—2.—Effect of Fraud—continued.**

either of the suit or of the sale under the decree passed in it, the High Court held that independent of the question of an ordinary review within 15 days, defendants could claim a rehearing at any time within 15 days after such steps in execution had been taken as must necessarily bring the decree to their notice. **BOIDOO NAUTH ROY v. BROJO KISSORE CHUCKERBUTTY**, 2 W.R. Act X, Rul. 15.

(17)—*Tenant setting up hostile title against zemindar—Forfeiture of occupancy rights.*—In this case, plaintiff alleged possession of certain lands from 1846, and might possibly have been entitled to a right of occupancy, had he set up a title under s. 6 of Act X of 1859. He, however, set up a hostile title as against the representative of the zemindar under a fraudulent pottah, and, this act of his having amounted to a disclaimer and forfeiture of all his rights of occupancy, the High Court was of opinion that the lower Court was right in having decreed *khas* possession of the land to the zemindar. **MIRZA NADIR BEG v. MUDDURRAM**, 2 W.R. Act X, Rul. 1. [R., 19 W.R. 95.]

(18)—*Ikrar—Fraud in previous suit—Effect on present suit.*—Where, *R* having joined *K* in an unsuccessful suit to have certain Government Chittahs rectified and to have the concerned lands re-placed as part of an estate held in share with *K*, the defendant successfully sued them for possession of the same land with *wassilat* and *K* meanwhile *pendente lite* executed an *ikrar* to the effect that, as *R* has no interest in the land, *K* will hold *R* harmless if a decree is given against them: *Held*, that there was nothing illegal or immoral in the *ikrar* and the circumstances of the former suit did not bar *R*'s recovering under the *ikrar*. **RAM KANT CHOWDHRY v. HEDAYET ALI CHOWDHRY**, 11 W.R. 208.

(19)—*Sale—Setting aside of sale—Respondents in England—Service—Practice.*—Where, on the first day of sale, the judgment-debtor's partner's bid was not accepted and, on the second day, there was some understanding between her (the partner) and the decree-holder that they would not bid against each other but that she would get the property back for the amount of the decree, and the property was purchased by the decree-holder, *held*, that there was no fraud on the part of the decree-holder which would justify a Court in setting aside the sale. The respondent having left for England, notice of the appeal was served on him through appellant's agent in England appointed for that purpose, the notice having been made over to the appellant's *vakil*, who transmitted it for service to the agent in England. **SATISH CHANDRA MUKERJI v. COL. A. R. PORTER**, 18 C.W.N. 18=4 M.L.T. 421=9 C.L.J. 244=36 C. 226=1 Ind. Cas. 158. (23 M. 227, P.C., *Rel. on*; 19 M. 315, R.; 7 C. 346, D.)

(20)—*Fraud—Fraudulent decree—Defendant not served through plaintiff's machinations.*—The mere fact that personal service of a sum-

**Fraud—continued.****—2.—Effect of Fraud—continued.**

mons has not been effected upon a defendant would not render the whole proceedings against him absolutely abortive, but where the non-service is due to the fraudulent conduct of the plaintiff and others acting in collusion with him, and a decree is thereby obtained, such decree may be set aside as fraudulent. **TIKA RAM v. DAULAT RAM**, 4 Ind. Cas. 596. (21 C. 612, 605, R.)

(21)—*Fraud—Suit to set aside sale made by plaintiff's father—Right of defendant to set up joint fraud of himself and plaintiff's father in bar of action.*—In a suit by a plaintiff to set aside a sale of ancestral property effected by his father in favour of the defendant, the latter cannot be permitted to set up the joint fraud of himself and plaintiff's father in bar of the suit. **NAGASAMI v. SUNDARARAJAN**, 2 M.L.J. 208.

(22)—*Fraud alleged in the plaint not proved, effect of—Cause of action irrespective of fraud—Principle to be observed where case is based on fraud.*—Where a plaintiff sets up a case entirely of fraud but fails to establish it, he cannot succeed on any other ground. But where a plaintiff alleges fraud and also alleges other facts necessary to establish his title independently of the question of fraud, he is entitled to a decree on proof of the latter facts, even if he fails to establish the allegation of fraud. The principle is that, if the allegations as to fraud can be eliminated so as to leave otherwise a good cause of action, the plaintiff should be given a decree. **GHULAM HAZRAT KHAN v. RAHIMDAD KHAN**, 2 Ind. Cas. 429.

(23)—*Fraudulent deed registered.*—A deed tainted by fraud, though registered, is not to be placed on the same footing as a *bona fide* deed. **SREENATH BHATTACHARJEE v. RAMCOMUL GUNGOPADYA**, 3 W.R. 43, P.C.=10 M.I.A. 220.

(24)—*Deed void against creditors.*—A deed by *A*, then in a state of indebtedness, charging real estate to secure a debt, set aside, as fraudulent and void against creditors. **TAREENY CHURN BONNERJEE v. MAITLAND**, 11 M.I.A. 317.

(25)—*Decree set aside as fraudulent against one party—Effect on others.*—A decree which is declared fraudulent and void against one only of several judgment-debtors remains intact as against the other defendants. **PASUPATI NATH BOSE v. NANDO LAL BOSE**, 30 C. 718. (10 B. 338, 25 M. 426, R.)

(26)—*Pressure put upon the executant of a document.*—A *Razinama* to compromise a suit, and a bond arising out of the same transaction, recognizing a right to one-fourth of a *Talook*, declared null and void, as having been obtained by fraud and intimidation by the manager of the Agent's Court at *Ganjam*, who used his official character as a pressure upon a *Zemindar* in difficulties in that District, to effect from him the execution of such instruments. **PAKALA BALAKRISTNAMA PATRULU v. SREE NARAINA MARDARAZ DEVU**, 10 M.I.A. 60.



**Fraud—continued.****—2.—Effect of Fraud—continued.**

(27)—*Fraud practised in foreign country—Decree obtained by fraud in one Court—Right of innocent party to impeach it in another Court of concurrent jurisdiction in subsequent proceeding—Power to treat such decree as nullity.*—Where a judgment has been obtained by the fraud of a party to a suit in a foreign country he cannot prevent the question of fraud from being litigated in the Courts of this country where he seeks to enforce the judgment so obtained. [Affirmed, 30 C. 369=7 C.W.N. 353, 33 C. 180, P.C.=2 C.L.J. 189=9 C.W.N. 961; F., 5 C.W.N. 559=25 A. 48=A.W.N. 1902, 179; R., 24 A. 242=A.W.N. 1902, 38.] Held:—(a) Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of justice. (b) An innocent party to a decree obtained in one Court may impeach that decree in a subsequent proceeding in another Court of concurrent jurisdiction with the Court which passed the decree, on the ground that the decree was obtained by fraud. (c) A Civil Court has, at the instance of an innocent party, power to treat a decree so obtained, as a nullity. (d) It is clear that the guilty party would not be permitted to defeat a judgment, by showing that in obtaining it he had practised an imposition on the Court. (e) A judgment or decree obtained by fraud upon a Court binds not such Court nor any other; and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding. (f) In applying this rule, it matters not whether the impeached judgment has been pronounced by an inferior tribunal or by the highest Court of judicature in the realm. NISTARINI DASSI v. NUNDO LALL BOSE, 26 C. 891=3 C.W.N. 670. [Affirmed, 30 C. 369=7 C.W.N. 353, 33 C. 180, P.C.=2 C.L.J. 189=9 C.W.N. 961; F., 5 C.W.N. 559, 25 A. 48=A.W.N. 1902, 179; R., 24 A. 242=A.W.N. 1902, 38, 23 M. 216, 26 A. 272=A.W.N. 1904, 25, 37 P.R. 1903, 6 A.L.J. 404=11 C.W.N. 489, 27 M. 157; D., 11 M.L.J. 91=29 M. 239 note, 28 M. 216, 31 C. 233.]

(28)—*Act I of 1845, object of—A party should not be allowed to take advantage of his own fraud.*—Act I of 1845 is not intended to protect a purchaser at a sale brought about by a pre-concerted fraudulent default. No one should be allowed to take advantage of his own fraud even under a title from a Government sale. SEEDEE NAZEER ALIKHAN BAHADOOR v. RAJAH OJODHYA RAMKHAN, 8 W.R. 399.

*Trial of question of fraud committed in execution sale—See CIV. PRO. CODE, 1908, s. 47, 12 O.C. 175 (B).*

*As a defence not pleaded in the written statement, effect of—See CIV. PRO. CODE, 1908, s. 47, O. XXI, rr. 72, 95, 96, 5 M.L.T. 248=32 M. 242=1 Ind. Cas. 221.*

*Practised on pleader—Effect—How, can be impeached—See COMPROMISE—SETTING ASIDE COMPROMISE, 3 Ind. Cas. 4.*

**Fraud—continued.****—2.—Effect of Fraud—concluded.**

*See DEBTOR AND CREDITOR, 6 W.R. 90.*

*When false evidence amounts to—See DECREE—MISCELLANEOUS, 5 M.L.T. 285=1 Ind. Cas. 548.*

*Fraudulent transfer of possession—Reversioner obtaining fraudulent possession through assignee of the widow—Sale by widow—Mortgage by vendee—Effect—See MORTGAGE—GENERAL, 13 Bom. L.R. 1200.*

*Suit for foreclosure—Order absolute obtained before the expiry of time by concealing facts—Taking advantage of mistake of Court—Suit to set aside decree and order absolute—Maintainability—See MORTGAGE—FORECLOSURE, 13 C.W.N. 300=4 Ind. Cas. 68.*

*Acquiescence—Elements—What constitutes fraud—See MORTGAGE—REDEMPTION, 13 Bom. L.R. 162.*

*See MORTGAGE—MISCELLANEOUS, 6 W.R. 293, 65 P.R. 1871.*

*On the part of persons dealing with the agent—See POWER OF ATTORNEY, U.B.R. 1902—1903, Vol. II, Power of Attorney, 5.*

*See PRINCIPAL AND AGENT—DUTIES AND LIABILITIES OF PRINCIPALS, 6 W.R. 252.*

*Concurrent findings of fraud reversed by Privy Council—See SALE—SALE IN EXECUTION OF DECREE—GENERAL, 15 C.W.N. 648, P.C.=8 A.L.J. 587=13 Bom. L.R. 440.*

**—3.—Fraud, Elements of, Proof of.**

(1)—*Proof of.*—The proof as to fraud must be cogent, not of an equivocal character. It must be proof of positive fraud to vitiate a voluntary conveyance. EBRAHIM v. FOOLBAI, 4 Bom. L.R. 180=26 B. 577.

(2)—*Agreement not to proceed with appeal, decree obtained from appellate Court subsequent to, to be deemed as in effect obtained by fraud.*—Notwithstanding the arrangement between the parties as to not prosecuting any appeal, the respondent had preferred an appeal against the decree of the Zillah Court in this case. The Sudder Court decreed the appeal reversing the Zillah Court's decree. Their Lordships of the Judicial Committee were however of opinion that though the decree of the Sudder Court amounted to an adjudication against the title of the appellants, such adjudication was improper and of no force as having been obtained not only with impropriety but in effect by means of fraud. For, by reason of the compromise between the parties, it was plainly the duty of the respondent not to prosecute the appeal. It was however contended that, on the assumption that the Sudder Court's decree was an adjudication against the title of the appellants, the fraudulent nature of such decree had not been put in issue and the decree itself nor sought to be set aside in a proper manner. But, their Lordships of the Judicial Committee held the view that the



**Fraud—continued.****—3.—Fraud, Elements of, Proof of—contd.**

fraudulent nature of the respondent's singular conduct in having obtained the above adjudication was sufficiently put in issue, by the original plaint in the case and by the replication, in both of which it was impeached, and, in their Lordship's opinion, impeached in a proper manner for fraud. **RAJMOHUN GOSSAIN v. GOURMOHUN GOSSAIN**, 4 W.R. P.C., 46=8 M.I.A. 91. [Appr., 8 C. 455=10 C.L.R. 443; R., 21 C. 612, 13 C.W.N. 710.]

(3)—*Concert between bidders not to bid at an auction.*—Where persons act in concert at an auction sale in such a way as to prevent the best price being obtained, the action does not amount to fraud nor is it an irregularity contemplated by s. 311 of the Civ. Pro. Code, 1882. **MAHOMED v. SAVVASI**, 2 Bom. L.R. 640.

(4)—*Notice—Purchase for valuable consideration—Undervalue—Practice.*—A purchaser for valuable consideration without notice is an object of solicitude to a Court of Equity: and against one who can predicate this of himself it does not adversely exercise its jurisdiction. At the same time mere under value does not exclude a man from this category, for if the consideration be valuable its adequacy will not be investigated. **CHITAMBER v. KRISTNAPPA**, 4 Bom. L.R. 249=26 B. 543.

(5)—*Onus on party pleading fraud—Shifting of onus.*—It is for the party who pleads fraud to prove it or to make out a very strong *prima facie* case before the *onus* can be shifted. **VITOBA v. LAXAMANGIR**, 6 C.P.L.R. 19. [R., 13 C.P.L.R. 81.]

(6)—*Burden of proof in a suit to set aside pottah on ground of fraud.*—In suit to set aside pottah on ground of fraud, onus of proving of fraud lies on party alleging it. **KUBEEROOD-DEEN v. JOGUL SHAHA**, 25 W.R. 133.

(7)—*Sale in execution of decree—Suit for possession—Burden of proof.*—This was a suit for possession. Plaintiff set up a late purchase against a defendant whose title was derived from a sale in execution of a decree made on a mortgage-bond, and alleged that the earlier transaction was fraudulent. *Held*, that the burden of proof lay on the plaintiff to prove fraud on the first instance. **ASGUR BEPAREE v. HURREE MOHUN MOZOMDAR**, 23 W.R. 56.

(8)—*Plea of fraud—Absence of specific allegation of fraud—Onus of proof on plaintiff.*—It was contended in this case that the burden of proving the plea of fraud should have been laid on defendant who urged it and there were no exceptional circumstances to shift that burden. The High Court rejected the plea. Defendant did not specifically allege fraud, otherwise than when, generally denying the truth of plaintiff's allegations, he stated the claim put forth by plaintiff to be not true, which every defendant may do who denies a claim and there was nothing in this which relieved plaintiff of the

**Fraud—continued.****—3.—Fraud, Elements of, Proof of—contd.**

ordinary burden of proving his own allegations. **LALLA ARBUNT DOSS v. LALLA MOTHORA LAL**, 6 W.R. 193.

(9)—*Deed for valuable consideration—Allegation that it was to defeat or delay creditors—Burden of proof.*—Where a deed is made for value, the question is, whether it was made *bona fide* and the burden of this proof is on those who seek to set aside the deed. The fact that there is valuable consideration shows at once that there may be purposes in the transaction other than the defeating or delaying of creditors. Those who seek to impeach a deed made for valuable consideration have to prove an actual and express intent to defeat or delay or defraud creditors in the parties to the deed. **RAOJI v. AMRIT RAO**, 2 C.P.L.R. 63.

(10)—*Fraud—Circumstantial evidence.*—In dealing with questions of fraud, there is no reason why circumstantial evidence should not be acted upon, if it is sufficient to overcome the natural presumption of honesty and fair dealing and to satisfy a reasonable mind of the existence of fraud by raising a counter-presumption. **MATHURA PANDEY v. RAM RUCHA TEWARI**, 3 B.L.R.A.C. 108=11 W.R. 482.

(11)—*Putneedar resuming Lakhraj lands—Evidence—Fraud.*—Oral evidence in general terms is insufficient to establish fraud in the conversion of mal lands of a putnee into rent-free lands, so as to entitle present putneedar to resume them as invalid lakheraj. **SHEBO-SOONDUREE DEBEA v. SYED MAHOMED ALI**, W.R. 1864, 137.

(12)—*Fraudulent character to be gathered from circumstances of each case.*—Where the question of the fraudulent or fictitious character of a transaction arises it can only be decided on a consideration of all the circumstances of the case as proved or admitted, direct proof of fraud being rarely forthcoming. **RAJA SETH GOCULDASS v. MT. JANKEE**, 9 C.P.L.R. 142. [R., 2 N.L.R. 87.]

(13)—*Fraud, Allegations of.*—The allegations in an application to set aside an execution-sale, that the auction-purchaser, who held a mortgage upon some of the property sold, told the judgment-debtor that it was not necessary for him to go to the place where the sale was held, because he, the auction-purchaser, would release the property from the mortgage lien, even if proved to be true, would not constitute fraud entitling the judgment-debtor to have the sale set aside. **ROJONI KANT BAGCHI v. HOSSAIN UDDIN AHMED**, 4 C.W.N. 588.

(14)—*Charge of fraud—Burden of proof—Decree obtained by fraud—Nature and effect—Perjury.*—A person, who charges another with fraud must himself prove the fraud, and he is not relieved from this obligation, because the defendant has himself told an untrue story. [F., 1 N.L.R. 20.] Where a decree has been obtained by fraud practised upon another, by which the other was prevented from placing



**Fraud—continued.****—3.—Fraud, Elements of, Proof of—contd.**

his case before the tribunal, which was called upon to adjudicate upon it, in the way most to his advantage, the decree is not binding upon him and may be set aside by a Court of Justice, in a separate suit, and not only by an application made in the suit in which the decree was passed to the Court by which it was passed; but it is not the law that because a person, against whom a decree has been passed, alleges that it is wrong and that it was obtained by perjury committed by or at the instance of another party, which was of course fraud of the worst kind, that he can obtain a re-hearing of the questions in dispute in a fresh action by merely changing the form in which he places it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given. To so hold, would be to allow defeated litigants to avoid the operation, not only of the law which regulates appeals, but also of that which relates to *res judicata*. **MAHOMED GOLAB v. MAHOMED SULIMAN**, 21 C. 612. [R., 12 C.P.L.R. 82.]

(15)—*Agent holding no special fiduciary position, allegations of fraud against—Onus of proof—Impeachment of accounts on ground of fraud.*—In the absence of evidence of the agent being one in active confidence as occupying a special fiduciary position in which he is bound to exercise extreme good faith in all his dealings with the principal, the latter is bound to establish any fraud imputed to the agent. Before calling upon the Court to re-open accounts from the first, on the ground of fraud, it is the duty of the plaintiffs to bring to its notice at least two or three instances of particular items and establish the same to be false and fraudulent. **BOO JINATHOO v. SHA NAGAR VALAB KANJI**, 11 B. 78.

(16)—*Mortgagor and mortgagee—Constructive fraud—Attestation, Effect of—Attestation not constructive fraud.*—If a prior mortgagee, knowing that a second mortgage is going to be executed, simply keeps quiet, he is not guilty of constructive fraud, and does not lose his priority. Nor does his attestation to the second mortgage amount to constructive fraud, if he is unaware of its contents. If he attests the second mortgage, knowing its contents, and keeps silent, and thereby leads the second encumbrancer to believe that the property is unencumbered, and if the circumstances are such that the latter would not have advanced money on the property, if he had known of the prior encumbrance, the silence would amount to constructive fraud, and the prior mortgagee will lose his priority. **SALMAT ALI v. BUDH SINGH**, 1 A. 303. (N.W.P. 1869, 402, R.) [R., 1 O. C. 252.]

(17)—*Fraud attempted and fraud accomplished.*—To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must be effected. Then, alone, does the fraudulent

**Fraud—continued.****—3.—Fraud, Elements of, Proof of—contd.**

grantor or giver, lose the right to claim the aid of the law to recover the property he has parted with. The purpose of the fraud having not only not been effected but absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out, the fraudulent scheme and recovering possession of his property. **T. P. PETHERPERMAL CHETTY v. R. MUNIANDY CHETTY**, 10 Bom. L.R. 590 = 12 C.W.N. 562 = 5 A.L.J. 290 = 7 C.L.J. 528 = 14 Bur. L.R. 108 = 35 C. 551 = 18 M.L.J. 277 = 35 I.A. 98.

(18)—*Relief by English Equity Court—Hard bargain.*—Apart from a recent statute an English Court of Equity cannot give relief from a transaction or contract merely on the ground that it was a hard bargain, except perhaps where the extortion is so great as to be of itself evidence of fraud. In other cases there must be some other equity arising from the position of the parties or the particular circumstances of the case. **AUSERI LAL v. RAJA MANESHWAR BAKSH**, 8 Bom. L.R. 491 = 3 A.L.J. 495 = 10 C.W.N. 849 = 9 O.C. 188 = 28 A. 570 = 4 C.L.J. 1 = 16 M.L.J. 292 = 33 I.A. 118.

(19)—*Speculation and probability not sufficient to support finding of fraud.*—Mere speculation and probability is not sufficient in law to support a finding of fraud. The party, putting forward a charge of collusion with a view to defraud, must support it by evidence to a reasonable extent. **RAJ NARAIN v. ROWSHIN MULL**, 22 W.R. 124.

(20)—*Suit for arrears under Act VIII of 1835—Legal inference of fraud—Destruction of itnamee rights—Act VIII of 1835—Reg. VIII of 1819.*—The plaintiff sued for possession on the declaration of his *itnamee* right, where the purchaser in the defendant's name of the superior tenure sold for arrears under Act VIII of 1835, obtained a pottah and settlement under Reg. VIII of 1819, and then falling into arrears, the talook was sold under this Regulation, and re-purchased by him *benamee*. Held that the legal inference was that his conduct was fraudulent. A purchaser of the rights and interests in a talook sold for arrears of rent is incompetent to destroy the *itnamee* tenure. **SOOBUL CHUNDER PAUL v. ATTUR ALI**, 11 W.R. 32.

(21)—*Setting aside agreement on the ground of an intention to defraud.*—It is not upon mere speculations of an intention to defraud that an agreement proved by strong evidence to have been not merely executed, but acted upon for a number of years, can be properly set aside. **RADHA MOHUN MUNDUL v. JADOMONEE DOSSEE**, 23 W.R. 369 = 3 Sar. 482.

(22)—*Act VIII of 1859, competency of Court to try issue of fraud under s. 272—Specific charge of fraud against decree not essential.*—The lower Courts had found that the decree obtained by the petitioner was conclusive, and



**Fraud—continued.****—3.—Fraud, Elements of, Proof of—contd.**

against that finding it was not competent for the High Court to interfere in special appeal. The contention on behalf of the petitioner that, under s. 272 of Act VIII of 1859, in the absence of any charge of fraud, against the decree appealed from, that it was not competent to the Courts below to have tried the issue relating to fraud, was not upheld by the High Court which was of opinion that the section was not capable of being so construed. **JOORAWUN SINGH v. MUSST. JHOOTA**, 2 W.R. Mls. 29.

(23)—*Suit to enforce instrument of sale—Defendant who executed it pleading fraud—Plaintiff denying fraud—Defendant estopped.*—In a suit to enforce an instrument executed by the defendant to the plaintiff, which is on the face of it a deed of sale, where plaintiff does not admit that he was a party or privy to any fraud, defendant cannot set up that the deed was concocted for fraudulent purposes. **SOOKNA MEDHEE v. GUNDHOO RAM MUNDUL**, 12 W.R. 264.

(24)—*Fraud cannot be assumed on slight grounds.*—In a suit by a zemindar against a gomashtha, where fraud is not alleged, the Court cannot assume it merely on the ground that the accounts were not filed till the close of the year of the determination of the agency. **KOONJO LALL MUNDUL v. DABEE PERSHAD TEWARRE**, 22 W.R. 398.

(25)—*Suspicious appearance of document—Burden of removing—Breach of contract—Compensation—Limitation.*—The person producing a document as evidence in his favour must give satisfactory and reasonable explanation of any suspicious circumstance about it before it can be allowed as evidence in his favour. A suit to recover the difference between the sums alleged to have been advanced in a contract for the supply of Kankar and the value of Kankar actually delivered fell under art. 115 of Limitation Act, the claim being one of compensation for loss or damage caused by a breach of contract. **SETH EDULJEE BYRAMJI v. ARJAN DAS**, 22 P.R. 1883.

(26)—*Intentional default—Dissuasion of bidders.*—In the absence of misrepresentation or concealment, the fact that a co-sharer intentionally defaults does not constitute fraud. Dissuasion of bidders is not necessarily an act of fraud. **DOORGA SINGH v. SHEO PERSHAD SINGH**, 16 C. 194. (3 C. 300. D.) [F., 18 B. 342, 97 P.L.R. 1901=37 P.R. 1901; R., 19 M. 315, L.B.R. 1893—1900, 477, U.B.R. 1897—1901, Vol. II, 317, 24 B. 622, 1 C.L.J. 85.]

(27)—*Whether fraud can be considered for the first time in appeal.*—In a case where the plaint made no charge of fraud and collusion, and no issue was framed on it, and the lower Court did not make mention of it, the Court of appeal refused to take it into consideration. **IMDAD HUSAIN v. AZIZ-UN-NISSA**, 23 C. 483, P.C.=23 I.A. 8=6 M.L.J. 43=6 Sar. 669. [R., 2 N.L.R. 49.]

**Fraud—continued.****—3.—Fraud, Elements of, Proof of—contd.**

(28)—*Fraud by minor, effect of.*—A man is not personally liable, either at law or at equity, to pay a debt contracted by him during his infancy, although he obtained the credit by fraudulent misrepresentations as to his age. To allow the creditor to recover the debt in a suit would amount to restraining the minor defendant from setting up the plea of infancy. **DHANNUL v. RAM CHUNDER GHOSE**, 24 C. 265=1 C.W.N. 270.

(29)—*Facts constituting fraudulent concealment—Pre-emption—S. 18, Limitation Act.*—In this case the following facts were proved, (1) A deed of sale was described in two places in itself as a mortgage-deed, (2) It was registered at a place different from that at which the land is situate, (3) The witnesses to the sale deed were not residents of either of three places, viz., the vendor's, the vendee's or that in which the land was situated. (4) For twenty years, after the vendee allowed himself to be recorded as the vendor's tenant, as before. (5) Some 20 years after the date of sale, a measurement clerk reported the sale and vendee's possession of the land. (6) Mutation of names took place 20 years after date of sale and by Tahsildar's order. (7) All the residents of the village were ignorant of the fact of sale. (8) On vendor's death, his son recorded himself as owner of the land. *Held*, the above facts put together will establish fraud within the meaning of s. 18, Limitation Act, though each of the facts by itself will not constitute such. **ABDUL RAHIM KHAN v. MUHAMMAD YAR**, 12 P.R. 1898. [R., 34 P.R. 1904; Doubled, 86 P.R. 1902.]

(30)—*Non-payment of debt, not by itself proof of collusion between debtor and vendor to defraud creditor—Fraud, probable grounds necessary for presuming.*—The mere non-payment, of the debt due to the creditor will not of itself be sufficient to establish any collusion between the debtor and his vendor to defraud the creditor. Fraud is presumable only on good grounds, and, from the fact of non-payment, fraud can be reasonably inferred if it be proved that besides the particular creditor there were other creditors holding decrees of claims against the vendor. **KISHEN DHUN SURMAH v. RAM DHUN CHATTERJEE**, 6 W.R. 285.

(31)—*Sale of a property, fraudulent and colourable, nature of—Indicia of fraud and collusion—Intention to defeat creditors.*—Suit to establish plaintiff's right to certain property under a sale-deed. Defendant answered that the sale to the plaintiff was a fraudulent and merely colourable transaction. The lower appellate Court, noticed the several indicia of fraud and collusion in the matter viz., (1) that the vendor having many debts to pay sold away all his property reserving nothing; (2) that the plaintiff purchased the property without even taking care to value it; (3) that the consideration consisted of debts some of which had become barred by time and others had not become then due; (4) that the properties



**Fraud—continued.****—3.—Fraud, Elements of, Proof of—contd.**

remained in the possession of the vendor, who paid the assessment of the same; (5) and that the consideration was grossly inadequate; and, on all these grounds and not merely because the sale was intended to defeat other creditors, *held* that there was no *bona fide* or valid sale and that the sale-deed was fraudulent and void. The High Court agreeing with it decided that the transaction was a merely colourable one without consideration and one by which it was not intended to transfer the property mentioned in it to the plaintiff. *NANA v. RAUTMAL*, 22 B. 255. [R., 22 B. 202, 6 P.R. 1901=P. L.R. 1900, 522.]

(32)—*Deposit of property—By wife of person, pending trial not fraudulent.*—The wife of the plaintiff deposited the suit property with the defendant, while the plaintiff was in jail under trial on a criminal charge. The plaintiff was discharged and the deposit of property by his wife was held not to be fraudulent. *MUNNOO KHAN v. JOWALA SINGH*, 5 P.R. 1869.

(33)—*Mourosee lease by guardian of minor—Cancellation of lease as to minor's share—Partial failure of consideration—Suit for consideration—Fraud—Evidence.*—A mourosee lease was granted by a minor's co-proprietors on their own behalf and as guardians of the minor, and it was set forth in the lease that money was required for the expenses of the joint estate, and that, in order to raise this money for necessary purposes, the mourosee lease was granted for the consideration stated therein. The minor, on coming of age, sued for the cancelment of the lease as far as his one third share was concerned and obtained a decree which was upheld in regular and special appeal. Plaintiff now sued for the recovery of one-third of the consideration paid to the co-proprietors for the grant of the lease. The only evidence produced on either side was the record of the case instituted by the minor for the cancelment of the lease. *Held* that the plaintiff was not entitled to recover without proof of fraud. *Held* also that the evidence tendered by the plaintiff, viz., the record in the former suit, was not admissible to prove fraud. *DOORGA CHURN BHUTACHARJEE v. SHOSHEE BHOOSUN MITTER*, 5 W.R.S.C.C. Ref. 23.

Fraud of administrator, liability of his surety for—*See ADMINISTRATION BOND*, 10 Bom. L.R. 648=12 C.W.N. 802.

Fraud as a plea in a sham transaction—*See ASSIGNMENT*, 9 Bom. L.R. 462

Fraud how far a determining factor in benami conveyance—*See BENAMI TRANSACTION—GENERAL*, 10 Bom. L.R. 590=12 C.W.N. 562=5 A.L.J. 290=7 C.L.J. 528=14 Bur. L.R. 108=35 C. 551, P.C.=35 I.A. 98=18 M.L.J. 277=4 M.L.T. 12=4 L.B.R. 266.

Fraud is a ground for setting aside a consent decree—*See CONSENT DECREE*, 7 Bom. L.R. 659=30 B. 101.

**Fraud—continued.****—8.—Fraud, Elements of, Proof of—concl'd.**

*See INSURANCE*, 12 B.H.C. 23.

*See MORTGAGE—ACCOUNTS BETWEEN MORTGAGOR AND MORTGAGEE*, 6 W.R. 283.

*See PARTNERSHIP—RIGHTS AND LIABILITIES OF PARTNERS*, 8 B.H.C. O.C., 209.

Fraud in getting a document registered can be shown—*See REGISTRATION*, 8 Bom. L.R. 375=10 C.W.N. 522=3 C.L.J. 349=33 C. 537.

*See REGISTRATION ACT*, 1908, s. 50, 13 B. 229.

Fraud as originally specified in pleadings, party bound to prove—Amendment of pleadings, when permissible—*See RIGHT OF SUIT—MISCELLANEOUS*, 11 B. 620, P.C.=14 I.A. 11.

Fraud is a ground for cancelling a sale which has already received the sanction of the Court—*See SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE*, 7 Bom. L.R. 653=29 B. 615.

Fraud as a ground for rectification of instruments—*See SPECIFIC RELIEF ACT*, 1877, s. 31, 8 Bom. L.R. 354=30 B. 457.

Fraud must be alleged and proved to support an action for infringement of trade mark—*See TRADE MARK*, 1 Bom. L.R. 291.

**—4.—Pleadings as to Fraud.**

(1)—*Fraud and collusion, Allegations of.*—Where a party alleges the fraud or collusion of the opposite party as a ground of relief, general allegations of it will not be sufficient, but the instances upon which such allegations are founded must be stated, as it is unreasonable to require the opposite party to meet a general charge of that nature without giving him a hint of the facts from which it is to be inferred. *JOOMNA PERSHAD SOOKOOL v. JOYRAM LALL MAHTO*, 2 C.L.R. 26.

(2)—*Fraud—Pleadings.*—When fraud is charged against the defendants, it is an acknowledged rule of pleading that the plaintiff must set forth the particulars of the fraud which he alleges. *CHANVIRAPA v. DANAVA*, 19 B. 593.

(3)—*Pleadings, statements in—Particulars should be given—Issue on fraud—Practice.*—Where fraud is set up, particulars of it must be given and it must be based upon a specification of the acts relied upon as constituting fraud. Where no such particulars are given in the plaint, the Court must require the plaintiff to amend his plaint by specifying the fraud alleged and in case of failure by him to amend, the Court should refuse to enter into the question. It is desirable to impress upon subordinate Judges the supreme importance and necessity of insisting that a case of fraud shall not be the subject of a mere vague allegation in the plaint or written statement; but that it shall be supported by particulars; and that if that condition is not complied with, the party relying on



**Fraud—continued.****—4.—Pleadings as to Fraud—continued.**

a case of fraud shall not be allowed to raise that case in the form of an issue. It is generally advisable, indeed, when framing an issue on the point of fraud, to set forth in the issue itself a brief statement of the fraud alleged, or at least to refer to the passage in the pleadings where it is specified. *BALAJI RAOJI v. GANGA DHAR RAMKRISHNA*, 10 Bom. L.R. 276 = 32 B. 255.

(4)—*Collusion—Specification, Necessity of.*—When charges of fraud and collusion are made, they must not be launched in a vague or general manner, but must be put in a sufficiently specific shape to enable the other side to combat them. *RAM KOMAL SAHA v. BANK OF BENGAL OF AKYAB*, 3 C.W.N. 91. (15 C. 532, R.)

(5)—*Fraud—Pleading—Question of fraud not to be raised first in the appellate Court—Practice.*—A question of fraud cannot be allowed to be raised in the appellate Court when it was not alleged in the written statements and no issue raised regarding it. *PUNDIT PRAYRAJ RAJ v. GOUKARAN PERSHAD TEWARI*, 6 C.W. N. 787.

(6)—*What constitutes fraud, and proof of fraud—Estoppel—Party pleading fraud of ancestor.*—The plaintiff claiming through the heir of A is not at liberty to plead the fraud of A as against the defendant in possession, although he claims under the fraudulent conveyance. To allow him to do this would be to violate a well known principle of law which does not allow a party to set up the fraud of the ancestor through whom he claims. *GHURREEB HOSSEIN CHOWDHRY v. USEE MOONNISSA KHATOON*, 1 Hay 528.

(7)—*Estoppel—Admission of fraud—Intention to defeat claim.*—An act done by a party with a view of defeating a claim made against him does not estop him from disputing afterwards the validity of that act. A statement made by persons in a former suit and which was intended as a fraud on a third party, does not amount to an estoppel as between them and there is nothing to prevent either of them from showing the real truth of the transaction. *MUKIM MULLICK v. RAMJAN SIRDAR*, 9 C. L.R. 64. (18 W.R. 485, 20 W.R. 112, 24 W.R. 391, 21 W.R. 422, F.) [R., 23 C. 460, 38 C. 967 = 10 C.W.N. 650 = 4 C.L.J. 22.]

(8)—*Suit on contract brought about by fraud of both parties—Right of defendant to plead fraud of himself and plaintiff.*—A defendant can plead the joint fraud of himself and the plaintiff as a bar to an action upon a contract which the plaintiff is seeking to enforce by action. *A. SESHAIYA v. K. KANDAIYA*, 2 M. H.C. 249. [R., 3 M.H.C. 231, 3 M. 215; D., 2 M.L.J. 203.]

(9)—*Setting up one's own fraud to invalidate deed.*—A party cannot set up his own fraud to invalidate a deed executed by him. *NATH SAHOY v. JUGDUM SAHOY*, 2 Hay 499.

(10)—*Collusive and fraudulent decree—Right of party to set aside decree.*—The plaintiff, to

**Fraud—continued.****—4.—Pleadings as to Fraud—continued.**

prevent his undivided son from obtaining his share of the family property, executed in favour of the defendant certain pro-notes unsupported by consideration and caused a decree to be obtained against him on those pro-notes. In execution of the decree the defendant brought to sale and himself purchased the plaintiff's family property. Thereupon, the son sued for his share of the property impeaching the sale as collusive, and obtained a decree. Though the defendant had agreed to hold the property at the disposal of the plaintiff, he refused to surrender the plaintiff's share in the property. Hence the present suit for a declaration that the decree and subsequent proceedings were collusively obtained and for recovery of the plaintiff's share in the property. *Held*, that it was not competent to the plaintiff, who was a party to the collusive decree, to seek to have it set aside. Though strangers may falsify a decree by charging collusion, a party thereto, not complaining of any fraud practised upon himself cannot be allowed to question it. *VARADARAJULU NAIDU v. SRINIVASULU NAIDU*, 20 M. 333. [R., 23 B. 406, 8 O.C. 278, 3 P.R. 1906 = 109 P.L.R. 1906.]

(11)—*Fraudulent transfer—Fraud carried out—Suit by transferor for declaration to continue in possession.*—The plaintiff, being heavily involved in debts, executed, without consideration, a sham sale-deed of certain lands in favour of the second defendant, and afterwards caused the latter to execute another sham sale-deed in favour of the first defendant. Plaintiff, however, remained in possession of the lands. But when the creditor of the plaintiff attached the lands in execution of a decree against the plaintiff, the sham sale-deeds were used as a cloak, and the attachments were successfully resisted. Thereupon the creditor sued for a declaration that the sale-deeds were collusive, but finally consented to a decree upholding the sale-deeds. Later on, the first defendant applied to the Collector for the transfer of revenue registry of the lands to his name. Hence the present suit for a declaration that the registry of the lands was not to be altered. *Held*, that it was contrary to public policy and disastrous to public morality for the Court to allow the plaintiff to plead his own baseness and actively assist him to undo his own solemn acts. Suit was dismissed. *YARAMATI KRISHNAYYA v. CHUNDRU PAPAYYA*, 20 M. 326. Diss., 33 C. 967 = 10 C.W.N. 650 = 4 C.L.J. 22; D., 32 M. 325 = 4 M.L.T. 279 = 5 M.L.T. 255, 17 M.L.J. 386; Not. F., 31 M. 97 = 18 M.L.J. 151 = 3 M.L.T. 246, F., 23 B. 406, 3 L.B.R. 245; R., U.B.R., 1897-1901, Vol. II, 544, 31 M. 485 = 18 M.L.J. 576 = 4 M.L.T. 331, 32 M. 323 = 5 M.L.T. 77.]

(12)—*Civ. Pro. Code, s. 283—Defence—Collusive and fraudulent decree.*—A defendant in a suit brought under s. 283, Civ. Pro. Code, is not precluded from showing that the decree in execution of which the property in dispute



**Fraud—continued.****—4.—Pleadings as to Fraud—continued.**

was attached, was collusively and fraudulently obtained. *NARANAYAN v. NAGESWARAYAN*, 17 M. 389. (10 B. 659, Diss.)

(13)—*Pleadings—Setting up one's own fraud—Estoppel—Heirs bound—Exception.*—It is well-known that a party cannot plead his own fraud, and the party who makes such allegation must fail. It is also established that the heirs and purchasers from the fraudulent parties representing them are equally bound with the original parties. The exception is only when a plaintiff is himself a defrauded party and comes into Court for relief from a fraud against himself perpetrated by his vendor in collusion with the other party. *LUCKEE NARAIN CHUCKERBUTTY v. TARAMONEE DOSSEE*, 3 W.R. 92. [F., 3 W.R. 221, 13 W.R. 97; D., 7 W.R. 502, 14 W.R. 95, 19 W.R. 145; R., 33 C. 967 = 10 C.W.N. 650 = 4 C.L.J. 22.]

(14)—*Benami transaction—Sale in fraud of creditors—Position of purchasers.*—The representatives of, or private purchasers from, a party selling *benami* in fraud of creditors, or pleading such a sale in order to recover the property afterwards, are bound, equally with the original defrauders, and cannot take advantage of what must be held to be their own wrong. *PURI KHEET SHAHOO v. RADHA KISHEN SHAHOO*, 3 W.R. 221. (3 W.R. 92, R.) [F., 5 W.R. 177; R., 12 W.R. 155, 33 C. 967 = 10 C.W.N. 650 = 4 C.L.J. 22.]

(15)—*Fraudulent benami gift by husband to wife, no bar to creditor's claims—Gift binding on representatives of husband.*—Plaintiffs, as legal heirs, the son and daughter of one S. K. sought to obtain possession of their share of his property from R B, the widow of the said S K, who was in possession under a deed of gift alleged to have been executed by S K in her favour in lieu of dower. On second appeal, it was urged that plaintiffs had no standing in Court, for they had admitted that their father, for some fraudulent purpose, made over the property *benami* to his wife; and as he, having done so, could not re-call his act, and take any advantage of his own wrong-doing, so were his representatives bound by his acts. *Held*, the lower Court having found that the *Nibbanamah* was not a *bona fide* transaction, plaintiffs who were representatives of the party who executed the deed were bound by his act. *ROWSHUN BEEBEE v. SHAIK KUREEM BUKSH*, 4 W.R. 11.

(16)—*Suit by son—Cause of action—Fraud of father—Maintainability of suit.*—Where a son sues as heir to his father to regain certain property, he cannot allege his father's fraud as the cause of action. He must be bound by his father's fraud. *BHUGGOBUTTY DOSSEE v. KISHEN NATH ROY*, 3 W.R. 30. [R., 7 W.R. 502, 7 C.P.L.R. 50.]

(17)—*Benami conveyance—Defrauding creditors—Plaintiff not to plead father's fraud.*—In a suit to recover property transferred by a

**Fraud—continued.****—4.—Pleadings as to Fraud—continued.**

*benamee* conveyance to defraud creditors: *Held* that plaintiff cannot plead the fraud of his father from whom he derives his title, *KALENATH KUR v. DOYAL KRISTO DEB*, 13 W.R. 87.

(18)—*Nominal transfer in fraud of creditors—Party claiming under transferor—Estoppel of plea of fraud as against defendant in possession under conveyance.*—It was clearly proved in this case, that the plaintiff's mother—under whom the plaintiff claimed the properties in dispute, alleging that they had been conveyed to her by a deed executed by the mother—had made several admissions in Court, that the transfer to the daughter was only nominal and made with the object of defrauding her husband's creditors. *Held*, that those admissions made in the course of legal proceedings by the mother would be binding on her and those representing her, and in, accordance with the rulings to the effect that a party claiming through another person is not at liberty to plead the fraud of that person as against a defendant in possession, although such defendant claims under the fraudulent conveyance, the defendant, the mother, was estopped from contesting the plaintiff's claim so far. *FURREEDOONISSA v. RUHOMUT*, 4 W.R. 37. [F., 13 W.R. 87; R., 33 C. 967 = 10 C.W.N. 650 = 4 C.L.J. 22; D., 7 W.R. 502.]

(19)—*Banamee ownership—Fraud of ostensible owner.*—Where the ostensible owner of *benamee* property assents to its being disposed of *benamee* to the prejudice of the real owner, the latter cannot object. *BROJONATH GHOSE v. KOYLASH CHUNDER BANERJEE*, 9 W.R. 593.

(20)—*Conveyance—Fraudulent intention not carried out—Locus penitentiae—Right of plaintiff to ask quiet possession.*—Where the fraudulent intention of a conveyance is not carried out, a *locus penitentiae* is left to plaintiff. *LALL MAHOMED v. BIBEE FURHUTOONISSA*, 15 W.R. 312.

(21)—*Deed binding executant's property—Executant pleading own fraud.*—A person deliberately executing a deed by which his own property is bound cannot set up as a plea that he did so to defraud others. *KOYLASH CHUNDER MITTER v. DHUN MONEE DOSSIA*, 15 W.R. 273.

(22)—*Insolvency—Fraudulent concealment from creditors—Official Assignee refusing to claim disputed property—Effect—Right of third party.*—Where a widow administering her husband's estate sues to recover certain moveable property appropriated by her son, who pleads that it was fraudulently kept out of his father's schedule when the latter passed through the Insolvent Court: *Held*, that where the Official Assignee refuses to make claim to property in dispute, no third party can set up a claim, the right of ownership being vested in the plaintiff notwithstanding the alleged fraud. *MANLY v. SARAH MANLY*, 14 W.R. 136.



**Fraud—continued.****—4.—Pleadings as to Fraud—continued.**

(23)—*True nature of the transaction can be shown in certain cases.*—Defendant is at liberty to show the real circumstances under which an agreement was entered upon, although it was entered upon by plaintiff and defendant's ancestor in furtherance of a fraud. **GOLAM KOODSEE CHOWDHRY v. JOKOORRUNNISSA KHATOON**, 19 W.R. 238.

(24)—*Decree upon mortgage obtained by fraud and collusion—Liability of property in hands of subsequent purchaser—Evidence Act, 1872, s. 44.*—Even though mortgaged property might have been purchased by a person from the mortgagor, subsequently to a decree obtained by the mortgagee in a suit upon the mortgage, the purchaser would not be precluded, having regard to s. 44 of the Evidence Act, from showing that the mortgage-decree had been obtained by fraud and collusion, and that consequently the mortgaged property in his hands would not be liable to satisfy the decree. **NILMONY MOOKHOPADHYA v. AIMUNISSA BIBEE**, 12 C. 156. (13 W.R. 157=5 B.L.R. 321, D.) [R., 27 C. 11, 3 C.W.N. 660.]

(25)—*Evidence Act, s. 44—Decree obtained by fraud.*—(a) *Held*, s. 44 of the Evidence Act, makes the same provision for impeaching on the ground of fraud judgments *inter partes*, and judgments *in rem* or judgments relating to public matters. (b) Under s. 44, it is competent for a party to a suit or other proceeding to show in it that a judgment or decree, which is conclusive as a judgment or decree *inter partes*, and which has been proved against him by his adversary in that suit, was obtained by fraud. (6 B. 703, 19 B. 826, Appr.; 12 C. 156, R.; 20 A. 370, Diss.) (c) If a party is precluded from avoiding a decree on the ground of his own fraud, he is precluded, not by any rule of evidence, but by the general principles of justice which prohibit a person to plead his own fraud. (d) But there is a material difference between the relief obtainable by a suit for setting aside a decree obtained by fraud and that which a party can have by showing as a defendant in action in which such a decree is used as evidence against him, that it was obtained by fraud. (e) A party to a suit may, as defendant in a second suit, impeach a decree *inter partes* proved against him in the second suit, without being affected by limitation. **RAJIB PANDA v. LAKHAN SENDH MAHAPATRA**, 27 C. 11=3 C.W.N. 660. [F., 23 M. 216, R., 24 A. 242=A.W.N. 1902, 38, 26 A. 272=A.W.N. 1904, 25, 30 C. 369=7 C.W.N. 359; D.; 10 C.W.N. 422.]

(26)—*Various acts of fraud and mal administration re: moveable and immoveable property—Multifariousness.*—An administration suit is not rendered bad for multifariousness by the fact that, in such a suit, various acts of fraud and mal administration, both with regard to moveable and immoveable property, are complained of and sought to be redressed. The various acts complained of do not form separate causes of

**Fraud—continued.****—4.—Pleadings as to Fraud—continued.**

action. **NISTARINI DASSI v. NUNDOO LALL BOSE**, 26 C. 891=3 C.W.N. 670. [Affirmed, 30 C. 369=7 C.W.N. 353, 33 C. 180, P.C.=2 C.L.J. 189=9 C.W.N. 961.]

(27)—*Execution of decree—Civ. Pro. Code, 1882, s. 283—Suit by attaching creditor for declaration that property is liable to attachment—Plea that decree was collusive, whether maintainable.*—The question in this case was whether the defendant in a suit brought by the attaching creditor under s. 283 of the Civ. Pro. Code, 1882, can resist the suit, at the outset, by impeaching the decree as a colourable one and made in a sham proceeding in Court. *Held*, that such a decree can doubtless be impeached by a stranger to it, when it prejudices a party to a suit on the merits, as in the case of a judgment *in rem* which determines the status of one of the parties; or again by a purchaser for value, where it is sought to use it as a shield to a sham mortgage or purchase of an earlier date; but the object of a suit brought under s. 283 of the Code being simply to determine whether the property can be taken in execution as belonging to the judgment-debtor, the question on the merits is not affected by the decree, and to allow the claimant to deny the plaintiff's right to bring the suit, by impeaching the decree which the latter is seeking to execute as collusive, would be to add to the difficulties (already very great) of judgment-creditors in enforcing their decrees, by affording additional encouragement to collusive resistance by judgment-debtors and third parties. **GULIBAI v. JAGANNATH GALVANKAR**, 10 B. 659. [Diss., 17 M. 389.]

(28)—*Suit for possession of land based on sale—Plea that sale was a sham transaction—Defrauding of creditors—Validity of plea—Rights of vendor.*—The plaintiff as vendee of the land in dispute from the defendant under a registered sale-deed, dated 10th Nov., 1876, sued for possession, and alleged that subsequent to the sale, the vendor had dispossessed him. The latter contended that he executed the sale merely for the purpose of screening the property from the reach of his creditors, that he received no consideration therefor and that the transaction was a sham and a fraudulent one. *Held*, that it was competent to the defendant to raise that plea and that it was open to him to defend his possession by showing that the real transaction between the plaintiff and himself was to defraud, whether a third party or his defendant's creditors generally. **BABAJI v. KRISHNA**, 18 B. 372. [Not F., 5 N.L.R. 146; Rel. on, 8 O. C. 278; R., 1 O.C. 188, 23 B. 406, U.B.R. 1897—1901, Vol. II, 544, 8 C.W.N. 620, 33 C. 967=10 C.W.N. 650=4 C.L.J. 22, 109 P.L.R. 1906=3 P.R. 906; D., 23 C. 962, Note.]

(29)—*Plaint allegation of fraud—Burden of proof.*—Where a decree-holder, in a suit to establish his claim to certain property as that of his judgment-debtor, alleges that the deed of sale conveying it to defendant was fraudulently



*Fraud—continued.***—4.—Pleadings as to Fraud—continued.**

executed *held* that plaintiff was bound to prove the fraud. *LALLA ROODRO PERSHAD v. BENODE RAM SEIN*, 10 W.R. 321.

(30)—*Sale — Fraudulent concealment of incumbrance—Allegation to be proved.*—A plaintiff starting such a case as that, in purchasing certain property, the knowledge of an existing encumbrance was fraudulently withheld, should tender himself as a witness and pledge his oath to the truth of the allegation. *DUL-LIL SINGH v. SHITAB LALL*, 15 W.R. 338.

(31)—*A party cannot be relieved against the effects of the fraud of his ancestor.*—A party succeeding to the possession of property cannot ask the assistance of the Court to rectify a fraudulent transfer effected by his predecessor. *GOPAL NARAIN v. GUNGA PERSHAD SAHEE*, 19 W.R. 270.

(32)—*Pleading one's own fraud.*—Where plaintiff and defendant, by their joint fraud, enter into a transaction against a third person they cannot be allowed to set up the fraud as against such third person; but, if by the preparation of the joint fraud, one of the parties to the fraud were to gain an undue advantage over the other, the latter can be allowed to plead that he and the former entered into the fraudulent transaction with the object of defrauding a third person. *JIWAN SINGH v. JORA*, 25 P.R. 1903=65 P.L.R. 1905. (61 P. R. 1895, R.)

(33)—*Plea of fraud by defendant—Innocent person not affected—Plaintiff not to take advantage of his own fraud.*—Where a plea of fraud is set up for the defence, not against an innocent person, but against a party to the fraud the maxim *in pari delicto potior est conditio defendentis* applies. Not for the sake of defendant, but on grounds of public policy, the Courts will not assist the plaintiff in such a case. *JANARDAN DAMODAR NAICK v. PAIKANLALA*, 7 C.P.L.R. 50. (1 C.P.L.R. 165, 11 B. 708, D.) [F., 5 N.L.R. 146.]

(34)—*Allegation of fraud—General allegations.*—When fraud is charged against the defendant, it is an acknowledged rule of pleading that the plaintiff must set forth the particulars of the fraud which he alleges. With regard to fraud, general allegations however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. *GANGA NARAIN GUPTA v. TILUCKRAM CHOWDHRY*, 15 C. 533, P.C.=15 I.A. 119=5 Sar. 168. [F., 18 B. 144, 19 B. 593; R., 91 W.R. 1893, 1 O.C. 262, 5 C.W.N. 91, 3 B.L.R. 100, 2 N.L.R. 49.]

(35)—*Claim on allegation of fraud*—Where a party to a suit bases his claim on an allegation of fraud he risks success with the charge. *HURRO MONEE DOSSEA v. ONOOKOOL CHUNDER MOOKERJEE*, 8 W.R. 461.

(36)—*Benami sale by husband to wife—Fraud on creditors—Suit by wife for confirmation of possession.*—A wife who has purchased certain

*Fraud—continued.***—4.—Pleadings as to Fraud—concluded.**

property from her husband not in her own name but in the name of another, with intent to defeat her husband's creditors, is not entitled to sue for confirmation of possession of that property. *BHOWANEE PERSHAD v. OHEEDUN*, 5 W.R. 177.

(37)—*Connivance by mother in favour of daughter—Attachment of property by daughter's creditors—Rejection of claim by mother—Suit to set aside order—Fraud—Burden of proof.*—A mother conveyed her property in favour of her daughter. A creditor of the daughter attached the property in execution of a decree obtained against her. The mother put in a claim petition alleging that she was the real owner of the property and that it was placed in the daughter's name for fear of her creditors. On the claim being dismissed, she filed a regular suit, alleging that the attachment was in pursuance of a decree obtained collusively to defraud her of her property. *Held* that the mother could not be permitted to set up her own fraud and seek to obtain a re-conveyance of the property on that ground. *Held* also that the burden of proving that the defendant's decree was obtained collusively and fraudulently in order to deprive her of the possession of the property lay on the mother. *KESHUB CHUNDER SEIN v. VYASMONEE DOSSIA*, 7 W. R. 118. [R., 33 C. 967=10 C.W.N. 650=4 C. L.J. 22.]

(38)—*Fraud, suit founded on admission of—Plaintiff whether could seek protection from consequences of his fraud.*—The defendant in this special appeal contended that the plaintiff's case which rested on an admission of fraud and asked protection from the consequence of such fraud, ought to have been dismissed. The High Court held that the contention was thoroughly well-founded. Courts of justice are designed for the protection of honest suitors and for the enforcement of just claims. They are not available as machinery to aid in the carrying out of schemes of fraud. It is quite right that parties should know, in making secret arrangements in regard to their property for fraudulent purposes, such as defeating their creditors, that they are entering on a dangerous course and that they must not expect the assistance of the Court to extricate them from the difficulties in which their own improbity has placed them. *ALOKSOONDHY GOOPTO v. HORO LAL ROY*, 6 W.R. 287. [F., 13 W.R. 87; R., 7 C.P.L.R. 52, 27 C. 231, 33 C. 967, =10 C.W.N. 650=4 C.L.J. 22.]

See ADMISSION—MISCELLANEOUS, 20 W.R. 112.

See ESTOPPEL—STATEMENTS AND PLEADINGS, 25 W.R. 40.

See PRE-EMPTION—GENERAL, 1 O.C. 262.

See SPECIFIC RELIEF ACT, 1877 ss. 21 39, U.B.R. 1897—1901, Vol. II. 544.

See TRANSFER ON CIVIL CASES, 25 W. R. 219.



*Fraud—continued.***—5.—Miscellaneous.**

(1)—*Compromise after decree induced by fraud, separate suit not maintainable to question*—Civ. Pro. Code (Act X of 1877), s. 244—Act XXIII of 1861, s. 11—*Judgment or order obtained by fraud, competency of Court to vacate.*—It is always competent to any Court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud; and, in the case of orders made in execution, s. 11 of Act XXIII of 1861 excludes all other remedy. So where a plaintiff in execution proceedings, alleged fraud in respect of a compromise entered into by the parties subsequent to the decree, the Court should not refer him to a separate suit for the purpose on the ground that it was not competent to the Court to interfere, in the execution proceedings, with the order on the compromise. *PARANJPE v. KANADE*, 6 B. 148. [F., 9 B. 468, L.E.R. 1893—1900, 639; R., 11 C. 376, 17 C. 769, 19 M. 230=5 M.L.J. 218, 12 C.P.L.R. 82.]

(2)—*Execution—Fraud and forgery—Inquiry—Direct application*—S. 11, Act XXIII of 1861.—An applicant desiring an inquiry into charges of fraud and forgery should apply directly for that purpose. Where the question raised goes behind the decree, it cannot be gone into under s. 11, Act XXIII of 1861, which implied the existence of the decree. *HEMMO MOYEE DAYEE v. R. WATSON AND CO.*, 14 W.R. 299. [D., 22 B. 267, 3 C.L.J. 158.]

(3)—*Setting aside decree obtained by fraud—Procedure.*—To set aside a decree obtained by fraud, the proper course is to apply to the Court which passed it, either within the time specified in Act VIII of 1859, or at any time (so that it be done with due diligence), for a review and alteration of the judgment. While none but a Court of appeal can interfere with the decree of a Court of competent jurisdiction, yet if the decree has been obtained by fraud, it shall avail nothing for or against the parties affected by it even in another Court. *MEWA LALL THAKOOR v. BHUJHUN JHA*, 22 W.R. 213.

(4)—*Suit to set aside a decree, on the ground of—Personal service not affected—Conduct of plaintiff.*—The mere fact that personal service of summons has not been effected on a defendant would not make the *ex parte* decree obtained against him, abortive. But where the non-service is due to the fraudulent conduct of the plaintiff and others acting with him the decree may be set aside as fraudulent. *TIKA RAM v. DOULAT*, 7 A.L.J. 74=4 Ind. Cas. 596=32 A. 145. (21 C. 619, F.)

(5)—*Plea of—Party to a fraud—Estate conveyed to a benamidar—Plaintiff not entitled to rely upon his fraud—Defendant not entitled to rely upon his fraud in defence.*—When a fraud has been carried into effect, a party to it cannot, as plaintiff, plead the fraud to vitiate the transaction. Nor is it open to him, as defendant, to plead his own fraud as an effective

*Fraud—continued.***—5.—Miscellaneous—continued.**

answer to a claim to immoveable property conveyed by him to a benamidar. *SHIDLINGAPPA v. HIRASA*, 9 Bom. L.R. 542=31 B. 405.

(6)—*Plaintiff pleading—Civil Court, jurisdiction of—Civ. Pro. Code, s. 11.*—The appellant brought a suit against the respondent for a declaration that a mortgage-deed executed by him in the latter's favour was null and void on the ground that the consideration recited therein had not in fact passed and that the deed had been executed solely with intent to defraud the appellant's minor brother. The lower appellate Court, without going into the merits of the case, dismissed it on the ground that, in view of the statement of the appellant, who pleaded his own fraud, the suit was not maintainable. *Held*, that the suit, as brought, being clearly cognisable by the Civil Courts under s. 11 of Civ. Pro. Code, the lower appellate Court ought to have decided it on the merits. *THAKUR HANUMAN SINGH v. RADHE LAL*, 8 O.C. 278.

(7)—*Colourable and collusive transaction between two parties—For defrauding a third party—Decree upholding transaction as valid—Effect of decree upon subsequent suit between same parties—Party precluded from setting up his own fraud—Public policy—Res judicata—Estoppel—Compassing object of the fraud unnecessary.*—Where two parties enter into a sham transaction with a fraudulent intention, and such sham is kept up by one of the parties, in a suit between them and a third party, the action of such party is none the less fraudulent and collusive, even though, as the result of that suit, the fraudulent transaction has not benefited the other party. And where a decree is passed in such suit, upholding the transaction as valid and binding, the party cannot subsequently be allowed to allege his own fraud for the purpose of escaping from the consequence of the decree thus fraudulently and collusively obtained. (10 M. 17. 18 M. 378, 20 M. 326, F.; 35 C. 551, D.; *Per Miller, J.* Where the decree of a Court has been passed, upholding a certain transaction between the parties to a suit, neither party will be afterwards allowed to say that the decree was the result of a collusive arrangement arrived at by them in order to carry out a scheme of fraud, and that it should therefore be treated as a nullity, and the state of things which existed previously to the passing of such decree be restored.—(*Per Abdur Rahim, J.*) The decree in the last case is regarded as a subsisting and effectual decree, so that the question covered by it is treated as *res judicata*.—(*Per Abdur Rahim, J.*) Also, where two persons have combined to defraud a third person and succeeded in their effort, without obtaining a decree of the Court, the Court will not permit one of the parties to show that the transaction between him and the other party to the fraud was not really what it purported to be, and that it does not therefore bind him. In this case the Court refuses on grounds of public policy to help a



**Fraud—continued.****—5.—Miscellaneous—continued.**

man who by his act has imposed upon another, to get rid of the consequences of that act against himself. (11 B. 708, 18 M. 378, 20 M. 326, R.) —(*Per Abdur Rahim, J.*) Even where there was no actual necessity in the suit for propounding the nominal and colorable nature of the transaction, still the putting the contrivance into use, with a view to effectuate the fraud, is sufficient to estop the party from setting up the shamness of the transaction.—(*Per Abdur Rahim, J.*) The effect of an apparent transaction, generally,— and especially when such transaction has been confirmed by the decree of a Court, — cannot be got over by showing that the real transaction was something different. —(*Per Abdur Rahim, J.*) KONDETI KANNA RAO v. LOLLA NUKAMMA, 4 M.L.T. 331. (27 M. 28, D.)

(8)—Onus probandi—*Mortgage suit—Fraud—Collusion.*—In a suit on a mortgage, where collusion and fraud is pleaded by a subsequent auction-purchaser of the mortgaged property, the onus is upon the plaintiff to prove that the transaction was perfectly genuine and free from the taint of fraud. SHIB NARAIN PAHARI v. SHANKAR PANIGRAHI, 5 C.W.N. 403. (6 C. 268, R. & Expl.; 24 C. 62, D.) [R., 6 C. L.J. 659=3 M.L.T. 38.]

(9)—*Civ. Pro. Code, Act XIV of 1882, s. 17—Suit to nullify decree obtained by fraud—Jurisdiction of Court*—Where a suit was instituted at Cawnpore to have a decree of a Court in Calcutta declared to be null and void as against the plaintiff, on the ground that it was obtained by fraud and collusion by the trustees of the Will of the plaintiff's adoptive father, *held* that the Court had jurisdiction (1) since the decree, though of a Calcutta Court, was sought to be executed against the property of the estate which lay within the jurisdiction of the Cawnpore Court which fact constituted a part of the plaintiff's cause of action; and (2) since it is competent for every Court, whether superior or inferior, to treat as a nullity any decree of any tribunal it was established that it was obtained by fraud and collusion. BANKI BEHARI LAL v. POKHE RAM, 25 A. 48=A.W.N. 1902, 179. (26 C. 891, 13 B.L.R. 91, 4 C.L.R. 366, D.) [R., 29 A. 418=A.W.N. 1907, 112=4 A.L.J. 392.]

(10)—*Obtaining of property or of any benefit through undue influence.*—The obtaining of property or of any benefit through the undue and unconscious abuse of influence by a person, in whom trust and confidence are placed, has always been treated as a fraud of the gravest character. NISTARINI DASSI v. NUNDO LALL BOSE, 30 C. 369=7 C.W.N. 353. (*Mixon v. Payne*, 1873, L.R. 8 Ch. App. 881, F.) [*Affir.*, 33 C. 180. P.C.=9 C.W.N. 961=2 C.L.J. 183=7 Bom. L.R. 887=15 M.L.J. 331=32 I.A. 193, 1 S.L.R. 160.]

(11)—*Fraud of the decree-holder—Fraud on Court—Minor defendant taking objection on attaining majority.*—Where a decree-holder

**Fraud—continued.****—5.—Miscellaneous—continued.**

keeps back from the knowledge of the Court a fact which, if disclosed, would have the effect of the Court rejecting the application on the ground of limitation, he is guilty of fraud practised on the Court. Where such fraud was practised and execution taken against a minor judgment-debtor who was represented by guardian, the minor, on attaining majority, is competent to raise the objection of limitation. BHOLANAND JHA v. PADMANUND SINGH, 6 C.W.N. 348.

(12)—*Suit for contribution—S. 70, Contract Act—'Ex turpi causa non oritur actio'—S. 65, Land Revenue Act—Claim not collected with land revenue.*—The revenue of a certain village was assigned to two Jagirdhars one of whom died subsequently. The fact of his death was concealed and the revenue which lapsed to the Government remained unpaid for a long time. Then the whole was recovered from the plaintiff. The plaintiff being a joint proprietor with the defendant sued the latter in contribution for a moiety of the amount paid by him. *Held*, that the suit will lie and the principle of 'ex turpi causa non oritur actio' will not apply as the obligation against the defendant had arisen by his having lawfully paid the money on defendant's account not intending to do so gratuitously. S. 65 (6) of Act XXXIII of 1871 does not bar a suit like the above which is merely one between two joint proprietors for contribution arising out of relations resembling those created by contract. It cannot be said to have arisen out of or connected with the collection of land revenue as there is no arrear of land revenue after it was fully paid by the plaintiff. MOHAR SINGH v. SHER SINGH, 42 P.R. 1885. [*Cited & F.*, 54 P.R. 1885; *F.*, 123 P.R. 1883.]

(13)—*Suit—Fraudulent institution of.*—The dismissal of a suit fraudulently instituted in a person's name without taking any evidence on the subject and not even examining the party or his pleader in Court, was held to be proper. MUSSUMAT GOOLJEHAN v. MUSSUMAT BUNNO, 1 Agra 252.

(14)—*Charge of fraud—Will—Costs.*—Charges of fraud, forgery, and perjury, having been made by the respondents against the appellant, the party who propounded the will, costs of the Court in India, and upon appeal to England were, upon the reversal of the decree of the Sudder Court, ordered to be paid by the respondents. NANA NURAIN RAO v. HUREE PUNT BHAI, 9 M.I.A. 96.

(15)—*Charge of fraud against minor.*—A charge of fraud against a minor, that, at the time of the mortgage, he falsely represented himself to be competent to contract, must be very strictly proved. RAJ COOMARY DASSEE v. PREO MADHUB NUNDY, 1 C.W.N. 453.

(16)—*Civ. Pro. Code, 1882, s. 108—Ex parte decree, Dismissal of application to set aside—Suit to set the decree aside on the ground of fraud—Maintainability of.*—An application made by



**Fraud—continued.****—5.—Miscellaneous—continued.**

the present plaintiff under s. 108 of the Civ. Pro. Code, to set aside an *ex parte* decree obtained against him by the defendant was dismissed on the ground of limitation. He thereupon brought the present suit for a declaration that the *ex parte* decree and the proceedings relating to it were null and void as having been obtained by the exercise of fraud. The decree of the Court of first instance dismissing the suit as not maintainable was set aside by the lower appellate Court and the High Court agreed with the latter for the reason that the application under s. 108 had never been heard on the merits and that the special grounds for the present suit were never considered by the Court. *DWARKA PRASAD v. LACHHOMANDAS*, 21 A. 289 = A.W.N. 1899, 67. [R., A.W.N. 1902, 187.]

(17)—*Fraudulent concealment—Registration—Notice.*—The principle that registration amounts to notice to all subsequent purchasers of the same property is not applicable to a case where there has been a fraudulent concealment by a judgment-creditor of the extent of his judgment-debtor's interest in the property brought by the judgment-creditor to sale in execution of a decree obtained by the latter against the former. *AGARCHAND GUMAR CHAND v. RAKHMA HANMANT*, 12 B. 678. [R., 20 B. 290.]

(18)—*Civ. Pro. Code, 1859, s. 7—Subsequent cause of action consequent on discovery of fraud.*—Where plaintiff sued for and obtained a decree for a declaration of his right to a share in a mortgage-debt, held, that s. 7, Civ. Pro. Code, was no bar to a subsequent suit by him for the recovery of his share of the amount due under the mortgage, afterwards discovered to have been fraudulently received by the same defendant prior to the first suit. *LACHMAN SINGH v. SANWAL SINGH*, 1 A. 543. (N.W.P. 1871, 27, R.)

(19)—*Act X of 1859—Accounts of agent—Fraud—Limitation.*—S. 33 of Act X of 1859 does not provide that an action on the ground of fraud in the accounts of an agent should be brought within a year of the time when the accounts may be offered or produced or might have been taken over by the plaintiff, or within a year from any time at which, with proper diligence, it might be supposed that the plaintiff might have discovered the fraud complained of. The suit must be brought within a year from the time that the fraud comes to the knowledge of the plaintiff. *HUREE MOHUN GOOHOO v. ANUND CHUNDER MOOKERJEE*, 5 W.R. Act X, Rul. 63. [R., 20 C. 425.]

Purchaser of occupancy holding—Re-purchase by him in execution of rent decree—Annulment of encumbrance—No fraud—See BEN. ACT VIII OF 1885, ss. 166, 167, 12 C.W.N. 114.

Can never be assumed, but must be proved—See PUN. ACT XVIII OF 1884, s. 70 (a), 143 P.W.R. 1908.

**Fraud—continued.****—5.—Miscellaneous—continued.**

Allegations of fraud must be specific—General allegations insufficient—See AUCTION SALE, 13 C.W.N. 87 = 36 C. 134 = 1 Ind. Cas. 784.

Fraudulent decree—Effect—Nullity—Remedy against such decree—See CIV. PRO. CODE, 1908, ss. 47, 158, 7 Ind. Cas. 11.

Decree whether fraudulent—Point of law—Second appeal—See CIV. PRO. CODE, 1908, s. 100, 5 Ind. Cas. 398.

In decree and in execution proceedings—Remedy—See CIV. PRO. CODE, 1908, O. IX r. 13, s. 47, O. XXI, r. 90, s. 99, 5 C.L.J. 328.

See CIV. PRO. CODE, 1908, O. XXI, rr. 10, 21, s. 48, 6 M. 365.

Fraud of judgment-debtor—Prevention of execution—Fresh period of limitation—See CIV. PRO. CODE, 1908, O. XXI, rr. 10, 21, s. 48, 22 M. 320 = 8 M.L.J. 79.

Burden of proof—S. 110, Evidence Act—See CIV. PRO. CODE, 1908, O. XXI, rr. 58, 63, U.B.R. 1904, 4th Qr., Civ. Pro. 8.

A party who has perpetuated a, cannot be allowed to take advantage of it—See CIV. PRO. CODE, 1908, O. XXI, r. 62, 2 C.L.J. 599.

In execution sale—Nature of proof of—Onus of—Inadequacy of price and arrangement between persons not to bid against each other—Effect—See CIV. PRO. CODE, 1908, O. XXI, r. 90, 150 P.W.R. 1909.

Fraudulent alteration of document, effect of—English Law how far applicable in mofussil—See CONTRACT—ALTERATION OF CONTRACTS, 9 M. 399, F.B.

Puffing statements, if fraudulent—See COPYRIGHT, 12 C.W.N. 753 = 35 C. 463.

See DECREE—DECREE, FORM OF, 2 Ind. Jur. N.S. 205.

Judgment in personam—Who can set aside on ground of—See DECREE—MISCELLANEOUS, 8 Ind. Cas. 614.

See ESTOPPEL—ESTOPPEL BY DEEDS, ETC., 7 B. 78 = P.J. 1881, 182.

Silence is—When there is duty to speak—See EVIDENCE ACT, 1872, s. 115, 1 C.L.J. 23 = 32 C. 357, P.C.

*Ex parte* decree, setting aside of—Fraud—Bona fide belief as to defendant's residence—See EX PARTE DECREE, 8 Ind. Cas. 599.

Hindu Law—Release by widow, of her claims on her husband's estate—Suit to set aside release—Duress—Coercion—Fraud—Undue influence—See HINDU LAW—ALIENATION, 8 M. 304.

Suit to set aside decree on ground of fraud—No further relief claimed—See JURISDICTION—GENERAL, A.W.N. 1907, 112 = 4 A.L.J. 392 = 29 A. 418.



**Fraud—continued.****—5.—Miscellaneous—continued.**

Whether decree of superior Court can be declared void by inferior Court on ground of fraud—See JURISDICTION—GENERAL, 11 C.W.N. 579.

Fraud—Setting aside decree of another Court—Jurisdiction—See JURISDICTION—GENERAL, 5 Ind. Cas. 648=14 C.W.N. 695=11 C.L.J. 636.

Letters of Administration obtained by fraud—Effect on position of such administrator—Validity of receipts granted by him for all moneys received by him as such—See LETTERS OF ADMINISTRATION, 12 C.W.N. 802, P.C.=35 C. 955=35 I.A. 109=14 Bur. L.R. 197=4 M.L.T. 21=18 M.L.J. 867=10 Bom. L.R. 648=8 C.L.J. 94.

Effect of—Limitation—See LIMITATION ACT, 1908, ss. 14, 18, 6 Ind. Cas. 154.

Knowledge of fraud—Burden of proof—See LIMITATION ACT, 1908, arts. 10, 120, A.W.N. 1905, 88=2 A.L.J. 350=27 A. 540.

See LIS PENDENS, 14 P.R. 1866, 21 P.R. 1875, 86 P. R. 1879.

Plaintiff's failure to prove his case of fraud—Whether he can be permitted to support case on different ground—See MORTGAGE—GENERAL, 5 C.L.J. 653.

Rent-decree tainted with—Purchase by landlord of tenant's holding in execution of decree—Effect of decree and sale on a prior mortgage lien created by tenant on his holding—See MORTGAGE—SALE OF MORTGAGED PROPERTY, 32 C. 283.

Pardanashin lady—Deed of gift—Allegation of—See PARDANASHIN WOMEN, 3 M. 215.

By co-partner while acting on his own separate account and not as firm's agent—Whether such fraud imputable to firm—See PARTNERSHIP—GENERAL, 12 C.W.N. 716.

Plaintiff's case resting solely on—Fraud negatived—Case on mistake whether allowable—See PLEADINGS, 6 Ind. Cas. 472=12 C.L.J. 70=37 C. 856.

See REGISTRATION ACT, 1908, ss. 49, 50, 8 M. 167.

Fresh suit to set aside *ex parte* decree on ground of fraud—See RIGHT OF SUIT—FRESH SUITS, 29 C. 395, P. C.=29 I.A. 99=6 C.W.N. 473.

Order absolute for foreclosure obtained by fraud—Suit to set aside order, maintainability of—See RIGHT OF SUIT—ORDERS, SUITS TO SET ASIDE, 12 C.P.L.R. 82.

See RIGHT OF SUIT—REGISTRATION OF NAME, 6 W.R. 179.

When revenue-sale brought about by—cannot be set aside—Innocent and *bona fide* purchasers—Equitable relief, grant of—See SALE—SALE FOR ARREARS OF REVENUE AND CESS—GENERAL, 32 C. 111=8 C.W.N. 757.

**Fraud—concluded.****—5.—Miscellaneous—concluded.**

In execution sale—Waiver—See SALE—SALE IN EXECUTION OF DECREE—GENERAL, 6 C.L.J. 111.

Setting aside sale on ground of material irregularity—Non-disclosure amounting to fraud—See SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 19 M. 315.

Suit for declaration that decree was fraudulent—Further relief—See SPECIFIC RELIEF ACT, 1877, s. 42, 8 C.L.J. 485.

Oral sale of land followed by unregistered sale-deed—Registered conveyance by defendant to plaintiff to defraud and defeat the third person's prior title under—Plaintiff concerned in the fraud and *in pari delicto* with the defendant—not entitled to any relief against the defendant—See TRUSTS ACT, 1882, s. 84, 15 M. L.J. 478=29 M. 72.

See VENDOR AND PURCHASER—MISCELLANEOUS, 9 M. 89.

See VOLUNTARY CONVEYANCE, 17 C.P.L.R. 24.

**Fraudulent Decree.**

See FRAUD.

(1)—Suit for possession of house—Allegation that defendant became owner of house under a fraudulent decree—Special prayer to set aside the decree not made—General prayer for any other relief—Maintainability of suit—Pleadings.—Plaintiff sued for possession of a house, which he purchased in execution of a decree obtained by him against first defendant and his father, and from which he was dispossessed by order of Court on the application of fifth defendant who purchased the same house under a mortgage decree. Plaintiff alleged in his plaint that fifth defendant's decree was fraudulent and collusive, and an issue was framed on that point. Beyond praying for possession of the house and such other suitable relief as the Court may deem fit to grant, the plaintiff did not specifically ask for cancellation of the fifth defendant's decree. The lower Courts dismissed the suits holding that it was not maintainable for want of this prayer: *Held*, (1) that the suit was maintainable as an issue was framed on the question of the fraudulent nature or otherwise of fifth defendant's decree, and a finding on that issue in the affirmative would justify the setting aside of the decree; (2) that the relief for cancellation of the fifth defendant's decree was embodied in the general prayer for any suitable relief, and it was competent to the Court to set the decree aside. **PAKKIRI MAHAMAD SAIB v. SUBRAMANIYA NAICKER**, 4 Ind. Cas. 356.

**Fraudulent Preference.**

See DEBTOR AND CREDITOR.

See FRAUD.

See FRAUDULENT TRANSFER.

See INSOLVENCY.

See TRANSFER OF PROPERTY ACT, 1882, s. 53.

See DEBTOR AND CREDITOR, 11 B. 666.



**Fraudulent Transfer.**

See FRAUD.

See TRANSFER OF PROPERTY ACT, 1882, s. 53.

(1)—*Fraudulent transfer—Unfair preference to one creditor.*—A transfer of property in favour of a creditor for valuable consideration is not void, merely because its obvious effect is to defeat or delay the claim of a less vigilant creditor. *MUSSAMAT MUKANDI KAUR v. BULAKI MAL*, 124 P.L.R. 1911. (81 P.R. 1908, 34 C. 999=6 C.L.J. 410=11 C.W.N. 889, F.)

(2)—*Plea of benamiee in.*—Every hindrance possible should be placed on the fraudulent disposal of property, in order to cheat creditors, and, where a person make such a fraudulent disposition or a disposition with such a fraudulent intention, the Court should not grant him relief, by putting him back into the position that he was in, before he made it. The refusal of relief in such cases would tend to restrict the practice, as persons will be less prone to resort to fraud, for fear of the consequences. The protection of the creditor is a much more important matter than the granting of relief to a person, who has lent himself to fraudulent practices, whether the intended fraud has been carried into effect or not. No question of encouraging fraud on the part of the benamiee holder should affect the question in such a case. *MA LE v. PO TAIK*, 3 L.B.R. 245. (11 B. 708, 23 M. 326, F.; 10 C.W.N. 650. 21 W.R. 422, Diss) [R., U.B.R. 1908, 3rd Quarter, Benami Transaction 1.]

(3)—*Sale of property to defeat claim of creditor—Good faith—Burden of proof.*—A owed a certain sum of money to a creditor. When the latter was pressing for payment, the debtor executed a deed of sale of certain immoveable property to his brother. Subsequently, the creditor sued the debtor, obtained a decree and sued for a declaration, that the property in question was the property of his debtor alleging that the sale was a fraudulent and collusive one, in order to defeat the plaintiff's realising his debt. *Held*, the circumstance of the case showed that the debtor placed the property, by means of the sale, beyond the reach of his creditors, and that it was fraudulent. *Held*, also, the burden of proving that he brought the property, in good faith and for valuable consideration lay upon him. *THE DWE v. A.L.V. R.S. ALLAGAPPA CHETTY*, 4 L.B.R. 211. (25 B. 202, R.; 5 Bom. L.R. 142, F.)

(4)—*Fraudulent transfer—Evidence—Onus—Mere living of the transferor and transferee together for two years before the execution of the deed does not give rise to a presumption of fraud.*—Where a Muhammadan wife sued for a declaration that a certain transfer made by her husband in favour of his second wife, was fraudulently made to defeat her claim for dower; *Held*, that the burden of proof that the transfer was fraudulent lay on the plaintiff. The mere fact that the husband and the second wife did live together peaceably for two years preceding

**Fraudulent Transfer—continued.**

the date of transfer, did not justify the inference that the transaction was colourable. *MUSAMMAT HAMIDUNNISA BIBI v. MUSAMMAT NAZIRUNNISA BIBI*, 1 Ind. Cas. 795=6 A.L.J. 131=3 A. 170=1 Ind. Cas. 883.

(5)—*Fraudulent conveyance—Sale-deed in fraud of creditors—Suit for recovery of possession by vendee on—Fraud completed—Whether Courts will assist vendee—Applicability of maxim in pari delicto potior est conditio defendentis et possidentis—Plea of defendant (vendor) setting up real facts—Maintainability.*—In a suit brought to recover possession of a house by a vendee who, having failed to obtain possession under his conveyance, seeks to enforce the transaction and it is found that by means of that transaction he intended to commit and actually succeeded in committing fraud, *held*, that the vendee cannot be allowed to recover possession. It is always open to the defendant to defend his possession, by showing that the real transaction between himself and the plaintiff was one for defeating the defendant's creditor or otherwise committing fraud. (18 B. 372, 8 C.W.N. 620, 20 M. 326, 7 C.F.L.R. 50, F.; 33 C. 551, 11 B. 708, 10 M. 17, 35 C. 551, P.C., R.; 31 B. 405, Not F.) The plaintiff, in such cases, whether he be the grantor or the grantee should not be assisted by the Court, and the maxim '*in pari delicto potior est conditio defendantis et possidentis*,' applies. *MANIRAM v. GANESH*, 5 N.L.R. 146=4 Ind. Cas. 233. (1 C.P.L.R. 165, R.)

(6)—*Transfer to secure a debt and transfer to hinder realisation of decree—Distinction—Fraud.*—Where a transferee not only intends to secure his own debt by the transfer of property from the debtor, but also to prevent a decree-holder from realising his decree by attaching the property transferred, the transfer is fraudulent. *MAUNG SAN v. SIT TWAN*, 5 L.B.R. 195=8 Ind. Cas. 953. (34 C. 999, F.; 5 M.H.C. 368, R.)

(7)—*Fraudulent conveyance—Debtor selling property—Retaining some interest in property sold—Evidence—Good faith.*—If a debtor retains some interest in property sold by him, that fact would not in all cases make the transaction fraudulent as a matter of law, (34 C. 999, 6 C.L.J. 410, 11 C.W.N. 889, R.) If property is sold below its value, on the understanding that the seller shall still be entitled to occupy it at a low rate of rent, that may be strong evidence, and nothing more, that the transaction was not made in good faith. *JAGAT CHANDRA SARMA v. RADHA NATH CHUCKERBUTTY*, 9 Ind. Cas. 623.

(8)—*Fraudulent transfer—Intent to defeat one creditor.*—The intent, which gives a creditor the right to have a transfer of immoveable property by his debtor avoided, is an intent to defeat or delay his creditors generally, and not merely an intent to defeat or delay one particular creditor. *MA ME GALE v. MA SAW THEIN*, 8 Ind. Cas. 1205. (3 L.B.R. 188, U. B.R. 1904—1906, C.P.O. 8, F.)



**Fraudulent Transfer—concluded.**

See **INSOLVENCY—VOLUNTARY CONVEYANCES AND OTHER ASSIGNMENTS BY DEBTOR**, 2 Ind. Jur. N.S., 142.

Test of—Effect of consideration—Intent to defraud essential—See **REGISTRATION ACT**, 1908, s. 28, 7 Ind. Cas. 614.

Of property—Fraudulent intention never carried out—Suit to recover such property—Conditions for recovery of such property—Burden of proof—See **TRANSFER**, 4 N.L.R. 26.

**Freight.**

(1)—*Contract—Promise—Breach—Repudiation—Proposal—Statement of intention—Expression of opinion.*—A agreed with B for freight for 325 tons of seed, wheat, etc., for June shipment. At the beginning of June, in reply to a letter from A, B named a certain ship against the engagement and added in the postscript that the steamer would be ready to load on or about the 12th June. The ship duly arrived, but from some unforeseen circumstance was not ready to load until the 23rd June. In the meantime, on the 18th June, A repudiated the contract and shipped his goods by another steamer. *Held*, that the postscript in B's letter was a mere expression of opinion and not a promise varying the original contract, which gave him the whole of June to provide a steamer in. **BEYTS CRAIG AND CO. v. OTTO MARTIN**, 16 B. 389.

See **BILL OF LADING**, 5 B. 313, 1 Ind. Jur., N.S., 230, Bourke O.C. 100, Bourke O.C. 171, Bourke O.C. 309.

See **CONTRACT -- MISCELLANEOUS**, 4 C.W.N. 313.

See **MERCANTILE LAW**, 1 Bom. L.R. 319 = 23 B. 551.

**French Court.**

Suit in—No objection taken as to jurisdiction—Right of defendant to plead want of jurisdiction after passing of decree—See **ESTOPPEL—ESTOPPEL BY CONDUCT**, 8 M.H.C. 14.

Pledge in British India—Debt due in future—Sale of property by a French Court—Right of pledgee in sale proceeds—Cause of action—See **PLEDGE**, 5 M. 330.

**French India.**

Interest of Hindu widow of French India in property inherited from her husband—Acquisition of British Indian domicile by such widow—Effect of change of domicile of her interest in property so acquired by her—See **HINDU LAW—WIDOW**, 24 M. 650 = 11 M.L.J. 309.

**French Law.**

(1)—*Art. 11, sch. I, Act VII of 1870 (Court Fees)—Property held by married parties under Code Napoleon—Probate—'Ad valorem' duty—Law of France.*—"Under the Law of France, a husband and wife have an equal interest in the property comprised in the community. So

**French Law—concluded.**

long as both are alive, the community remains; but upon the death of either, the property is divided into two parts, of which one part goes to the survivor and the other to the heirs, or to donees under a testamentary disposition."—**Code Napoleon**, Book III, Ch. XI, Translation by Richard, p. 382. Where married parties held property under the Code Napoleon and one of them died, it was held that only one-half of the property was chargeable with duty, under art. 11 of sch. I of the Court Fees Act, the other half being exempted under s. 19-D. *In the goods of FROUSCHMAN*, 20 C. 575. [R., 29 B. 161 = 6 Bom. L.R. 652, 19 M.L.J. 591.]

(2) — *Unauthorised translation of the Code Napoleon—S. 38, Evidence Act, 1882.*—An unauthorised translation of the Code Napoleon is not a work to which reference can be made under s. 38, Evidence Act. **E. CHRISTIAN v. P. J. DELANNE**, 26 C. 931 = 3 C.W.N. 614.

See **FOREIGN COURT—JUDGMENT OF**, 23 M. 458 = 10 M.L.J. 39.

**Fresh Suit.**

See **CIV. PRO. CODE**, 1908, O. XXIII, r. 1.

See **WITHDRAWAL OF SUIT**.

Omission to sue for part of claim—Case struck off with liberty to bring fresh suit—Fresh suit including omitted claim—Act XII of 1881 (N.W.P. Rent Act), s. 140—See **U.P. ACT XII OF 1881**, ss. 93 (h), 140, 7 A. 624 = A.W.N. 1885, 129.

See **CIV. PRO. CODE**, 1859, ss. 226, 229, 231, 4 A. 131 = A.W.N. 1881, 145.

Objection to execution disallowed—Fresh suit for possession by objector—See **CIV. PRO. CODE**, 1908, s. 47, 12 M. 228.

Liberty to bring a—See **RES JUDICATA—MATTERS IN ISSUE**, 6 Bom. L.R. 594.

**Fruits.**

(1)—*Fruit growing upon trees—Whether moveable or immoveable property—Act XI of 1865 (Moffusil Small Cause Courts), s. 6—Registration Act, 1877, s. 3.*—Fruit growing upon trees is moveable property, and a suit for damages for the wrongful taking of such fruit is one of a nature cognizable by Small Cause Court. **NASIR KHAN v. KARAMAT KHAN**, 3 A. 168. [Cons., 11 M. 193; R., 5 A. 564, F.B.]

Suit for possession of certain trees—Not barred by suit for damages for loss of fruits or for declaration of title to such trees—See **CIV. PRO. CODE**, 1908, s. 11, 7 C.P.L.R. 63.

See **IMMOVEABLE PROPERTY**, 66 P.R. 1900.

See **JURISDICTION OF CIVIL COURTS**, 2 B. L.R., App. 19 = 11 W.R. 52.

Suit for possession of mango trees—Adverse enjoyment by taking fruits—No easement—See **LIMITATION ACT**, 1908, s. 26, art. 144, 16 B. 353.



**Fruits—concluded.**

Of a tree severed and removed—Suit for—See SMALL CAUSE COURT—MOFUSSIL, JURISDICTION OF—GENERAL, 28 P.R. 1881.

Landlord and tenant—Suit for—Of trees or share of proceeds—See SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, A. W.N. 1885, 299.

**Fruit Trees.**

See ENHANCEMENT OF RENT—ENHANCEMENT, GROUNDS OF, 1 C.L.R. 549.

**Full Bench.**

Power of, on cases referred to it—See CIV. PRO. CODE, 1908, s. 17, 12 P.W.R. 1910=5 Ind. Cas. 838=59 P.L.R. 1910.

See PRESIDENCY SMALL CAUSE COURT ACT, 1882, s. 37, 21 M. 232.

Reference to—Junior Judge whether can make reference—See REFERENCE TO FULL BENCH, B.L.R. Sup. Vol. App. 43=7 W.R. 277.

See REVIEW—REVIEWS AFTER TIME, 9 W. R. 102.

**Full Bench Decision.**

Appeal—Objection allowed as going to the root of the suit, though not taken in memorandum of second appeal—Objection in accordance with reversing previous decisions on which plaintiff respondent had relied—Costs—See PRACTICE AND PROCEDURE, A.W.N. 1890, 183.

**Full Bench Rulings.**

(1)—*Civ. Pro. Code, s. 623—Review of judgment—Grounds for admission—Subsequent ruling of High Court.*—A Court cannot admit a review of judgment on the ground that the ruling of a Division Bench of the High Court, which it had followed in that judgment, was subsequently overruled by a Full Bench. *AMRIT LAL v. MADHO DAS*, 6 A. 292=A.W.N. 1884, 89. [F., U.B.R. 1892—1896, Vol. II, 153; D., 11 C.P.L.R. 41, 124, P.R. 1906=97 P.L.R. 1907.]

(2)—*Reference to Full Bench—Cross-appeal.*—When a Division Bench refers a question to the Full Bench, the party who is affected by the answer of the Full Bench may, before the Privy Council, take exception to the correctness of the answer of the Full Bench without filing a cross appeal. *PHOOLBAS KOONWUR v. LALLA JOGESHUR SAHOY*, 1 C. 226, P.C.=3 I.A. 7=25 W.R. 285=3 Sar. 573.

(3)—*Circulars of High Court, Effect of.*—A circular order of High Court cannot affect the law as laid down by a Full Bench. *GOLOKE-MONEY DABIA v. MOHESH CHUNDER MOSA*, 3 C. 347=1 C.L.R. 149.

(4)—*Review of judgment, Ground for—Subsequent Full Bench Decision.*—Where a plaintiff, unsuccessful in his first suit before the High Court, made an alternative claim in a second

**Full Bench Rulings—concluded.**

suit, and, upon a reference of the question in suit, a Full Bench unanimously decided the course taken by the plaintiff in the second suit to be wrong and that in the first to be right, the High Court would be justified in reversing the former judgment on review and carrying into effect the decision of the Full Bench. *SONNIEN-JOY MULLICK v. DASSMNOEY DASSEE*, 8 C. 700. (7 W.R. 405, 9 W.R. 102, B.L.R., Sup. Vol., 892=9 W.R. 181, D.) [F., 13 B. 330.]

(5)—*Full Bench ruling, Effect of.*—A Full Bench Ruling, as it only expounds what the law is, must have retrospective as well as prospective effect. *JUGROOPA CHOWDHRAIN v. BUNWAREE TEWAREE*, 20 W.R. 351, F.B.

(6)—*Full Bench ruling, Effect of.*—A decree declaring a Hindoo female entitled to maintenance from her father-in-law was held to bind the latter, notwithstanding a later Full Bench Ruling to the effect that a daughter-in-law was not entitled to such maintenance. *NUND MOHUN CHUTTORAJ v. ROHINEE DEBIA*, 22 W.R. 293.

See REVIEW—REVIEWS AFTER TIME, 10 W.R. 415.

**Full Owner.**

Juristic definition of—Whether full owner in possession can, by his crime or absconding, cause forfeiture of reversioner's interest—See CRIM. PRO. CODE, 1898, ss. 87 and 88, 19 P.W.R. 1908, F.B.=18 P.R. 1908=156 P.L.R. 1908.

**Funds, Police Superannuation.**

See ACT X OF 1869.

**Funds, Provident.**

See ACT IX OF 1897.

**Funeral Ceremonies.**

See HINDU LAW—INHERITANCE, 6 Bom. L.R. 1052=29 B. 316.

Caste question—Assistance by fellow members of caste—Custom—Refusal to assist at funerals—Cause of action—Suit for damages and injunction—Maintainability—See RIGHT OF SUIT—CASTE QUESTIONS, SUITS CONCERNING, 18 B. 115.

**Funeral Expenses.**

See NEGLIGENCE, 16 B. 254.

**Future Crops.**

Mortgage of—See MORTGAGE—GENERAL, 5 Ind. Cas. 373.

Hypothecation of property to come into existence in future—Equity, rule of—See MORTGAGE—FORM OF MORTGAGES, 10 A. 133=A.W.N. 1888, 35.

Mortgage of future crops, validity of—See MORTGAGE—FORM OF MORTGAGES, 13 C. 262.

Are immoveable property—See REGISTRATION ACT, 1877, 5 C.P.L.R. 6.



**Future Earnings.**

Court could compel insolvent to pay part of — For liquidating debts — See **INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 19 C. 730.**

**Future Rents.**

Mortgage of—Registration — See **REGISTRATION ACT, 1908, ss. 2, 17, 6 Ind. Cas. 504=8 M.L.T. 91=20 M.L.J. 966.**

**Future Wages.**

Decree directing payment out of — See **DECREE — DECREE, CONSTRUCTION OF, 4 M.L.T. 330.**

**Gadaba Service Inam.**

Sale of—Public policy—See **INAM, 2 M.W. N. 1911, 588.**

**Gains of Science.**

See **HINDU LAW—JOINT FAMILY, 2 M.H.C. 56, 11 B.L.R. 201, note=10 W.R. 122, 6 B. 225, 16 B. 32.**

**Gambling.**

See **CONTRACT—ILLEGAL CONTRACTS.**

See **CONTRACT—WAGERING CONTRACTS.**

See **CONTRACT ACT, 1872, s. 23.**

(1)—*Currency notes entrusted for specific purpose—Notes lost by gambling—Trover—Loan—Bailment—Bona fide holder for value—Costs.*—A broker D, who was a friend of the plaintiff, the Calcutta agent of the Oriental Bank, and who had been entrusted with money on former occasions to buy Company's papers for the plaintiff, represented to the plaintiff that there were some Company's papers for sale at the Alipore Court and that, if the plaintiff gave him a sum of Rs. 13,700, he could get the same much cheaper than if he bought them in the market at Calcutta. The plaintiff placed in D's hands 13 currency notes of Rs. 1,000 each and 7 of Rs. 100 each on the express understanding that it was solely for the purpose of enabling him to secure the Company's papers at the Alipore Court and that, if the papers were purchased, he, D, was to bring them to the plaintiff in lieu of the Rs. 13,700 to be advanced by him and that, if the papers were not bought, D was to return the money to the plaintiff immediately and without changing or otherwise dealing with the same. If the papers had been bought, the plaintiff would either have taken the papers at the most favourable market price for the Bank, or have sold them and given D the profit in either case. Instead of going to Alipore, D went to a common gaming house in Calcutta, hired by the defendant and others for express purpose of procuring persons to play there and gambled and lost and paid to the defendant some of the notes he had received from the plaintiff. In a suit by the plaintiff to recover from the defendant the notes so entrusted to D on the ground that he had entrusted them to D for a specific purpose and that the defendant was not a *bona fide*

**Gambling—concluded.**

holder for value. *Held (a) that the defendant having won the money by gaming could not be treated as having obtained the notes under any contract, or for any valuable consideration, and that plaintiff was entitled to recover them. But if D, while in possession of the notes, had passed them away to any person in the ordinary course of business in payment of a debt or the like, the person taking the money from him would not have been bound to make any enquiry whatever as to the title of D; (b) that the notes were given to D on trust for a specific purpose. The papers, if purchased, would not have become the property of D, and the plaintiff's intention to give D the profits did not alter the complexion of the transaction and change it from a trust to a loan; (c) that each party must be made to bear his own costs. BULDEO NARAYAN v. SCRYMGEOUR, 6 B.L. R. 581. [Expl. & Appl., 8 C. 91.]*

Lending money for paying off gambling debt — Contract not immoral—See **CONTRACT ACT, 1872, s. 30, 22 A. 452=A.W.N. 1900, 170.**

See **CONTRACT ACT, 1872, s. 30, 1 L.B.R. 107.**

See **STAMP ACT, 1879, s. 34, L.B.R. 1893—1900, 60.**

**Gambling in Litigation.**

See **CHAMPERTY.**

See **CONTRACT ACT, 1872, s. 23, 11 A. 118=A.W.N. 1899, 72.**

Sale by person out of possession—Misstatement in sale deed as to receipt of consideration money—Whether sale tainted on the ground of — See **RIGHT OF SUIT — MISCELLANEOUS, 9 C.W.N. 477=S.O.C. 155=27 A. 271=32 I.A. 113=15 M.L.J. 197.**

**Gaming.**

See **CONTRACT—WAGERING CONTRACTS.**

See **GAMBLING.**

**Ganjam and Vizagapatam Act, Madras.**

See **MAD. ACT XXIV OF 1839.**

**Ganjam and Vizagapatam Agency Rules.**

(1)—*Rules XVIII and XX—Disposal of case by Agent under rule XVIII—Petition to High Court under Rule XX, whether lies—Civ. Pro. Code (Act XIV of 1882), s. 244—Application to Agency Tracts—Right of third party to invoke s. 244 as a bar to suit.*—A petition lies to the High Court against an order of the Agent to the Governor of the Ganjam and Vizagapatam Agency Tracts, under Rule XX of the Ganjam and Vizagapatam Agency Rules even though the Agent has acted under Rule XVIII of the rules. An order summarily dismissing an appeal is a decree and is open to revision by the High Court. S. 244 of the Civ. Pro. Code of 1882, has never been in force in the Agency tracts. A person, whose claim has been upheld in execution proceedings, is not a party to the suit in which the



### Ganjam and Vizagapatam Agency Rules—concluded.

execution proceedings took place and has no right to invoke the aid of s. 244, Civ. Pro. Code, 1882, as a bar to the plaintiff's claim. **VENKATARAMA DEO v. RAGHUNATHA PATRO**, 10 M.L.T. 261. (16 M. 229, Not Appr.)

(2)—Rule 20—See LIMITATION ACT, 1908, art. 14, 17 M.L.J. 147=30 M. 280=2 M.L.T. 195.

(3)—Rule 20—See No. 1, *supra*.

### Gaondars.

See JURISDICTION OF REVENUE COURTS, 5 N.W.P. 40.

### Gaontia.

Transfer and re-transfer of tenant right in Sambalpur District — Family arrangement—Right of Gaontia to interfere—See TRANSFER OF PROPERTY, 12 C.P.L.R. 152.

### Garbhari Gosavi.

(1)—'Garbhari Gosavi'—Adoption—Custom.—According to the custom obtaining among the Garbhari Gosavis, a stranger may be adopted, who would acquire rights of succession superior to a son born; but one son is never adopted to the prejudice of others and in the absence of an adopted stanger, sons succeed equally. **BALGIR v. DHONGIR**, 3 Bom. L.R. 114.

(2)—Marriage—Widow — Inheritance.—The widow of a Garbhari Gosavi is not entitled to succeed to his property in preference to the Chela of a Gurubhaubana of the deceased, but she is entitled to residence in and maintenance from the property of her deceased husband. The Garbhari Gosavi do not form a distinct body governed by a different rule of inheritance from the Nisprahi Gosavis. A Garbhari Gosavi is competent to contract a valid marriage. **GITABAI v. SHIVBAKAS**, 5 Bom. L.R. 318.

### Garden.

What constitutes—See BEN. ACT XI OF 1859, S. 37, 7 Ind. Cas. 912.

Suit for rent of garden attached to a house—See RENT, SUIT FOR, 2 Agra 243.

### Garden Crops.

Raised owing to improvement by tenant, landlord not entitled to enhanced rent on account of—See MAD. ACT VIII OF 1865, s. 11, 21 M. 136.

### Garnishee Proceedings.

(1)—Guardian proceedings—Notice to a firm to pay into Court debt due to judgment-debtor—Debt due by individuals composing the firm and not by the firm—Material irregularity—Presidency Small Cause Courts Act (XV of 1882), ss. 36, 38 and r. 223—Rehearing—Orders in contested suits—Ex parte order in garnishee proceedings—Revision—Civ. Pro. Code, (Act V of 1908), s. 115.—Where the Registrar of the Madras Court issued notice in garnishee proceedings, to a firm, to pay into Court the

### Garnishee Proceedings—concluded.

amount of a debt due to the judgment-debtor, while the debt was due not by the firm but by the individuals composing the firm, and notice was issued, not to the individuals but to the firm: *Held*, (1) that the Registrar acted with material irregularity so as to justify interference by the High Court in revision under s. 115 of Act V of 1908; (2) that, as the order was one passed by the Registrar *ex parte* in garnishee proceedings, to which neither s. 38 of the Presidency Small Cause Courts Act nor r. 223 of the rules framed thereunder applied, the aggrieved party was entitled to go to the High Court direct in revision, without applying for a re-hearing by a full Court of the Small Cause Court. **MURUGAPPA CHETTY v. RANGA-NAYAKALU CHETTY**, 8 Ind. Cas. 856=21 M. L.J. 525

### Garro Hills Act.

See ACT XXII OF 1869.

### Gas Plant.

(1)—Dangerous articles—Gas plant set up in Railway Company's premises by Gas Company—Defective installation—Explosion—Liability of Gas Company for damages—Proximate cause—Liability independent of contract—Onus of proof.—A gas company installed a supply plant at the premises of a Railway Company. The plaintiffs' workmen of the Railway Company, were in charge of the boilers heated by the gas. The gas exploded and killed and injured the workmen. It was found by the jury that the explosion was traceable to the negligence of the Gas Company. *Held*, that the gas plant was an article dangerous in itself, and persons who instal such articles owe a peculiar duty to take precaution, when it is necessarily the case that other parties will come within their proximity. This duty arises irrespective of any contract. *Held further*—that, initial negligence having been found against the Gas Company, they were liable unless they proved that the proximate cause of the accident was the conscious act of another volition. **THE DOMINION NATURAL GAS CO., LD. v. JAMES H. COLLINS**, 14 C.W.N. 158.

### Gavthan Land.

In hamlet of town—Collector's order prior to Bombay Act IV of 1868, for payment of rent—Suit to set aside order—See BOM. ACT IV OF 1868, 4 B. 513, Note.

### Gayawals.

Adoption among the Gayawals—See HINDU LAW—ADOPTION, 22 C. 609, P.C.=22 I.A. 51.

### General Average.

See SHIPPING LAW, 17 C. 362, P.C.=16 I. A. 240.

### General Clauses Act.

See ACT I OF 1868.

See ACT I OF 1887.

See ACT X OF 1897.



**General Clauses Act, Bengal.**

See BEN. ACT I OF 1899.

**General Clauses Act (Bom. Act III of 1886).**

S. 8—See BOM. ACT III OF 1901, s. 2 (1), 3 Bom. L.R. 584.

**General Clauses Act (Bombay Act I of 1904.)**

(1)—S. 3 (10)—See BOM. ACT III OF 1888, ss. 410, 398, 7 Bom. L.R. 726.

(2)—S. 7—See BOM. ACT II OF 1906, 10 Bom. L.R. 330=32 B. 337.

**General Clauses Act, Madras.**

See MAD. ACT I OF 1891.

**General Clauses Act, Punjab.**

See PUN. ACT I OF 1898.

**General Clauses Act, United Provinces.**

See U.P. ACT I OF 1904.

**General Relief.**

Plaint—Prayer for—Effect of possession—See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 20 B. 798.

Prayer for, effect of—See MORTGAGE—GENERAL, 3 O.C. 254.

**Genuineness.**

Correspondence with other evidence a test of—Comparison of handwriting—See EVIDENCE—ACCOUNTS, 16 A. 157=21 I.A. 6, P.C.

**Gestation.**

Legitimacy—Period of gestation—See EVIDENCE—MISCELLANEOUS, 24 A. 445=A.W. N. 1902, 119.

**Ghat.**

Right to use a ghat for the purpose of collecting religious offering—Right to the soil—See DECLARATORY DECREE, SUIT FOR—WHEN DECLARATORY SUITS LIE, 6 A. 39=A.W.N. 1883, 185.

**Ghatwal.**

(1)—Ghatwali tenure—Mussulman grant—Words of inheritance—Cessation of services—Enhancement of rent—Act XI of 1859, s. 37.—Where a ghatwali tenure was granted under a valid sunnad from a person representing the then Government in that behalf more than 100 years ago, and had been allowed to change hands by descent or purchase without question, the zemindar was held incompetent, of his mere motion without the assent and against the will of the Government, to put an end to the ghatwali, to deprive the ghatwalis and to treat them as common trespassers. *Per Peacock, C.J.*—The case falls within and is protected by s. 37, Act XI of 1859. *Per Trevor and Jackson, JJ.*—S. 37, Act XI of 1859, does not apply to the case. *Quære*:—Is the zemindar entitled to enhance the rent of a ghatwali in

**Ghatwal—concluded.**

lieu of service? *BABOO KOOLDEEP NARAIN SINGH v. MOHADEO SINGH*, 6 W.R. 199=B. L.R., Sup. Vol., 559, F.B. [*Affirmed*, 11 B.L.R. 71, P.C.; *F.*, 9 C.W.N. 663; *Appr.*, 5 B.L.R. 529, P.C.=13 M.I.A. 438=14 W.R., P.C., 28, 13 B.L.R. 124, P.C.=I.A. Sup. Vol., 181; *R.*, 1 B. 586, 6 B. 211, 12 C.L.R. 333, 28 B. 305=6 Bom. L.R. 364, 26 M. 403, 34 C. 753=5 C.L.J. 583=12 C.W.N. 193; *Expl.*, 9 W.R. 579, 5 B.L.R. 529, P.C.=13 M.I.A. 438=14 W.R. P.C., 28, 17 W.R. 315.]

Future rents and profits, attachment of—Prohibitory order to—In execution proceedings against him—See ATTACHMENT—SUBJECTS OF ATTACHMENT, 28 C. 483.

See EVIDENCE—MISCELLANEOUS DOCUMENTS, 8 B.L.R. 504, P.C.=16 W.R. P.C., 29=14 M.I.A. 259.

**Ghatwali Tenure.**

(1)—Ghatwali tenure—Its nature—Istemraree, meaning of.—Ghatwali tenures are perpetual holdings subject to condition of service. "Istemraree" means "perpetual." *RAJAH LEELANUND SINGH v. THAKOOR MONORANJUN SINGH*, 5 W.R. 101, [*Confirmed*, 13 B.L.R. 124; *R.*, 5 C. 543=5 C.L.R. 138, 30 C. 883; *D.*, 8 C. 664.]

(2)—Chakeran tenure—Grant of Ghatwali tenure.—In the absence of long usage, a ghatwali grant confers a mere chakeran holding or interest. *In re SARWAN SINGH*, 2 Ind. Jur. N.S. 149.

(3)—Ghatwalee tenure at Gurruckpore—Its nature—Mokurraree Istemraree holding—Definition.—The Ghatwalee tenure at Garrackpur is a perpetual hereditary tenure at a fixed jumma in money and service, and except for misconduct and failure to perform the conditions annexed to their tenure, the Ghatwals cannot be evicted by the zemindar. A mokurraree istemraree holding is a perpetual holding at a fixed jumma—the word "istemraree" referring to perpetuity in point of time and the word "mokurraree" to fixity in respect of jumma. *MUNRUNJUN SINGH v. RAJAH LEELANUND SINGH*, 3 W.R. 84.

(4)—Ghatwalee tenure—Holding land at fixed rate as long as ghatwal service required—Resumption.—Where ghatwalee lands held under a lease were given in lieu of wages, the jumma was fixed, and was payable as long as ghatwal service was rendered, and there was no recital in the pottah either confirming or recognising the pre-existing status of the ghatwals, and there was nothing in the terms thereof which directly or by implication, could be held as creating, hereditary or perpetual tenure, the zemindar was at liberty, in the absence of distinct words to the contrary, to determine the tenure when that service was no longer required. *RAJAH NEELANUND SINGH v. SURWAN SINGH*, 5 W.R. 292.

(5)—Ghatwalee lands not held under hereditary sannad, resumption of—Payment of



**Ghatwali Tenure—continued.**

*quit rent by Ghatwals — Long enjoyment of profits in lieu of wages, right to hold land at fixed jamma not claimable on ground of.*—This was a suit brought by the plaintiff, a zemindar, for possession of a tenure hitherto in the occupation of the defendant. The defendant relied upon long occupation as a ghatwal and in support of his defence, filed a copy of a copy of a sannad of the year 1182 *fasli* without date alleged to have been granted by the ancestor of the plaintiff, but, the original not having been accounted for, the said copy of its copy was held to be inadmissible. The position of the defendant was that he had been in possession for a long period paying a quit rent and enjoying the profits of the holding in lieu of wages; but in the absence of a sannad granting any hereditary indefeasible right, mere possession of the above description however long, would not entitle him to hold the lands at a fixed jamma or to retain possession of them after he had ceased to perform and could no longer perform the duties for which the lands had been assigned to him. **RAJA NEELANUND SINGH v. NUSSEB SINGH**, 6 W.R. 80. [*Expl.*, 9 W.R. 579; R., 17 W.R. 315; D., 11 B.L.R. P.C., 71.]

(6).—*Succession to Ghatwali tenures by females — Custom — Guardians and minors.*—Succession to Ghatwali tenures is regulated by no rule of *koolachar*, nor by the Mitakshara Law, but solely by the nature of the Ghatwalee tenures which descend undivided to the eldest son to the exclusion of others. A female can hold as Ghatwali tenure. A female whose estate is managed by the Court of Wards, may give up her rights in favour of the next heir only with the consent of the Court of Wards. Custom, where it is ancient, invariable and established by clear and positive proof, does override the usual law of inheritance. **MUSSAMUT KUSTOORA KOOMAREE v. MONOHUR DEO**, W.R. 1864, 39.

(7).—*Fresh assessment of.*—A Ghatwali tenure dated before the decennial settlement and the creation of the zemindaree is protected from fresh assessment. **JAMES ERSKINE v. THE GOVERNMENT**, 8 W.R. 232.

(8).—*Right of females to hold.*—A Ghatwali estate is not necessarily held by males to the exclusion of females. **TEKAET DOORGA PRASAD SINGH v. TEKAETNEE DOORGA KOOREE**, 20 W.R. 154.

(9).—*Ghatwali tenures — Title — Minor — Ghatwal — Custom — Services dispensed with.*—Where, in a suit to establish right to and recover possession of an ancestral Ghatwali mehal, plaintiff fails to prove possession and ouster, she is entitled to go into the question of title. Where, in the case of a Ghatwali mehal, the resumption and the settlement proceedings have been cancelled, the minor son holds his former position. Though, in custom, the ghatwalli tenures descended from father to son, no succession was legal or valid till confirmed by the zemindar and

**Ghatwali Tenure—continued.**

reported by him to the Government authorities (6 *Sudder Rep.* 170, R.) Where Government has dispensed with the services of the ghatwals, the zamindar is under no obligation to continue to appoint, and may, on a vacancy occurring, settle the tenure as he pleases. (S.D. A. Rep. 1857, p. 1812, *ibid.*, 1858, p. 1669, *cited.* (A plaintiff claiming as a ghatwal is not entitled to recover possession of a ghatwalli mehal in that part of the country where the services of a ghatwal are no longer required by Government. **MAHBUB HOSSEIN v. PATASU KUMARI**, 1 B.L.R., A.C. 120 = 10 W.R. 179. [*Cons.*, 14 W.R. 28, P.C.]

(10).—*Demise of Ghatwal — Rival claimants — Commissioner's powers.*—A Commissioner of Revenue is not warranted, on the demise of a ghatwal to consider the eligibility of rival claimants, or reject the natural heir on purely moral considerations. **LALL DHAREE ROY v. BROJO LALL SINGH**, 10 W.R. 401.

(11).—*Ghatwalli lands admittedly included in decennially settled estate — Suit for khas possession not maintainable by Government.*—This was a suit instituted by Government for khas possession on allegation that the mouzah in question was ghatwali property and had been held by the ghatwals in ghatwali right, and that the ancestors of the principal defendant the zemindar dispossessed the ghatwals under color of a decree secured in the civil suit collusively brought by them and that the ghatwals subsequently sued to recover possession of their land, but their suit was declared to be inadmissible. The lower Court was of opinion that the ghatwali tenure was not included within the Decennial Settlement of the Pergunnah and that, consequently, defendants could not have any title to it, but that it was clearly proved to be with the plaintiff. That Court therefore decreed in favour of the plaintiff. On appeal preferred to the High Court by the *putneedars* it was urged that, as the whole of the pergunnah within which the village in question was situated was admittedly included within the Decennial Settlement. Government can have no right to the village; and that, though Government may have a right to certain services by ghatwals holding all or particular lands in the village and can sue to have those services performed, they could not claim khas possession of the lands of a village admittedly included within the decennially settled estate which they held in *putnee* and that, consequently, the plaintiff's present suit was not maintainable. The High Court held that the Government's present suit for khas possession was admittedly erroneous and unsustainable and, as full justice could not be done between the parties in the suit, it dismissed the claim of the Government. **GUDADHUR BANERJEE v. THE GOVERNMENT**, 6 W. R. 326. [R., 34 C. 753 = 5 C.L.J. 583 = 12 C.W.N. 193.]

(12).—*Transfer of defaulting ghatwali tenure — Reg. XXIX of 1814 — Limitation Act, 1908, art. 15. — Suit to cancel transfer of land by revenue authorities.*—The authorities may, under



**Ghatwall Tenure—continued.**

Regulation XXIX of 1814, transfer a defaulting—Ghatwals' tenure, notwithstanding that money is offered before the tenure is actually made over to another. A suit to set aside a transfer of land made by the Revenue authorities for arrears of revenue was held to be governed by cl. 4, s. 1, Act XIV of 1859. **CHITTRO NARAIN SINGH TEKAIT v. ASSISTANT COMMISSIONER OF THE SONTHAL PERGUNNAHS**, 14 W.R. 203. [R., 5 C.L.J. 583, 34 C. 753, 12 C.W.N. 193.]

(13)—*Reg. I of 1793, s. 8, cl. 4—Ghatwallee lands whether liable to resumption.*—The question for decision in this case was touching the validity of a claim made by the East India Company to resume, for the purposes of Revenue assessment, certain beeghas of land forming part of the zemindary of the Rajah of Khurruckpore. The lands sought to be resumed were of ghatwallee tenure, and the main question therefore was, whether lands of that description were liable to be resumed as under Reg. I of 1793, s. 8, cl. 4, relating to thannah or police establishments. Special commissioners appointed for the purpose passed a final judgment in favour of Government, resting their decision on the grounds that the lands were in reality lands granted for the police establishments and were to be considered and treated as provided for in cl. 4, s. 8, Reg. I of 1793. From the above decision the present appeal was brought to the Privy Council, and their Lordships advised that the decision complained of ought to be reversed. The lands in question were not lands properly coming under cl. 4 of s. 8 of Regulation I of 1793; they were a part of the zemindary of Khurruckpore and were included in the settlement for that zemindary and covered by the *junma* assessed upon it. With respect to the costs of the proceedings, their Lordships directed that the respondents should be ordered to re-pay to the appellant all the costs that they had received from him under orders of Judges below, and should also be ordered to pay to him all his own costs of the proceedings including those of the appeal to the Privy Council. The claim of the Government had been wrongly persisted in by them after the several decisions against them by their own officers acting as Judges; further, the decree in their favour had been finally obtained upon grounds different from those on which it was originally sought, and the appellant had been exposed to a long and most expensive litigation. **RAJA LEELANUND SINGH v. THE GOVERNMENT OF BENGAL**, 4 W.R.P.C., 77=6 M.I.A. 101=1 S.C. 505. [F., 9 C. 187=9 I.A. 104; R., 6 W.R. 109, 13 B.L.R. 124, 3 C. 251, 10 C. 677, 5 B.M. L.R. 983, 12 C.W.N. 178, 34 C. 753=5 C.L.J. 583=12 C.W.N. 193.]

(14)—*Resumption of.*—In a suit by an auction-purchaser of a *Zemindary*, for resumption of *Jaghire* lands, forming part of, and within, his *Zemindary*, as *mal*, it was proved that the lands in question had been granted by *sunnuds* for the performance of certain services which, though now obsolete, might again be required

**Ghatwali Tenure—continued.**

to be performed, and had been held, under such *sunnuds*, rent-free anterior to the Decennial Settlement. *Held* by the Judicial Committee:—First, that the *sunnuds* created a *chakeran*, or services tenure, not affected by s. 41 of Ben. Reg. VIII of 1793, and were *pro servitus impensis et impendendis*, partly as a reward for past, and partly as an inducement for future, services; and that the grantees, though liable to forfeit the lands, if they wilfully failed in the performance of the duties imposed by the *sunnuds*, were not liable to have such lands resumed, on the ground that there was no longer occasion for the performance of the particular services required; secondly, that as it was a tenure created before, and subsisting at the time of, Decennial Settlement, and then held rent-free, the presumption was that the lands were treated as *lakhiraj*, and the *Jaghire* was within the exception of the 26th section of Act I of 1845; and thirdly, that the *onus* was upon the auction-purchaser, who sought to dispossess, or to rack-rent the grantees under the *sunnuds*, to make out a clear title for resumption. **FORBES v. MEER MAHOMED TUQUEE**, 14 W.R. 28, P.C.=5 B.L.R. 529=13 M.I.A. 438.

(15)—*Ghatwallee tenure—Personal grant—Transferable at fixed rate—Resumption.*—A *sunnud* respecting a ghatwallee tenure which is personal to the grantee does not confer on his descendants or representatives an hereditary, transferable and permanent tenure at a fixed rate. To support such a grant as the latter, the *sunnud* should contain, not general language which may be interpreted one way or another according to the wishes of either party, but the clearest and most precise definition, such as *istemraree* and *mourasee* with the addition of *nusleen banusleen*. **MUSSAMUT SONA v. RAJAH LEELANUND SINGH**, 5 W.R. 290.

(16)—*Ghatwallee lands—Long possession evidencing implied grant—Protection of Ghatwal from enhancement—Adjudication of competent Court in favour of ghatwal, evidentiary value of.*—Plaintiff, a *putneedar*, sued to oust defendants from a quantity of land which was in their possession, as trespassers, as it was not included within their *ghatwallee* lands, and as they refused to enter into an engagement to pay rent for the same. The *Ghatwals* asserted that the land in suit had been *Ghatwallee* from before the Decennial Settlement, and that neither plaintiff nor the zemindar had ever had possession of them. It was in evidence that the defendants had gradually, during a long series of years, from generation to generation, which may be fairly presumed to have continued from the time of the Decennial Settlement, brought into cultivation the lands in dispute, without any interference from the parties representing the estate, and paying always a fixed quit rent to them. This long possession and gradual cultivation in the absence of any express grant, was evidence of an implied grant



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and it was held that in respect of land cultivated under these circumstances, the plaintiff, as *durputneedar*, could have no right to demand increased rent, for it would be covered by the implied grant made by the zemindar anterior to the creation of the *putnee* tenure, and one therefore, by which the *putneedar* would be bound. In this case, a previous suit had been instituted by the party that then represented the estate against the then *ghatwals*, and the adjudication made therein dismissing the suit of the landlord for rent from the *ghatwal* was regarded by the High Court as good evidence in favour of the right of the *ghatwal* in the present suit to claim protection from enhancement. **MR. JAMES ERSKINE v. MANICK SINGH GHATWAL**, 6 W.R. 10. [F., 8 W.R. 232.]

(17)—*Lands on Ghatwali tenure—Enhancement of rent—Ghatwals—Beng. Reg. VIII of 1793, s. 51, cl. 1.*—A Zemindar, of lands granted prior to the Permanent Settlement on Ghatwali tenure, had no right to enforce payment of an enhanced rent on the ground that the services, which the *Ghatwals* were able and willing to perform, had been dispensed with on the Zemindar's part by Government. [R., 12 C.W.N. 178.] The *Ghatwals* are dependent talookdars within the meaning of Reg. VIII of 1793 and are protected from enhancement by cl. 1, s. 51 of the Regulation. **LEELANUND SINGH BAHADOOR v. THAKOOR MUNRANJUN SINGH**, 3 C. 251.

(18)—*Ghatwali lands in Mahal—Kuruckpore—Resumption by Government—Compensation.*—Government illegally resumed the *ghatwali* lands in Mahal Kuruckpore (the profits of the lands minus the quit rent paid to the Zemindar, being the remuneration given to the *ghatwals* for police services), dispensed with the services of the *ghatwals* and settled the tenures with the *ghatwals* at half the rates current in that part of the country. The resumption proceedings were set aside. The question was to whom, and in what proportions, Government should refund the half-jumma taken by it from the *ghatwals* during the period of settlement. Held, that the *ghatwals* had in the half-rates which they retained during the existence of the settlement, been amply compensated for any loss they might have sustained (though they did not appear to have sustained any), during the period when, owing to particular circumstances they did not and could not perform police duties; and that the whole of the money paid by the *ghatwals* to the Government, in the shape of revenue, should be paid over to the Zemindar, partly as quit-rent due to him, and the remainder as compensation for the loss of the services of the *ghatwals* during the period the settlement with the *ghatwals* continued in force. **RAJA LILANAND SINGH BAHADUR v. THE GOVERNMENT**, 2 B.L.R.A.C., 114. [R., 12 C.W.N. 178.]

(19)—*Civil Court—Jurisdiction—Ghatwal's right to hold land after dismissal.*—The Civil Courts cannot interfere to reinstate a *Ghatwal*

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who has been dismissed by the police authorities, in the lands which he formerly held as *ghatwal*. The tenure being such, the right to possess the land depends on the tenure of the office. **DEBEE NARAIN SINGH v. SREE KISHEN SEIN**, 1 W.R. 321.

(20)—*Service tenure—Arrears of rent unpaid by preceding jaghirdar—Suit for arrears.*—A suit will not lie against a jagheerdar holding a service-tenure, on account of arrears of rent unpaid by his predecessor. **RAJAH NILMONEE SINGH v. BUKRONATH SINGH**, 10 W.R. 255.

(21)—*Rents of ghatwalee lands, debts of former deceased holder not recoverable from.*—The question in this case was whether the rents which accrued out of the *ghatwalee* estate in question after the death of deceased, were liable, in the hands of his successor, to pay the debts of the deceased; and the High Court held that the tenure was one held for the purpose of public services and that those who perform such services were entitled to remuneration, and that, consequently, the rents were not liable for the debts of the previous holder of the tenure. **BINODE RAM SEIN v. THE DEPUTY COMMISSIONER OF THE SONTHAL PERGUNNAHS**, 6 W.R. 129.

(22)—*Hereditary Ghatwalee estate, non-liability of, for debts of previous holder deceased.*—A *ghatwalee* estate passing from father to son is not what is called assets by descent. Reg. XXIX of 1814 says that the *ghatwals* and their descendants in perpetuity shall be maintained in possession of the lands which, consequently, cannot be seized as assets in the hands of the heir. The son taking such lands after the death of the father does not take them as assets by descent subject to the payment of the father's debts, but he takes them under the specific rules laid down in the Regulation vesting the lands in the descendants in perpetuity. The law enacting that he is to be kept in possession of the estate, he is entitled to the rents and profits derived from it and the profits so derived during the life of the son are not liable in his hands to pay the father's debts. **BENODE RAM SEIN v. THE DEPUTY COMMISSIONER OF SONTHAL PERGUNNAHS**, 7 W.R. 178. [Appl., 10 W.R. 255; Appr., 15 W.R. 38, 9 C. 178=9 I.A. 104; R., 34 C. 753=5 C.L.J. 583.]

(23)—*Effect of lease by ghatwal.*—A *ghatwal* cannot give a potta of his tenure binding upon a subsequent *ghatwal*. The rights and interest of each *ghatwal* in his tenure last for his life. **JOGESWAR SIRKAR v. NIMAI KARMA KAR**, 1 B.L.R. S.N., 7 (b). D., 2 C.L.J. 379.]

(24)—*Alienation by ghatwal of Beerbhoom—Lease.*—Notwithstanding the *ghatwals* of Beerbhoom independently of the recent statute had not the power of alienation, still, having an estate in perpetuity so long as the services were performed and the rent paid, a lease by them



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could not be regarded as a nullity. **DEPUTY COMMISSIONER OF BEERBHOM v. RUNGO LALL DEO**, W.R. F.B., 34=Marsh 117=1 Ind. Jur. O.S., 34=1 Hay 200.

(25)—*Ghatwali tenure of Beerbhoom—Nature—Alienation—Lease in perpetuity of Ghatwali tenure.*—Ghatwali tenures of Beerbhoom are not the private property of the ghatwals but lands assigned by the state in remuneration for specific police services, and are not alienable or attachable for personal debts. Each ghatwal is entitled to the whole income of the estate and such income should not be charged or incumbered by a previous ghatwal. [R., 14 B. L.R. App., 7=23 W.R. 376.] A ghatwal in the district of Beerbhoom has no authority to grant a lease of his tenure in perpetuity. **GRANT v. BANGSI DEO**, 6 B.L.R. 652=15 W. R. 38. [F., 6 C.W.N. 94=29 C. 227; D., 2 C. L.J. 379.]

(26)—*Suit for arrears of rent—Special appeal.*—In a suit for arrears of rent at enhanced rates, the fact of the lower appellate Court's not recording any opinion on a kubooleut incidentally in issue, and found by the first Court to have been fabricated, is not a valid ground of special appeal. Any presumption against the right of a ghatwal to grant mokurruree lease cannot hold good against such leases, when granted in good faith, for the clearance of jungle. **DAVIES v. DEBEE MAHTOON**, 18 W.R. 376. [Expl., 29 C. 227.]

(27)—*Ghatwali tenure—Attachment of profits due to ghatwali, after deduction of necessary outgoings.*—Profits due to a ghatwal, after deducting all necessary outgoings, from the total rents, during his lifetime may be regarded as his personal property. Such property is his own absolute property. As such, it can be attached in execution of the personal decree against the ghatwal, and appropriated by the decree-holder. **RAJKESHWAR DEO v. BUNSHIDHUR MARWARI**, 23 C. 873. (9 C. 388, D.; 4 W.R. Mis., Rul. : 5, Appr.) [R., 28 C. 483.]

(28)—*Sale of Ghatwalee lands in Kuruckpore.*—Ghatwali lands in Kuruckpore are incapable of alienation by private sale or otherwise. Nor could they be sold in execution of decrees. They could be alienated only with the consent of the Zemindar whose approval of the vendee being previously obtained. **RAJAH LEELANUND SINGH v. DOORGABUTTY**, W. R. 1864, 249.

(29)—*Sale of—Zamindar's consent—Sale in execution—Extent of interest passed—Effect of fresh grant of ghatwali estate.*—A proprietor is incompetent to sell the whole of his ghatwalee estate without the consent of the zemindar, and the interest which he conveys cannot be higher than what he himself has; accordingly, when his rights and interests are sold in execution, those of the former purchaser cease. The effect of a zemindar granting a fresh ghatwalee sunnud is that he appoints the grantee

**Ghatwali Tenure—continued.**

to the office of ghatwal and disallows any previous sale by the former. **LALLA GOOMAN SINGH v. HUGH GRANT**, 11 W.R. 292. [R., 10 C. 677.]

(30)—*Shikmi Ghatwali tenure—Attachment and sale in execution.*—A shikmi ghatwali tenure, held under the superior ghatwal, is not liable to be sold in execution; nor are its proceeds liable to attachment for satisfaction of the debt due from its holder. The inferior tenure cannot have larger incidents attached to it than the superior. **BALLY DOBEY v. GANEI DEO**, 9. C. 388. [D., 23 C. 873.]

(31)—*Ghatwali tenure in Kharukpore—Transferability—Presumption of assent by Zemindar—Recognition of transfer by Court—Inapplicability of Mitakshara Law and family custom.*—A ghatwali tenure in Kharukpore is transferable on the zemindar assenting and accepting the transferee. Where a zemindar has not objected to a transfer of ghatwali tenure for over twelve years, his assent thereto may be presumed and the Court ought to recognise such a transfer. In dealing with a ghatwali tenure, the Court must have regard to the nature of the tenure itself, and to the rules of law laid down in regard to such tenures, and not to any particular school of law or to the customs of particular families. A ghatwali is created for a specific purpose, has its own particular incidents, and cannot be subject to any system of law affecting only a particular class or family. **ANUNDO ROY v. KALI PROSAD SINGH**, 10 C. 677. [Affir., 15 C. 471, P.C.; R., 9 B. 198, F.B., 34 C. 753=5 C.L.J. 583=12 C. W.N. 193.]

(32)—*Application of Mitakshara Law—Incidents of ghatwali tenure in Kharagpore.*—The doctrines of Mitakshara are not to their full extent applicable to a ghatwali tenure. A ghatwali estate is impartible and the succession is by primogeniture. Such a tenure in Kharagpore is not inalienable and may be transferred by the ghatwali or sold in execution of a decree against him, if such transfer or sale is assented to by the zemindar. And when once it is established that the ghatwal had the power of alienation, that power forms an integral portion of his right, and interest in the ghatwali, and must not, in the absence of evidence, be limited to an alienation for his own life and no longer. **KALI PERSHAD v. ANAND ROY**, 15 C. 471=15 I.A. 18, P.C.=5 Sar. 121. (On appeal from 10 C. 677.) [R., 5 C.L.J. 583=34 C. 753=12 C.W.N. 193.]

(33)—*Ghatwals of Kuruckpore.*—Although the word "instamrari" is not used in the sannads filed in this case, yet, the ghatwals of Kuruckpore producing such sanads hold a perpetual hereditary tenure at a fixed jumma payable in money and service, and cannot be evicted by the zemindar except for misconduct. **TEKAIT MANORAJ SINGH v. RAJA LILANAND**, 2 B.L. R. A.C., 125, Note. (3 W.R. 84, Appl.) [R., 34 C. 753=5 C.L.J. 583=12 C.W.N. 193.]



**Ghatwali Tenure—continued.**

(34)—*Service-tenure — Ghatwal — Auction-purchaser—Resumption.*—An auction purchaser of a zemindary at a sale of arrears of Government revenue cannot resume lands held under a ghatwali, at a fixed rent, created before the permanent settlement, on the ground that the services have ceased to be performed by the ghatwal and that there was no necessity for such services, if the Government refuse to renounce its claim to ghatwali services. *KOOLDEEP NARAIN SINGH v. GOVERNMENT OF INDIA*, 11 B.L.R. 71, P.C.=14 M.I.A. 247=2 Sar. 734, =2 Suther, 491. [Appl., 14 B.L.R. 113; R., 3 B. 452, 26 M. 403, 9 C.W.N. 663, 34 C. 753=5 C.L.J. 583=12 C.W.N. 193.]

(35)—*Ghatwali tenure before permanent settlement—Services dispensed with—Resumption of land—Ghatwali tenure created after permanent settlement — Auction-purchaser — Revenue sale—Reg. XLIV of 1793—Enhancement of rent—Wrongful resumption by Government—Mesne profits—Rent—Refund of Government revenue.*—Ghatwali tenures which had been created before the permanent settlement at a fixed rent cannot be put an end to by the zemindar dispensing with the ghatwali services (which the Government no longer required on the part of the zemindar) so long as the ghatwals are willing and able to perform the services. [*F.*, 29 M. 52, P.C.=16 M.L.J. 1=1 M. L.T. 3=3 C.L.J. 1=3 A.L.J. 55=8 Bom. L.R. 1=10 C.W.N. 161=33 I.A. 46; R., 12 C.W. N. 178, 5 C.L.J. 583=12 C.W.N. 193=34 C. 753.] Ghatwali tenures which had been created after the permanent settlement cannot, under Regulation XLIV of 1793, be cancelled by a purchaser at a sale for arrears of Government revenue. *Quare*:—Whether he would be entitled to enhance the rent? Where the Government, having wrongfully resumed certain ghatwali lands, were directed to refund mesne profits thereof which consisted of the rent paid by the ghatwals under a settlement in force with them until the resumption was set aside, held that, inasmuch as the ghatwals held the lands upon a tenure by which they were liable to certain rent and services, such refund should be made by paying to the zemindar the rent which was due to him by the ghatwals under the tenures, and returning to the ghatwals the remainder of the money. *RAJA LEELANAND SINGH BAHADUR v. THAKUR MUNORUNJUN SINGH*, 13 B.L.R. 124, P.C.=I.A. Sup. Vol. 181=3 Sar. 238.

(36)—*Ghatwali tenure—Mussulman grant—Words of inheritance—Cessation of services—Enhancement of rent—Act XI of 1859, s. 37.*—Where a ghatwali tenure was granted under a valid sunnad from a person representing the then Government in that behalf more than 100 years ago, and had been allowed to change hands by descent or purchase without question, the zemindar was held incompetent, of his mere motion without the assent and against the will of the Government, to put an end to the ghatwali, to deprive the ghatwalis, and to

**Ghatwali Tenure—continued.**

treat them as common trespassers. *Per Peacock, C.J.*—The case falls within and is protected by s. 37, Act XI of 1859. *Per Trevor and Jackson, JJ.*—S. 37, Act XI of 1859, does not apply to the case. *Quare*.—Is the zemindar entitled to enhance the rent of a ghatwali in lieu of service? *BABOO KOOLDEEP NARAIN SINGH v. MOHADRO SINGH*, B.L.R. Sup. Vol. 559=6 W.R. 199. [Affirmed, 11 B.L.R. 71, P.C.; *F.*, 9 C.W.N. 663; *Appr.*, 5 B.L.R. 229, P.C.=13 M.I.A. 438=14 W.R. P.C., 28, 13 B.L.R. 124=I.A. Sup. Vol. 181; R., 1 B. 586, 6 B. 211, 12 C.L.R. 333, 28 B. 305=6 Bom. L.R. 364, 26 M. 403, 34 C. 753=5 C.L.J. 583=12 C.W.N. 193; *Expl.*, 9 W.R. 579, 5 B.L.R. 529, P.C.=13 M.I.A. 438=14 W.R. P.C. 28, 17 W.R. 315.]

(37)—*Dismissal of a ghatwal for misconduct—Forfeiture of tenure.*—The dismissal of a ghatwal for misconduct will carry with it the forfeiture of his tenure. *THE SECRETARY OF STATE v. PORAN SINGH*, 5 C. 740. [*D.*, 9 C. W.N. 663.]

(38)—*Ghatwal tenure south of Birbhum, Nature of—Liability for predecessor's debts.*—The fact that an incoming jagirdar takes the land, subject to either appointment or approval by the Government and with an attached burden of public duty, is sufficient to deprive the jagir of the character of simple heritable property; and such a jagir could not be attached and sold in satisfaction of the debts of the jagirdar's predecessor-in-title as property of the deceased jagirdar in his possession. *Per Jackson, J.* (10 W.R. 255, R.) [*R.*, 34 C. 753=12 C.W.N. 193=5 C.L.J. 583.] But *Ainslie, J.*, held that the fact that the Government could dismiss a ghatwal, and so cut off the descent, did not destroy the generally hereditary character of the holding, or make such lands, when included in the Permanent Settlement, police lands resumable by Government under cl. 4, s. 8 of Regulation I of 1793. *BHUKRONATH SINGH v. NILMONI SINGH*, 5 C. 389=4 C.L.R. 583. (6 M.I.A. 101, 7 W.R. 178, W.R. 1864, 39, R.)

(39)—*Ghatwali tenure in Beerbhum, Nature of—Ben Reg. XXIX of 1814, s. 2—"Descendants," Meaning of.*—Ghatwali tenures in Beerbhum are tenures to be held in perpetuity, and are descendible from generation to generation subject to certain conditions and obligations, and it would be inconsistent with the true character of these tenures to hold that the Legislature intended that they should devolve on issue of the body only, and not on heirs generally according to the law which may govern such succession. (10 W.R. 401, R.) The word "descendants" in the Regulation is not meant to be confined to the heirs of the body, but it includes heirs generally according to the particular law applicable to the case (*e.g.*, the widow of a deceased ghatwal). *CHHATRA-DHARI SINGH v. SARASWATI KUMARI*, 22 C. 155. (10 W.R. 401, W.R. 1864, 39, R.)



**Ghatwali Tenure—continued.**

(40)—*Ghatwals of Beerbhoom — Permanent leases prior to Decennial Settlement for performance of Police duties—Creation of under-tenures—Sirdar ghatwals.*—Where the ghatwals of Beerbhoom have granted permanent leases prior to the Decennial Settlement for the due performance of the Police duties for which the lands were originally granted to them, and have been held by them from generation to generation, such leases cannot be set aside at the instance of the present sirdar ghatwals. The ghatwals are competent to create such under-tenures. *MUKURBHANOO DEO v. KOSTOORA KOONWAREE*, 5 W.R. 215. [D., 2 C.L.J. 379.]

(41)—*Succession to jaghir included in settled zemindari—Ghatwali tenure—Reg. XXIX of 1814—Decree against predecessor—Liability of jaghir in execution.*—Where a jaghir, succession to which was subject to Government sanction, and the jaghirdar of which was bound to render public services in return for a portion of the revenue retained by him, was included in a zemindari at the permanent settlement, held, whether the jaghir was a ghatwali tenure or not, under Reg. XXIX of 1814, it was analogous to such tenure as is described in the preamble to the Regulation. It was, also, held that the settlement had not altered the character of the tenure, that the zemindar was entitled only to the rent due previously to Government and that the services were still due to the Government. [R., 10 O. 677, 9 B. 198, F.B., 5 Bom. L.R. 983, 5 C.L.J. 583=34 C. 753=12 C. W.N. 193] The jaghir, though hereditary, is not subject to the ordinary rules of inheritance governing Hindus and Mahomedans; but the heir must be approved by Government. The jaghir is both indivisible and inalienable by the holder during his life. [R., 10 O. 677, 9 B. 198, F.B., 5 Bom. L.R. 983, 5 O.L.J. 583=34 C. 753=12 C.W.N. 193.] The jaghir is not liable to attachment and sale in execution of a decree against the predecessor, as assets in the hands of a jaghirdar approved by Government. *NILMONI SINGH DEO v. BAKRANATH SINGH*, 9 C. 187, P.C.=9 I.A. 104=4 Sar. 335. (On appeal from 5 C. 389.) (6 M.I.A. 101, F.) [R., 10 C. 677, 9 B. 198, F.B., 5 Bom. L.R. 983, 5 C.L.J. 583=34 C. 753=12 C.W.N. 193.]

(42)—*Nature of.*—As to the nature of ghatwalee tenures, and the rulings of the High Court which should govern such cases. *RAJAH LEELANUND SINGH v. KUNHYA LALL*, 17 W. R. 315.

(43)—*Zamindar's right in.*—According to Regulation XXIX of 1814, the zemindar retains an interest in Ghatwali lands. *BHAGERUTH MOODEE v. RAJAH JABUR JUMMAH KHAN*, 18 W.R. 91.

(44)—*Suit for reversal of Act X decision—Jurisdiction—Civil Court.*—The mere fact of there being a recital in the plaint that the land was being held under a ghatwally tenure and was not *mal*, could not give the Civil Court jurisdiction where the prayer of the plaint was

**Ghatwali Tenure—continued.**

for the reversal of a previous Act X decision and the recovery with damages of the moneys recovered in execution. *KRISTO PERSHAD MOOKERJEE v. HERA LOLL AUDHICARY*, 2 W.R. Act X, Rul. 42.

(45)—*Suit for settlement of land held under—Principles applicable in determining succession to—Heritability and permanency of Bankura Tenure—Discontinuance of service in—Effect thereof on right to resume lands—Dismissal of deputy of permanent incumbent, Effect thereof on latter's rights to—Limitation—Cause of action.*—A ghatwali tenure in Bankura had existed from before the grant of the dewani to the East India Company and had, for many generations, descended from father to son. It had been held upon payment of a quit-rent and the performance of the ghatwali services; such quit-rent had been paid at a fixed amount from a time long antecedent to the Permanent Settlement and was recognised at the time of the settlement, when the lands were included within the *mal* lands of a Zemindari and the revenue was assessed upon the footing that the quit-rent was fixed in perpetuity. The services and tenure descended last upon the plaintiff's father and when he became incapacitated the plaintiff was appointed to act as his deputy but was subsequently dismissed by the District Magistrate for misconduct. Thereupon the father of defendant No. 2 was appointed ghatwal and placed in possession of a portion of the tenure. Some time after, the services were dispensed with by Government and settlement was made with the second defendant, upon the assumption that, as son of the late ghatwal, he was entitled to such settlement. Hence, the present suit by the plaintiff for a declaration of his title to the lands and of his rights to obtain settlement thereof. The plaintiff's claim was resisted upon the allegations that the tenure was neither permanent nor hereditary, that it was an ordinary service tenure, the holder whereof was liable to removal upon misconduct, that the father of the plaintiff was dismissed for good cause, that the appointment of a successor rested entirely upon the discretion of the District Magistrate, who gave the office and the lands appurtenant thereto to the father of the second defendant and consequently the latter became entitled to settlement when the resumption took place. It was also contended that the suit was barred by limitation. *Held* the general principles applicable to cases of this description are:—Although a ghatwali grant may not contain any words of inheritance, if it is proved by long uninterrupted usage that the lands have passed from ancestor to heir, that is from father to son, for two or three generations without objection, the inference would be that the grant was a grant of inheritance. The omission of words of inheritance does not show conclusively that the tenure was not hereditary, whereas the fact that it had descended from father to son, is the strongest possible evidence of its hereditary character. (B.L.R., Sup. Vol. 559=6 W.R. 199, F.; 14 M.I.A. 247, 12 M.I.A. 263, 10 M.I.A. 188, R.).



**Ghatwali Tenure—continued.**

Another principle is that where lands are held subject to the payment of quit-rent and the performance of ghatwali services and when it is shown that, at the Permanent Settlement, the lands comprised in the tenure were included in the *mal* lands of a Zemindary and were assumed upon the footing that the amount of revenue to be paid therefor by the Zemindar was equal to the amount of rent payable to him by the holders of the tenure, the inference to be drawn is that the tenure was a permanent one descendible to heirs, the holders whereof would continue bound to perform the services. A third principle is that a hereditary ghatwali tenure held upon payment of rent and performance of services cannot be determined or resumed either by the Zemindar or by the Government, on the ground that the services are no longer required (B.L.R. Sup. Vol. 559=6 W.R. 199, *F.*; 13 M.L.A. 438, I.A. Sup. Vol. 181, *R.*) Applying these principles to the facts of the present case, the Court held that the tenure was not merely heritable but also permanent (5 C. 740, *D.*) and it was not liable to be determined or resumed either by the Zemindar or by the Government. The second contention was that as the tenure had become forfeited, the plaintiff could have no subsisting right to the lands on the basis of which he could sue for possession. If it be one of the incidents of a ghatwali tenure, either under the original grant or engrafted on it by usage, as in this case, that when the ghatwal becomes incapable of personally performing the services, a deputy, preferably the next successor, may be appointed to act on his behalf by the Magistrate, it does not follow that an incapacity on the part of the deputy to discharge adequately the duties incidental to the office, operates as forfeiture of the appointment of the principal. The order of the Magistrate dismissing the plaintiff could not, in law, operate as a dismissal of the plaintiff's father, even though such was the intention of the Magistrate. When the plaintiff was dismissed, he ceased to hold office only in his character as deputy and consequently, when some years later he became entitled to succeed his father to the tenure, his previous dismissal could not disqualify him from taking upon himself the rendering of ghatwali services. The tenure was hereditary, and he was, in consequence, entitled to succeed and to continue in possession till dismissed by reason of misconduct. The result, therefore, was that, upon the death of the father of the plaintiff, the tenure passed to him unaffected by the order of the Magistrate under which the father of the second defendant obtained possession. Finally, the suit was not barred by limitation. The possession of the father of the second defendant in its inception was on behalf of plaintiff's father and became adverse only after death of the plaintiff's father, when the Commissioner decided that his appointment must be taken to be in supersession of the permanent incumbent. Further, so long as his father was alive, the plaintiff had no claim to the office of ghatwal and, in consequence, had no cause of action

**Ghatwali Tenure—concluded.**

against the father of defendant No. 2. Whether time began to run from the date of the death or the plaintiff's father or from the date when the possession of the predecessor of the defendant became adverse, in either view, the suit, instituted within 2 years thereof, was in time. The plaintiff was, therefore, entitled to the settlement. JOGENDRA NATH SINGH v. KALI CHARAN ROY, 9 C.W.N. 663. [*R.*, 34 C. 753 = 12 C.W.N. 193.]

(46)—*Excess lands occupied by ghatwals, Suit maintainable to assess.*—Although the rent of ghatwals is not liable to be enhanced by means of a suit, yet, for the purpose of assessing the lands in occupation in excess of the area recorded in the *isumnovisee* filed by them, a suit will clearly lie. RAJAH JAGO JIVAN LAL v. ROGHONATH KAPAT, 6 W.R. 197.

Ghatwal, right of, to grant permanent lease—See BEN. ACT VIII OF 1885, ss. 5, 181, 29 C. 227 = 6 C.W.N. 94.

Occupancy and non-occupancy rights in Ghatwali lands—See BEN. ACT VIII OF 1885, s. 181, 10 C.L.J. 602 = 4 Ind. Cas. 737.

Local usage and custom—Occupancy right—See BEN. ACT VIII OF 1885, s. 181, 1 C.L.J. 138.

See CUSTOM, 22 C. 156.

See LANDLORD AND TENANT—RELATIONSHIP OF LANDLORD AND TENANT, 22 C. 533, P.C. = 22 I.A. 60.

See LEASE—CONSTRUCTION OF LEASE, 15 C. 342, P.C.

See LEASE—ZUR-I-PESHGI, LEASE, 2 C.L.R. 382.

See LIMITATION ACT, 1908, arts. 144, 139, 9 C. 411.

See POSSESSION—ADVERSE POSSESSION, B.L.R. Sup. Vol. 182 = 3 W.R. 73.

In Beerbhum—Land taken for public purposes—Right of Zemindar to compensation money—See BEN. REG. XXIX OF 1814, 14 B. L.R. App. 7.

See RESUMPTION, RIGHT OF—GENERAL, 4 W.R. 77, P.C.

See SALE—SALE IN EXECUTION OF DECREE—PURCHASERS, RIGHT OF, 6 W.R. 169.

**Gift.**

See BUDDHIST LAW—GIFT.

See CUSTOMS—PUNJAB—ALIENATION.

See CUSTOM—PUNJAB—GIFT.

See GRANT.

See HINDU LAW—ALIENATION.

See HINDU LAW—GIFT.

See HINDU LAW—WILL.

See MAHOMEDAN LAW—GIFT.

See MAHOMEDAN LAW—WAKE.

See MAHOMEDAN LAW—WILL.

See MALABAR LAW—GIFT.



**Gift—continued.**

See TRANSFER OF PROPERTY ACT, 1882. SS. 122 to 129.

See WILL.

(1)—*Valid and operative deed of gift.*—A deed of gift, valid and operative between the parties, cannot be avoided, for the reason that, in another suit between different parties, it has been held to be fraudulent as against creditors. It is doubtful whether a donor can avoid his own deed of gift on the ground of his own fraud. *RAMANUGRA NARAIN v. MAHASUNDUR KUNWAR*, 12 B.L.R. 433, P.C.=3 Sar. 277. [R., 33 C. 967=10 C.W.N. 650=4 C.L.J. 22.]

(2)—*Gift—Completion of, by donor taking necessary steps—Subsequent revocation by Will—Validity.*—When a gift is completed by the donor taking all steps in his power to give effect to it, cannot be revoked by him by a subsequent Will. *RAJARAM v. GANESH*, 23 B. 131. [Cons., 64 P.L.R. 1901=45 P.R. 1901; R., 27 B. 31.]

(3)—*Donation to one member of a family—Express exclusion of another—Effect.*—Where a donor in making a donation to a member of a family of priests, expressly and intentionally excluded another member of the family from the benefit of the donation such excluded member cannot sue to recover the whole or a share of the gift merely on the ground of hereditary right. *MATHRA v. KANHYA*, 119 P.R. 1879.

(4)—*Father giving land to sons—Sons dead—Son's wife and children suing father for possession—Entry in revenue register by thugyi—Entry to the effect that father sent sons with letter declaring his wishes—Report to thugyi could not effect the gift—Children wrongly joined as plaintiffs—Duty of Subordinate Court—Pyatbaing, Meaning of—S. 35, Evidence Act.*—The plaintiffs alleged that P.G., their husbands' father, gave his paddy land to his sons and transferred it to their names in the revenue register. On the death of their husbands they and their children brought a declaratory suit against P.G. and prayed for possession of the land. The evidence in the case consisted of an entry made by a *thugyi* or revenue surveyor in the revenue register, the entry being that P.G. sent his sons with a letter declaring his wishes. The plaintiffs did not allege that the gift in question was effected by the report to the *thugyi*; *Held* that what the plaintiffs had to prove was gift made, and that the report to the *thugyi* could not effect the gift; *Held*, also, that the entry could only be proved with the letter that accompanied it, but not otherwise. *Held*, further, that their children were wrongly joined as plaintiffs, as they had no rights to possession of inherited property during the life-time of their mothers. The duty of Divisional Judge is to follow, not criticise, the rulings of the Chief Court, to which he is subordinate. A *pyatbaing*, as its name implies, is the foil cut out of revenue register IX, and given to the person who reports any matter to the *thugyi*.

**Gift—continued.**

When a *thugyi* or revenue surveyor is examined, he may be asked to prove that he made entries in the ordinary course of his duty in revenue register IX, and those entries may be put in evidence under s. 35 of the Evidence Act. *MAUNG PO GAUNG v. MA SHWE BWIN*, 14 Bur. L.R. 30=4 L.B.R. 231.

(5)—*Necessity for delivery of possession under Mahomedan Law—Subject-matter of gift remaining in donor's hands, Effect of—Contract Act, s. 25, Expln. 1—Buddhist Law (Gifts).*—S. 4 (1) of the Upper Burma Civil Courts Regulation (or s. 13 of the Burma Laws Act, 1898) only refers to cases of succession, inheritance, marriage or caste, or any religious usage or institution. And questions relating to gifts, which do not fall under any of those heads, must be governed by s. 25, Contract Act. This has been so held in regard to gifts by and to Buddhists. The effect of Expln. 1 to s. 25, Contract Act, is that a gift actually made is valid, though it may not have been expressed in writing or registered. The Mahomedan Law does not render it impossible for a husband to make a gift to his wife of the house in which they both live (28 A. 147, R.) Actual delivery of possession is not necessary. If the character of the possession changes, the mere retention of the subject-matter of the gift in the hands of the donor would not affect the validity of the gift. Under the Mahomedan Law, the husband takes a fourth of his wife's estate, where there are children. It depends upon the circumstances of each case whether the Mahomedan or the Buddhist Law applies to gifts. *ABDUL GAFUR v. DEYAN SINGH*, U.B. R. 1907, Buddhist Law—Gift 1.

(6)—*Gift by a Native Christian to his three children—Joint tenancy or tenancy-in-common—Indian Succession Act (X of 1865), s. 93—English Law.*—A Native Christian made a gift of property to his three children. Two of them died. *Held* that the surviving brother took the interest of the deceased by the principle of survivorship. *Held* that the gift was joint, and the donees took as joint tenants. The rule of English Law is to presume that the donees are joint tenants. This principle is adopted by the Indian Legislature in the illustration to s. 93 of the Succession Act. Though the illustration deals with the case of a legacy, the same principle is applicable to wills as to gifts, unless there are special rules justifying a deviation. *ARAKAL JOSEPH GABRIEL v. DOMINGO INAS*, 7 M.L.T. 379=6 Ind. Cas. 7=20 M.L.J. 377=M.W.N. 1910, 74=34 M. 80. (23 B. 80, R.; 28 A. 33, D.)

(7)—*Succession—Agreement that land would go to a shrine on the death of persons who were parties to the agreement—Gift in favour of shrine by one of the parties—Suit to question the gift by another party.*—When the parties to the present suits and others had agreed in a previous case that, on the death of persons who were parties to the agreement, the land in dispute would go to a shrine. *Held* that a gift



**Gift—continued.**

of her share by one of the parties, a female, in favour of one of the managers of the shrine, was not liable to be questioned by a person who was also a party to the agreement and claimed a right to the land as an heir of the donor. **INAYAT ALI SHAH v. WILAYAT SHAH**, 46 P.L.R. 1910=8 Ind. Cas. 231.

(8)—*Gift—Registered deed of gift—Possession, Delivery of, under registered deed of gift—Transfer of Property Act, s. 123.*—The plaintiff claimed possession of certain lands under a registered deed of gift executed by the defendant. One of the pleas taken by the defendant was that, the gift not having been followed immediately by possession, no title passed to the plaintiff. *Held* that, under the provisions of s. 123 of the Transfer of Property Act, delivery of possession was not necessary to pass the title under the registered deed of gift which was signed by the donor and properly attested. **NANDU v. CHAND DATT**, 5 O.C. 89.

(9)—*Oral gift in favour of daughter of part of taluka by talukdar—Oral gift of land before Transfer of Property Act—Presumption as to nature of estate taken by female under oral gift—Act I of 1869, ss. 13, cls. 1 and 22—Hindu Law.*—The plaintiff claimed possession of two villages forming part of a taluka. Her case was that in 1880, S.B. the then talukdar made an oral gift of the two villages to his daughter J by way of shankalap and placed her in possession thereof; that J remained in possession till her death in January 1899 when S, son of M brother of S.B. managed to induce the revenue authorities to place him in possession instead of recognising the plaintiff who was J's daughter as entitled to succeed her mother; hence this suit against the defendant who was his widow. Upon the death of S.B. in 1885 a dispute arose between his widow and his brother N, and a suit between them was settled upon terms stated in a petition of June 1st, 1887 of which cl. (2) ran thus:—"The two villages were given by S. B. to J at her marriage by way of shankalap. They have been in her possession up to the present time free from all demands and in accordance with the gift of the deceased S.B. We the parties by common consent have given the two villages to her rent free generation after generation without the power to mortgage, sell, or give away the same, and the said daughter shall keep possession thereof and receive the profits. We shall have nothing to do with them but they shall remain part of the taluka. N died in 1882 and was succeeded by his son S who died in June 1889, and was succeeded by his widow, the defendant. The defendant's case was that the villages were not given to J by way of shankalap but were allotted to her by way of maintenance, that under Act I of 1869 a gift could not be made to J of part of the taluka except by a registered deed. It was proved that J was no party to compromise, nor had she any knowledge of it and that her possession of villages had lasted for over thirteen years. Beyond the fact that the villages were given

**Gift—continued.**

in shankalap there was very little evidence as to the terms of the gift. *Held*, that upon the question whether, if the terms of a gift to a female made before the Transfer of Property Act are not proved, the gift should be presumed to be of a heritable estate or only of a life estate in the lands given, there is no presumption either way. *Held* also upon the authority of Select Case No. 222 that cl. (1) of s. 13 of Act I of 1869 referred to a person or persons who would in fact have succeeded under the Act or under the personal law if the Act had not been passed and that J was a person who would under the Hindu Law have succeeded to an interest in the state of her father and therefore could take under an oral gift by him. *Held* also, that S.B. gave the villages to J in shankalap; that the donee took a heritable estate in the villages and that her rights were not affected by the compromise of 1887 to which she was not a party; that such gift was permissible under s. 13 of Act I of 1869; and that if it was not permissible the defect in J's title was cured by her exclusive possession of the villages for over thirteen years. **ITRAJ KUAR v. BAOHA MAHADEO KUAR**, 5 O.C. 343. [R., 9 O.C. 113.]

(10)—*Gift to two or more persons—Interest of each not specified—Nature of gift—Construction—Joint tenancy or tenancy-in-common.*—Where a Hindu widow, by a registered deed, gave certain property to her four daughters, without specifying the share upon which the donees were to hold severally, *held* that, as the donees were incapable of forming a joint Hindu family and as there was no declaration in the deed of gift to the contrary, the donees took as tenants-in-common and not as joint tenants. **MUNNI v. UMRAO SINGH**, 39 P.R. 1909=59 P.L.R. 1909=55 P.W.R. 1909=1 Ind. Cas. 720. (33 C. 670, P.C.=32 I.A. 37, 28 M. 363, F.; 11 C. 1, P.C., 27 P.R. 1891, 28 A. 38, D.; 25 M. 673, Expl.)

(11)—*Disposal of property—Description of property.*—The Transfer of Property Act recognizes the gift of a man's entire estate, and does not in terms require that the property shall be described in the instrument of gift. Even with regard to mortgages, it has been held that general words will suffice without any specification of the boundaries or exact locality of the land. **SUBBA ROW v. SEETHARAMAYYA**, 11 M.L.J. 27. (12 A. 175, R.)

(12)—*Gift deed by father to daughter—Clauses excluding all claims of donor and heirs—Construction.*—Words used in deeds of gift, which have the effect of excluding all claims of the donor and his heirs have always been held to confer on the donee a heritable estate with power of alienation. So, where a deed of gift of property executed by a Hindu to his daughter with the object of rewarding the donee for her dutiful behaviour to the donor, contained these words, *viz.*, "If, after my death, my heirs bring any sort of claim in respect of the property given in gift, it shall be false and invalid. I and my representatives have ceased to have any



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claim to the property," the deed was held to confer on the daughter, by implication, an absolute heritable and alienable estate. **THAKUR SINGH v. NOKHE SINGH**, 23 A. 309 = A.W.N. 1901, 84. (10 A. 425, 9 C. 830, R.) [R., 9 O.C. 119, D.; 30 C. 20.]

(13)—*Imperfect gift—Court's power to construe it as trust—Trust—Creation of trust—Donor's intention and acts—Indian Trusts Act (II of 1882), ss. 5, 6.*—Where there has been a clear intention to make a gift, but on account of some omission on the donor's part, that intention has failed, the Courts will not erect a trust on the imperfect gift. Where the intention is to make a gift, and the intention has failed for want of transfer, or any other cause, the Courts will not convert what was meant to be an out and out gift into a trust. The intention, in doubtful cases, may be shown in favour of the contention that although words of present gift were used, a trust was meant, by the donor or settlor having done everything in his power to divest himself of the beneficial ownership, more especially in the way of interest. Where, however, the Courts can find from the facts of any individual case, that although the words used are words of present gift there was an unmistakable intention of the donor to constitute himself a trustee, and create a trust, effect may be given to the true intention. The question whether the donor intended to make an out and out gift or only to create a trust, is one of fact in each case. In the case of a gift the donor must intend to part entirely with the property at the moment of completing the gift. If he expresses that intention, but fails to carry it out, there will be an imperfect gift which the Court will not convert into a trust. But where the donor or the grantor uses words of present gift, but has no intention of parting with the property, but only with the beneficial interest, it might be right to look to the real meaning rather than to the verbal form, and, if that real meaning can be positively ascertained, give effect to it. It is clearly necessary to the creation of a trust that the author of the trust should express that intention in some words which can have no doubt that he did mean to accept the position of a trustee. Conduct which might be deemed conclusive in England is very likely to be a treacherous and misleading guide in India where the conditions of life are often widely different from those which prevail in the West. Reading ss. 5 and 6 of the Indian Trusts Act, 1882, together, the legislature seems to have meant that a specific oral declaration of trust on points (a) to (d) would be enough to create a trust without transfer where the author was himself the trustee. **MANCHERSHAW v. ARDESHIR**, 10 Bom.L.R. 1209; *Reversed on appeal*, 12 Bom.L.R. 53.

(14)—*Nair, Gift of lands by, to his children—Intention that donees should enjoy them as joint property—Nature of estate taken.*—Where a gift of property is made to persons who are members of one tarwad with the intention that the property should be impartible descending to the

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heirs in the female line as tarwad property, each of the donees takes a distinct share in the property. In execution of a decree against one of the donees, his share in such property may be sold. Whatever may be the intention of the donor, he cannot alter the fact that property acquired by gift is not, in the hands of the original donees, ancestral property to which the incident of impartibility attaches. **PARVATHI AMMAH v. KORAN NUMBIAR**, 1 M.L.J. 395. (7 M. 315, F.)

(15)—*Gift to stranger by blind old woman—Liability of donee to show that donor knew of nature of instrument executed.*—Where an old woman nearly blind without relatives or friends deprived herself of all her property by a gift to a stranger without legally securing anything from him in return it is only reasonable that the donee should show that the donor really knew the nature of the instrument executed and intended to make a gift. **MT. CHIMNABAI v. PAIKU**, 5 C.P.L.R. 44.

(16)—*Gift to a class—Hindu law—Clause in will, restraining beneficiaries from alienating property—Effect.*—Where a gift is made to a class of persons some of whom are incapable of taking, the disposition fails as to all. This rule applies even though all the members of the class are born before the gift takes effect; it was antecedently possible that they might not have been so born and the fact that the gift might have included objects too remote is fatal to its validity irrespective of the event. A gift "to such of my grandsons by my said daughter as shall be alive at the death of my daughter in equal shares for and during their respective lives if more than one or to such grandson alone for life if there be only one" or a gift "after the death of my daughter to her sons in equal shares" is invalid. A provision in a will whereby the beneficiary under the will are restrained from alienating the property given to them by the will is not valid. **ROJOMOYEE DASSEE v. TROYLUKHO MOHINEE DASSEE**, 29 C. 260 = 6 C.W.N. 267.

(17)—*Gift—Conditions subsequent, Effect of.*—A gift which is complete and absolute at the time it was made, cannot be modified by conditions subsequently added. A gift to which an immoral condition is attached, remains a good gift, while the condition is void. **RAM SARUP v. BELA**, 6 A. 313, P.C. = 11 I.A. 44 = 4 Sar. 493.

(18)—*Transfer of Property Act (IV of 1882), s. 127—Gift to minor burdened with obligation—Acceptance.*—Where property is given by the donor and accepted by the donee, the fact that the gift is burdened with an obligation to pay some debts and that the donee died a minor, does not render the gift incomplete. S. 127 of the Transfer of Property Act only gives a minor the right to repudiate the gift on attaining majority. **SUBRAMANIA AYYAR v. SITHA LAKSHMI**, 20 M. 147.

(19)—*Gift—Restriction on enjoyment—Sale of interest of donee by judgment-creditor.*—Notwithstanding a restriction in a deed of gift that



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the estate should be impartible, and be held by the donees as joint family estate descendible to their heirs in the female line, the interest of a donee in the land is liable to be attached and sold in execution of a decree against him. **NARAYANAN v. KANNAN**, 7 M. 315. *Not F.*, 16 M. 201; *R.*, 1 M.L.J. 395, 1 M.L.J. 739.]

(20)—*Rule of construction—Intention to be gathered from entire instrument—Transfer of Property Act—Gift or sale without delivery or possession when operative—Principle of Hindu Law.*—The rule as to the construction of the language of a gift, independently of the Transfer of Property Act, 1882, (which may or may not have been expressed so as to lay down, in favour of absolute gifts, a rule more positive) is that indefinite words of gift are calculated to convey all the interest of the grantor, it being also necessary to read the whole of an instrument, in order to gather the intention. Where a gift "making over certain taluks to the donee" was preceded by "in order that you may perform those religious ceremonies, celebrate the festivals satisfactorily, and may provide for your own support, by having the property under your authority and control," *held*, that the words of the gift were limited by its purpose, and that the donor's intention, as gathered from the whole instrument, was that the donee should take the property for life only. Where a donee, or vendee, is, under the terms of the gift or sale entitled to possession, there is no reason why such gift or sale, though not accompanied by possession, whether of moveable or immoveable property, (where the gift or sale, is not of such a nature as would make the giving effect to it to be contrary to public policy) should not operate to give the donee, or vendee, a right to obtain possession. This is consistent with Hindu Law. [Earlier authorities discussed. The head note in 12 M.L.A. 306 pointed out to be incorrect.] **KALIDAS MULLICK v. KANHAYA LALL PUNDIT**, 11 C. 121=11 I.A. 218=4 Sar. 578. [*F.*, 17 B. 486, 18 B. 332, 11 C.P.L.R. 11, 64 P.L.R. 1901=45 P.R. 1901, 6 Bom. L.R. 687=29 B. 42, 45 P.R. 1906=120 P.L.R. 1906; *Expl.*, 5 C.P.L.R. 63, 27 B. 31=4 Bom. L.R. 754; *Appl.*, 2 Bom. L.R. 69; *Cited*, 21 P.L.R. 1901, 125 P.L.R. 1903=75 P.R. 1903; *D.*, 13 B. 156, 23 B. 682, 30 C. 265; *R.*, 9 B. 324, 15 C. 684, P.C., 12 A. 523, 20 C. 464, U.B.R. 1897—1901, Vol. II, 573, 3 O.C. 215, 27 C. 242, 26 B. 449=3 Bom. L.R. 857, 111 P.L.R. 1903=48 P.R. 1903, F.B., 7 C.L.J. 387.]

(21)—*Registration of deed of gift after donor's death—Validity—T.P. Act, ss 122, 123.*—A gift of immoveable property is not rendered invalid merely because registration of the document embodying the gift was affected after the death of the donor. **NAND KISHORE LAL v. SURAJ PRASAD**, 20 A. 392=A.W.N. 1898, 88. (11 A. 319, *R.*) [*F.*, 32 B. 441=10 Bom. L.R. 536; *Appr.*, 33 C. 584=10 C.W.N. 717=4 C.L.J. 340.]

(22)—*Sale before registration—Compulsory registration—Effect.*—A deed of gift is not complete until it has been registered as required

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by s. 123, Transfer of Property Act, and if, after execution but before registration of the deed, a sale of the same property is completed, the latter will prevail over the gift. When a donor after executing a deed of gift changes his mind and refuses to get the document registered, he cannot be compelled to register it under the provisions of the Registration Act, as a gift is a voluntary transfer and remains a *nudum pactum*, until the donor has done everything to render it legally complete. **RAMAMIRTHAYAN v. GOPALA AYYAN**, 19 M. 433=6 M.L.J. 207. [*Not F.*, 3 O.C. 231; *R.*, 13 M.L.J. 303; *D.*, 13 M.L.J. 364.]

(23)—*Gift of property intended to be made by father to daughter—Gift not completed—Transfer whether valid as declaration of trust—Nature of evidence required to establish trust.*—Plaintiff, the daughter of one K, sued the defendants, his grandsons, for the delivery up of a Government promissory note on the ground that, although purchased by her father in his name, it had been set apart by him as a provision for her. Plaintiff stated that although there was no complete transfer to her of the legal ownership in the note, the father having constituted himself a trustee of the note for the benefit of the plaintiff, the Court should enforce the trust, as such, although a voluntary one. *Held* that the doctrine, obtaining in the Courts of equity in England, of the transfer of ownership by acknowledgment of a trust, requires to be cautiously applied in the Courts in India, especially when it is sought to be established by oral evidence. The evidence in the case was of an unsatisfactory nature owing to discrepancies in it and to its uncertain character. The evidence left no doubt as to the intention of the father to give the note to the daughter, but was not of such a character as to justify the conclusion that the father had constituted himself a trustee for the daughter before he died. The conclusion arrived at by the Court on the evidence was that the father failed to carry out his intention into effect by some instruments declaring distinctly the manner in which the note was to be appropriated to the benefit of his daughter, the plaintiff, whose suit was, therefore, dismissed by the Courts but without costs. **HIRBAI v. JAN MAHOMED KHALAKDINA**, 7 B. 229. [*R.*, 17 B. 486, 10 Bom. L.R. 1209.]

(24)—*Property claimed as a gift—Gift or sale—Purdanashin.*—Where the evidence shows that a purdanashin intended by a deed to pass the property for some purpose, and the suggestion of gift is excluded, the deed must operate, if at all, according to what it purports to be, as a sale. **HAKIM MUHAMMAD IKRAM-UD-DIN v. NAJIBAN**, 2 C.W.N. 548, P.C.=20 A. 447=25 I.A. 137=7 Sar. 353. [*D.*, 2 A.L.J. 436.]

(25)—*Contract—Construction—Revocability.*—Where A and B entered into an agreement by which the former delivered over certain lands to the latter in consideration of his promise to perform certain services, *held*, in a



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suit brought by A's son against B for restoration of the land on the ground that B had failed to perform the services, that the question was whether there was in this case the offer of one performance for the other, and whether the continuous performance of the services on the one side was the pre-supposition of the continuous existence of the gift on the other, or whether there was a mere gift with a charge upon it, the primary intention being to give, that this was a question of construction, and that, in the present case taking the agreement and the counterpart together, there was clearly a covenant for the hereditary enjoyment of the land, to be exchanged for an hereditary performance of the services. **KACHUR SUBRAYA v. BENGAL SANTAPPAIYA. 7 M.H.C. 167.**

(26)—*Suit by the agent's representative for enforcing gift against widow's successor—Burden of Proof*—See **WAJID KHAN v. EWAZ ALI KHAN, 18 C. 545=18 I.A. 144, P.C.=6 Sar. 46.**

(27)—*Ss. 16 and 17, Act IX of 1872—(Contract Act) deed of gift—Absence of proof of confidence—Failure to prove inequitable advantage.*—Where after the donee had obtained possession, the donor sued to have the gift set aside but failed to prove the alleged inequitable advantage taken over him by the donee, or any confidence reposed by him in the donee, it was held, that there was nothing in the case to bring it within s. 16 Act IX of 1872, and that the gift could not be set aside as prayed for by the donor; and the setting aside of a gift, as being inequitable between the parties, would depend on the circumstances existing at the time of the gift and not on subsequent events. **GANGA BAKSH v. JAGAT BAHADUR SINGH, 23 C. 15 P.C.=22 I.A. 153=5 Sar. 643. [F., 8 Bom. L.R. 252; R., 22 B. 176, 7 Bom. L.R. 772.]**

(28)—*Transfer of property by gift—Essentials for validity.*—A voluntary transfer of property by gift is valid as against creditors, if it is made *bona fide*, and not with the intention of defrauding creditors. **GNANABHAI v. C. SRINIVASA PILLAI, 4 M.H.C. 84. [F., 5 M.H.C. 368; Appr., 3 M.L.J. 174; R., 10 B. 395, 16 M. 397, U.B.R. 1892—1896, Vol. II, 315, 17 C.P.L.R. 24.]**

(29)—*Deed of gift, setting aside—Absence of power of revocation—Transfer of Property Act, s. 126—Grounds on which voluntary deeds could be set aside—Burden of proof.*—The executant of a voluntary deed of gift was an old illiterate woman of 60 years. In full possession of all her senses and without the exercise of any fraud, misrepresentation or undue influence she voluntarily conveyed all her property to her nephew. When she executed the deed of gift, she fully understood its contents and the effect it would have of divesting her of her property. It appeared that the gift was her free determined act and that she intended the gift to be irrevocable. Sometime after the execution she sued to set aside the

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deed: *Held*, that the deed should not be set aside and was binding on the executant. In the case of a voluntary gift executed by an old illiterate woman, which leaves her entirely destitute, it lies on the donee to prove that the executant thoroughly understood the contents of the document she executed, that all the material clauses were explained to her, that she appreciated the effect the execution of the deed would have on her with respect to her property, and that the deed carried out her intentions at the time. It is then open to the other side to show that some substantial reason existed why the deed should be set aside. The absence of the power of revocation in a deed of gift is but one of the circumstances to be taken into consideration, when the Court has to consider whether a deed of gift shall stand or be set aside. **RAJARAM RAJARAM v. KHANDU BALU, 14 Bom. L.R. 340.**

(30)—*Gift to female, presumption as to the extent of.*—In the case of gifts as in the case of wills, the well established rule must be followed, *viz.*, that in the absence of express words showing such an intention, a gift to a woman does not confer an absolute estate of inheritance which she is enabled to alienate. **ANNAJI DATTATRAYA v. CHANDRABAI, 17 B. 503. (5 C. 684, R.) [Expl., 32 C. 1051=9 C. W.N. 784=2 C.L.J. 50; R., 19 B. 36, 1 Bom. L.R. 303, 3 Bom. L.R. 790, 6 Bom. L.R. 625, 6 Bom. L.R. 975=29 B. 306, 1 S.L.R. 211, 9 O.C. 119; D., 22 B. 984.]**

Decision as to validity of gift in enquiry under Land Acquisition Act—Subsequent suit impeaching same gift. *res judicata*—See **ACT X OF 1870, s. 39, 20 M. 269.**

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See UNDUE INFLUENCE, 15 C. 684=15 I.A. 81, P.C.

Rule against perpetuities—Trust for masses—See WILL—CONSTRUCTION, 15 M. 424.

Of income of immoveable property—Its effect—See WILL—CONSTRUCTION, 2 A.L.J. 568.

To children—See WILL—CONSTRUCTION, 1 Ind. Jur., O.S., 74=1 M.H.C. 17.

Of share of rents and profits—Gift of corpus of estate—See WILL—CONSTRUCTION, 8 C. 788=11 C.L.R. 370.

Legacy to minor—Absolute—Discretion of executor—See WILL—CONSTRUCTION, 1 Ind. Jur. N.S. 16=Bourke, O.C. 281.

See WILL—CONSTRUCTION, 15 C. 282, 6 A. 583=A.W.N. 1884, 194, 2 Hyde 65.

**Gift to a Class.**

See GIFT.

(1)—*Gift to class, not all capable of taking—General rule—Semble.*—As a general rule, where there is gift to a class, some of whom are or may be incapacitated from taking, because not born at the date of gift or the death of the testator, as the case may be, and where there is no other objection to the gift, it should ensure for the benefit of those members of the class who are capable of taking. RAM LAL SETT v. KANAI LAL SETT, 12 C. 663. (2 C. 262, 4 C. 455, R.)

See HINDU LAW—WILL, 16 B. 492.

To a class in a will—Postponement of period of distribution—After born child—See WILL—CONSTRUCTION, 4 C. 670.

**Giving Time.**

Principal and surety—Giving time—Advance interest—Discharge of surety—See PRINCIPAL AND SURETY—DISCHARGE OF SURETY, 4 C. 132=2 C.L.R. 455.

To principal debtor—Subsequent interest—See SURETY—DISCHARGE OF SURETY, 4 C. 331, P.C.

**Glasgow.**

Chief Magistrate, Glasgow—Power to administer oaths—See OATH, 22 C. 491.

Declaration as to execution of power of attorney, before the Chief Magistrate, Glasgow—Certificate by Notary Public—See PRACTICE AND PROCEDURE, 22 C. 491.

**Godown.**

Principle of assessing mesne profits in respect of a—See EXECUTION OF DECREE—GENERAL, 10 Ind. Cas. 312.

**Golden Temple, Amritsar.**

(1)—(*Darbar Sahib*)—Its 1859 *Dastur-ul-Amal*—Pujari disobeying its provisions—Failing to pay half of the Ardas to the Temple Treasury—Misconduct—Right of Manager to prevent him from entering the temple—Interference of Civil Court—Court fee Rs. 10.—Held, that (1) The *Dastur-ul-Amal* prepared in 1859 for the management of the Golden Temple, Amritsar, rightly sets out the arrangements and practice and custom relating to the temple and its officials: (2) If a Pujari does not obey its provisions or does not follow the custom of the Institution, as for instance by withholding half of the Ardas (subscription) realized by him which he is bound to pay into the Temple Treasury, he is guilty of decided misconduct, which justified the Managing Committee of the Institution in taking necessary steps to prevent him from entering the Temple for the purpose of discharging his duty as Pujari, and that such a matter is within the cognizance of a Civil Court. (2) A person setting up a special custom must prove it. SARDA MAN SINGH v. GANGA SINGH, 100 P.W.R. 1909=4 Ind. Cas. 894.



**Gomasta.**

See GUMASTAH.

**Good Faith.**

See BONA FIDES.

See NOTICE.

See ACT XVIII OF 1850, 1 M. 89, F.B.

See ACT XVIII OF 1850, s. 1, 1 A. 290.

Proof of —Of a transaction where one party stands in fiduciary relationship to another—All accounts forming basis of contract need not be proved—See CIV. PRO. CODE, 1908, s. 2, 12 C.W.N. 1102=36 C. 493=2 Ind. Cas. 553.

Voluntary alienation by debtor — Fraud against creditor—See CONTRACT ACT, 1872, s. 25, 2 A. 891.

See EVIDENCE ACT, 1872, s. 111, 26 A. 130, P.C.=31 I.A. 46=8 C.W.N. 569.

See INSTALMENT DECREE, 24 A. 85=A.W.N. 1901, 168.

See TRANSFER OF PROPERTY ACT, 1882, s. 53, 13 C.P.L.R. 180, 20 M. 465=7 M.L.J. 246.

Trust—Purchase of trust property—Notice—See TRUSTS ACT, 1882, s. 3, 2 O.C. 319.

**Goods.**

(1)—Government currency note not "goods."—A Government currency note is not "goods" within the meaning of the Contract Act. In the matter of CAPTAIN MICHELL, 1 C.L.R. 339. [R., 5 Ind. Cas. 202.]

(2)—"Goods," evidence as to special meaning of.—Evidence of a special meaning of the word "goods" rejected. JADEB RAI v. BHUBOTARAN NUNDY, 17 C. 173.

Sale or mortgage of goods not in existence—Property when passes — Goods consigned to vendee — Attachment by consignor's decree-holder in course of transit—Charge—Lien—See APPROPRIATION OF PAYMENTS, 9 Ind. Cas. 255=9 M.L.T. 276=21 M.L.J. 413.

Claim for—In possession of third parties—See DECREE—DECREE, FORM OF, 22 M. 478.

Sale of—Loss by misdirection of, by railway — Negligence of agent—Liability—See PRINCIPAL AND AGENT—GENERAL, 7 A.L.J. 732=7 Ind. Cas. 287.

Sale of—Stipulations as to time of delivery, whether of the essence of contract—See SALE—GENERAL, 13 O.C. 143=6 Ind. Cas. 1011.

**Goods Delivered.**

(1)—Goods delivered "Jangad" to another—Effect of.—The term *jangad* has several meanings. When goods are delivered "jangad" it is a question of fact in each case as to the terms upon which they are delivered. When, therefore, as found here, they are delivered upon the condition that, if not returned within the stipulated time, whether fixed definitely or

**Goods Delivered—concluded.**

ascertained by the course of dealing between the parties, they are to be considered as sold to the person to whom they are delivered at the price fixed upon, then the person delivering the goods cannot, after the expiration of such fixed period, recover the goods back, but his right is to sue for their price. ISHWARDAS TRIBHOVANDAS v. KALIDAS BHIDAS, 20 B. 779.

**Goods Sold and Delivered.**

(1)—Sale of goods, agreement for—Ordinary contract for sale of goods and contract to pay existing debt in specific articles.—In the absence of any agreement as to delivery, goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement for sale, or, if not then in existence, at the place at which they are to be produced. Distinction between an ordinary contract for sale of goods and a contract to pay an existing debt in specific articles pointed out. DADABHAI NARSI v. SALLEMAN DASSU, 5 B.H.C. A.C. 126.

**Goods Yard.**

Goods yard of a railway station is a public place—See ACT XI OF 1890, s. 3 (4), 4 B.L.R. 290.

**Good Will.**

(1)—Sale of good-will—Seller not entitled to solicit old customers—Newspaper—Sale of proprietary rights.—Where a person sells his good-will in a business, the vendor after sale is not entitled to solicit his old customers to the prejudice of the purchaser. Hence, where the proprietor of a newspaper sells all his rights in it to another he is not entitled to solicit the old customers of the paper when it was under his control. DAMODAR v. KASHINATH, 9 Bom. L.R. 312.

(2)—Good will, in a partnership—Rights on dissolution.—Where the partners at the time of dissolving the partnership make no stipulation about the good will, every one of the partners has a right to carry on the trade in the identical name under which the firm had traded prior to the dissolution, because the good will of the business is an asset of the partnership, to which one member of the firm has no higher right than the other. MANCHERJI v. FRAMJI, 2 Bom. L.R. 1026.

(3)—In a partnership, Survival of, to a surviving member.—In the absence of agreement, the good will of a business does not survive. HASANALI v. ESMAILJI, 9 Bom. L.R. 606.

Tenant assigning—Etc. holding over after notice by landlord to lessee and to assignee for possession on expiry of lease or for payment for rent—Liability of assignee—See LANDLORD AND TENANT—HOLDING OVER, 26 C. 338.

Whether—of a partnership forms assets of the partnership—See LIMITATION ACT, 1908, ss. 6, 8, 17, art. 106, 9 C.W.N. 537.



**Goonjaish Land.**

(1)—*Construction.*—The term "goonjaish lands" construed. **SHAIK ASSANOOLAH v. SUFFER ALI**, 21 W.R. 135.

**Gorabandi Tenure.**

(1)—*Burden of proof — Gorabundi tenure—Transferability.*—The purchaser of the tenure from the former holder, who sues for possession must prove that such lands are transferable. *Per Curiam.*—There are no decided cases, nor is there any evidence to show either that gorabundi rights are more extensive than rights of occupancy, or, if more extensive, that they are extensive in this particular direction, that is to say, that they are transferable. **MOHUNT CHUTTERBHUI BHARTI v. JANKI PRASAD SINGH**, 4 C.L.R. 298.

(2)—*Act X of 1859, Object and effect of.*—The object of Act X of 1859 was to re-enact provisions relative to the rights of ryots, and not to destroy those rights, and the enactment of that law did not deprive any party of his rights in a gorabundi tenure existing before such enactment, and recognized in a long series of decisions. **RAJAH LEELANUND SINGH BAHADUR v. NIRPUT MAHTOON**, 17 W.R. 306.

**Gordon Settlement.**

See BOM. ACT III OF 1874, 4 C.W.N. 517, P.C.=24 B. 556=27 I.A. 86=2 Bom L.R. 548.

See BOM. ACT III OF 1874, ss. 5, 10, 15, 20 B. 423, F.B.

With vatandars in Southern Mahratta Country nature of—Service vatan land—Alienability—Vatandars Act III of 1874—See SERVICE TENURE, 15 B. 13.

See SERVICE TENURE, 15 B. 22.

See VATANDARS, 2 Bom. L.R. 548=24 B. 556.

**Gosavi Guru.**

See HINDU LAW—INHERITANCE, 11 B. 514.

**Gossains.**

See GARBHARI GOSAVI.

(1)—*Maintenance and champerty—Agreement to carry on litigation not per se opposed to public policy—Extortionate and unconscionable agreement—Question between assignor and assignee—Covenant prohibiting assignor to compromise, valid—Suspicion, Court not to proceed upon—Benami, Presumption in favour of—Dasnami Gossains—Custom of inheritance—Chela—Initiation—Biraja Home—Age of discretion—Auspicious day—Performance of Biraja Home essential to claim by inheritance the estate of guru—Rule of succession by nomination or election—Custom of lapse, how to be proved.*—The English Law of maintenance and champerty has not been introduced into India. A fair agreement to supply funds to carry on a suit, in consideration of having a share in the property if recovered, ought not to be regarded per se as opposed to public policy; but when

**Gossains—continued.**

the agreement is found to be extortionate and unconscionable, so as to be inequitable, or to be made not with the *bona fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation or of injuring or oppressing others by encouraging unrighteous suits so as to be contrary to public policy, effect ought not to be given to it. (1 M.I.A. 170, 3 W.R. 33, P.C., 1 I.A. 241, 22 W.R. 148, 1 B.L.R. 509, 4 I.A. 23=2 C. 233, 20 I.A. 112=20 C. 843, 20 I.A. 127=15 A. 352, F.) But the question whether the transaction is an unfair and unconscionable bargain for an inadequate price, is entirely a question between the assignor and assignee. (35 I.A. 48=35 C. 420, F.) Where, in such an agreement, there was a covenant to the effect that it will not be competent to the assignor to enter into any compromise with the defendant, in respect of the subject-matter of any suit instituted for the recovery of the properties, and that, if he entered into any such compromise, the transferee would be entitled to prosecute the suit; *Held*, that a covenant of this nature for the protection of the purchaser is valid in law (32 I.A. 113, F.) The Court must not proceed upon suspicion only, and must not make any presumption against apparent ownership (11 M. I.A. 28, 11 M.I.A. 551, R.) In the case of *Dasnami Gossains Sanyasis*, the custom is this: When a person intend to enter the sect, some ordinary ceremonies are performed, such as the shaving of the head, bathing of the body, wearing of new clothes and taking of a new name. He then becomes a *Gossain* in a state of probation. After he has remained so for a year or two and made himself familiar with the usages of the order, the ceremony of *Biraja Home* is celebrated by whispering the *Mulmantra* into his ears, and it is only after the performance of *Biraja Home* that he attains the status of a perfect and completed *Chela*. During the period of probation it is open to the *chela* to renounce the life of the monastery and to return to his family, but, after the performance of the *Biraja Home*, reversion to secular life is an impossibility. The *Biraja Home* ceremony is not performed till the probationer attains the age of discretion, so as to be able to realise for himself the full signification of the final act of renunciation of the world. (7 C.W.N. 145, R.) It is unlikely that the *Biraja Home* ceremony should be reserved for performance on only one day in the year. It is more likely that it should be allowed to be performed on specially auspicious days. The performance of *Biraja Home* ceremony is essential to entitle a *chela* to claim by inheritance the estate of his *guru*: a mere nomination by the *guru*: is not sufficient. (7 C.W.N. 145, 10 M. 375, 13 M. 524, R.) The rule of succession by nomination by the *guru* or by election by the *mohunts* of the order, is not of universal application. There is no fixed rule which regulates the relation between the superior and subordinate *Maths*, for even if a *Math* is subordinate to another, it must be governed by it



**Gossains concluded.**

own rules of management. (8 C.L.J. 499, *F.*; 20 W.R. 217, 10 M. 375, *R.*) In order to establish the custom of lapse, it is necessary to prove not merely that, in some instances, the property had passed to the spiritual head of the monastery, but also that this took place in the presence of a *chela* who would otherwise, be competent to take by inheritance. **GOSSAIN RAMDHAN PURI RAJ KUMAR THAKUR v. GOSSAIN DALMIR PURI**, 2 Ind. Cas. 385=14 C.W.N. 191.

(2)—*No family system among gossains.*—No family system among gosains, among whom the family system does not exist. **VITOBA v. LAXMANGIR**, 6 C.P.L.R. 19. [*R.*, 13 C.P.L.R. 81.]

Office of Mahant—Marriage—Forfeiture—Evidence—Burden of proof—See **HINDU LAW—INHERITANCE**, 5 B. 682.

Posthumous *chela*—Appointment by widow of Gossain—Inheritance—See **HINDU LAW—INHERITANCE**, 3 A.L.J. 717=A.W.N. 1906, 289=29 A. 109.

Succession not barred to one in an immature stage of asceticism—See **HINDU LAW—INHERITANCE**, 93 P.R. 1898.

See **HINDU LAW—INHERITANCE**, 2 B. 140.

**Government.**

See **ACT OF STATE**.

(1)—*Suit against Government for breach of contract of service—Public servant and Government—Hiring, Period of.*—A suit lies against Government to make it answerable for the breach of the terms of a contract of service, as well as for the breach of the terms of any other contract it may enter into. Where there is no period fixed for the service of a Government servant, but there is a stipulation that the employee should give 6 months' notice of his intention to leave the service of the Government, *held* that the period of service contemplated by the parties was indefinite, that it may be put an end to by the Government at its pleasure, and by the employee on giving 6 months' notice but the Government will not be allowed in a Court of equity or in a Court of law to exercise that power capriciously to the damage of the servant. An indefinite hiring in India does not mean a hiring for a year. The mere payment of wages monthly is not enough to show that the hiring is a monthly hiring. **P. F. HUGHES v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL**, 7 B.L.R. 688. [*R.*, 6 Bom. L.R. 131.]

(2)—*Temporary settlement by Government—Suit for land—Government, whether necessary party.*—In a suit for land brought by a person claiming to be the owner against a person who had obtained a temporary settlement from Government, the Government ought to be a party to the suit. **MAHOMED ISRAILE v. WISE**, 13 B.L.R. 118, *F.B.*=21 W.R. 327. [*F.*, 22 W.R. 52, 5 C.L.R. 154; *Cons. and Expl.*, 2 C.L.R. 467; *R.*, 21 W.R. 395, 21 B. 229, 5 C.L.J. 583=12 C.W.N. 193=34 C. 753.]

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(3)—*Act IX of 1847, s. 9—Scope.*—The words of s. 9 of Act IX of 1847 are limited to forbidding a suit wherein the plaintiff seeks to make Government, or any of its officers responsible in damages, on account of anything done in good faith in the exercise of the powers conferred by the Act; and do not necessarily extend to forbidding a suit which is brought to recover property, which either the Government or its offices might be instrumental in keeping from the rightful owner. **THE COLLECTOR OF MOORSBEDABAD v. ROY DHUNPUT SINGH BAHADOOR**, 15 B.L.R. 49=23 W.R. 38. [*F.*, 4 C. 103, 11 C. 784; *Appr.*, 14 C. 67.]

(4)—*Limitation Act—Government.*—The Government is not entitled to any exemption from the provisions of the Limitation Act relating to applications. **APPAYA v. THE COLLECTOR OF VIZAGAPATAM**, 4 M. 135. [*R.*, 25 M. 457.]

(5)—*Suit for recovery of property of Government—Limitation.*—Possession of a defendant for a period of 12 years, though it would be sufficient to bar a claim by any other party, would not exclude a claim by the Crown to recover what could be shown to be Government property. **SECRETARY OF STATE FOR INDIA IN COUNCIL v. DURBIJOY SINGH**, 19 C. 312, P.C.=19 I.A. 69=6 Sar. 113.

(6)—*Sovereign powers of Government—Government, Liability of, for its acts—Right of suit of subjects.*—Government is not civilly liable for its acts in exercise of sovereign powers. The subject has no right of suit in such cases. [*F.*, 3 A. 829; *Diss.*, 4 M. 344, 3 A. 829, 5 M. 273, 7 M. 466, 6 Bom. L.R. 131; *R.*, 27 B. 189=5 Bom. L.R. 30, 1 C.L.J. 355=9 C.W.N. 495.] The right of suit is limited only to suits for acts done in the conduct of undertakings, which might be carried on by private individuals without sovereign powers. **NOBIN CHUNDER DEY v. THE SECRETARY OF STATE FOR INDIA**, 1 C. 11=24 W.R. 309. [*Cited*, 30 C. 36, 7 C.W.N. 249.]

(7)—*Title from Government under sanad—Grantee under Government—Evidence that he is only trustee.*—Though the title conferred by Government under a sanad is absolute and overrides all other titles, nevertheless, the grantee under Government may, by an express declaration of trust or by an agreement to hold in trust, constitute himself a trustee for another. [*F.*, 1 O.C. Sup. Vol., 24; *D.*, 3 O.C. 250.] The Courts cannot, on the ground that the title under a Government sanad is absolute, decline to consider evidence relied on by a party to a suit to show that the grantee really holds for him as a trustee. **THAKUR SHERE BAHADUR SINGH v. THAKURAIN DARIO KUAR**, 3 C. 645, P.C. [*R.*, 9 O.C. 113, 10 C.W.N. 1065.]

(8)—*Provision intended for benefit of Government only—Party if entitled to claim.*—It is not open to a party to rely upon a provision of which Government only is entitled to take advantage. **VASUDEV ANANT v. RAMA KRISHNA**, 5 B. 292.



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(9)—*Indian Government—Liability for things entrusted to Post Office for conveyance.*—The Government is not responsible for any loss or damage which may occur in respect to anything entrusted to the Post Office for conveyance. *WINTER v. WAY*, 1 M.H.C. 200.

(10)—*Municipal law—Act of State—Private property—State property—Jurisdiction of Municipal tribunal.*—Where the Government submitted itself to the jurisdiction of the municipal tribunal if the property in dispute should be held to be the property of the sovereign in respect of whose dominion the Government exercised an Act of State, the tribunal would be deprived of its jurisdiction over the property if it finds that the property was the public or State property of such sovereign. *GHULAM MUHAMMAD NAIAMUT KHAN v. DALE*, 1 M.H.C. 281.

(11)—*Positions and right of, in respect of artificial channel and natural streams—Government and private individuals, relative position of—Easements Act (V of 1882), s. 2 (a)—Irrigation works—Government's rights in connection with independence of ownership of the bed of a stream—Right of Government to divert water for non-riparian purposes—Proof of damage necessary in action against Government by riparian owners—Burden of proof—Easements—Infringements of—Easements Act (V of 1882), s. 7. Ill. (h), meaning of "interruption"—Riparian owners, upper and lower rights inter se—Right to sue in representative capacity—Distinct causes of action—Water, Right of—Civ. Pro. Code (Act XIV of 1882), s. 30.*—The Government have power by the customary law of India to regulate, in the public interest, in connection with the collection, retention and distribution of waters of rivers and streams flowing in natural channels, and of waters introduced into such rivers by means of works constructed at the public expense and in the public interests for purposes of irrigation, provided that they do not thereby inflict sensible injury on other riparian owners and diminish the supply they have hitherto utilised. (28 M. 72, 28 M. 236, R.; 31 M. 171, 7 B. 209, D.) The Government, in discharging the duty, (1 I.A. 364, 28 M. 72, R.) which rests upon them in connection with works of irrigation, have the right of diverting the waters of natural streams and to carry water to non-riparian tracts of country; and in this presidency, at any rate, it has never been held that in so doing they had violated the rights of private owners of land, unless the party alleging to be aggrieved was able to prove that the amount of water he had been accustomed to utilise had been diminished. The rights and liabilities of Government in connection with irrigation are not governed by the same principles as those which regulate the rights and liabilities of private individuals, (1 I.A. 364, R.; 28 M. 542, 28 M. 72, R.) The rights of Government as distinguished from the rights of private individuals are recognised by the legislature in s. 2 (a). Easements Act, The

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rights of Government with regard to controlling the water of a natural stream stand upon a different footing from their rights to interfere with the water of artificial channels in which easements have been acquired by third parties. (5 M.H.C. 6, 7 M.H.C. 60, D.) The paramount right of Government to control irrigation furnished by waters of a natural stream subject to the limitation mentioned, under the law of this Presidency, is independent of the ownership of the bed of the stream. No distinction can be drawn between cases where the interest said to be effected is that of ryotwari tenants and where the interest is that of holders of proprietary estates. The plaintiffs, as lower riparian proprietors and on behalf of other lower riparian proprietors alleged to have the same interest as the plaintiffs, sued the Government, alleging that the defendant, by increasing the height of dam, caused an obstruction to the natural flow of the water, and, by increasing the width of a channel, caused a larger volume of water to be diverted than he was customarily entitled to and thus also diminished the flow of water to the lower riparian proprietors, and prayed *inter alia* for a declaration that the defendant had no right to execute the two works complained of. But the defendant contended that the Government has full power to regulate in the public interest the distribution of the water of a natural stream, that the plaintiffs even as riparian proprietors are not entitled to the undiminished supply but merely to the amount sufficient for their customary needs that the defendant had not diminished but increased the usual flow and that the works complained of were executed in order to utilise the large increased supply of water that he put in 86 miles higher up the stream. *Quære.*—Though some of the plaintiffs are the owners of lands which abut upon the right bank of the river, the water which they or some of them used for irrigation purposes is outside the area of their riparian tenements; and it is a question whether in a case of this sort the plaintiffs can sue in a representative capacity. the cause of action of each plaintiff being distinct and each party having to prove damage if proof of damage is necessary. *Held*, that the case of the plaintiffs against the defendant cannot be treated as though it had been an action brought by a lower riparian owner against a private upper riparian owner. There are difficulties in the way of regarding either the plaintiffs on the one hand as entitled to certain rights as against upper riparian owners, or the defendant on the other hand as entitled to certain rights as against lower riparian owners, since the defendant has admittedly used the waters for non-riparian purposes and the plaintiffs have likewise used the waters for the benefit of non-riparian owners. *Held* also, according to English law, where the water had been diverted by the upper riparian owner for riparian purposes, the lower riparian owner had no cause of action unless he could prove damage, but where it had been diverted for non-riparian purposes it was not necessary



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for the lower riparian owner to prove damage in order to establish a cause of action. But proof of actual damage would be necessary in this case, even though the defendant has used the diverted water for non-riparian purposes, since the rights of Government as upper riparian owner are higher than those of a private upper riparian owner. Further under the law of America, "to give the lower owner a ground of complaint, the quantity taken to the non-riparian land must be sufficient to inflict a perceptible injury on him." And as the plaintiffs allege their rights have been infringed by reason of irrigation works carried out by Government, the *onus* is on the plaintiffs to show they have sustained damage. But, the plaintiffs have not established that sensible injury has been inflicted on them, and that the supply of water which they formerly utilised has been diminished by the works complained of. *Held*, further that the defendant as a riparian owner was entitled to divert so much of the water as he put into the stream before it reached the lower proprietor, if in so doing he did not injure a lower riparian owner; and that the plaintiff's easement rights if any have not been infringed, the meaning of the word "interruption" in ill. (h) to s. 7 of Easements Act (which refers to the rights of a lower riparian owner as against an upper riparian owner) being "such interruption as results in material alteration in quantity"—and this is borne out by the wording of ill. (j). If the plaintiff's natural rights are wider than any rights which they have acquired by way of easement or could acquire by prescription, these are subject to the paramount right of government which would otherwise be altogether nullified. *Held* also, when the Ramnad and Sivaganga estates were permanently settled, the proprietary rights in streams were granted to them by the Government, subject not only to certain easements rights in parties who had been previously supplied with water, but also to the paramount right of Government to control the water of such streams for purposes of irrigation subject to the limitation aforesaid. **ROBERT FISCHER v. SECRETARY OF STATE FOR INDIA**, 5 M.L.T. 149=19 M.L.J. 131=32 M. 141=2 Ind. Cas. 325.

(12)—*Power of, to charge prohibitory water-rate for the use of Government water—Power to levy water-rate as a penalty, whether exists—Civ. Pro. Code, s. 542—Objection not taken in the grounds of appeal, not considered in appeal—Practice.*—Where the plaintiff, the owner of a tank failed to construct a weir as ordered by the Collector and the latter thereupon charged a prohibitory water-rate for the cultivation under the tank, *held* the fact that Government was not entitled to charge prohibitory water-rate merely as a penalty for the non-construction of the weir would not take away its right to charge water-rate for the use of Government water. *Held*, also, an objection not taken specifically in the grounds of appeal and not clearly arising from any of those grounds should

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not be considered. **SAMU IYANGAR v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL**, 5 M.L.T. 214.

(13)—*Liability of—For acts done by its servants.*—Where an officer of Government is in such a position that, for all practical purposes, the Government had no control over him, did not cause the act complained of, did not authorise or adopt it and gained no profit from it, any tort of his cannot render the Government liable. **MOTI LAL GHOSE v. SECRETARY OF STATE**, 9 C.W.N. 493=1 C.L.J. 355. (4 M. 344, D.; 17 C. 290, R.)

(14)—*Wrongful taking possession by Government—True owner taking ijara from Government—Effect.*—Where the Government wrongfully took possession of certain land, and the true owner took an ijara from Government and held it for over 12 years, the Government was held to have acquired a prescriptive title to the land at the end of the period of the lease. **SECRETARY OF STATE FOR INDIA v. KRISHNAMONI GUPTA**, 29 C. 518, P.C.=29 I.A. 104=6 C.W.N. 617=4 Bom. L.R. 537=8 Sar. 269. [F., 26 M. 410, 97 P.R. 1902=121 P.L.R. 1902, 9 C.W.N. 111; R., 27 B. 43=4 Bom. L.R. 721, 34 C. 753=5 C.L.J. 583=12 C.W.N. 193, 3 C.L.J. 316, 28 A. 760=A.W.N. 1906, 234=3 A.L.J. 567, 35 C. 120=8 C.L.J. 245=12 C.W.N. 16, 7 C.L.J. 414=12 C.W.N. 273=3 M. L.T. 212, 10 C.L.J. 527, 12 O.C. 45, 58.]

(15)—*Suit by assignees from Government—Decree.*—When the assignees, from the Government bring a suit joining the Secretary of State as a co-plaintiff, a decree can be given only in favour of the assignees. No alternative decree can be passed in favour of the Secretary of State or the assignees especially when right of the assignees, are admitted by the Secretary of State. **PULLANAPPALLY SANKARAN NAMBUDRI v. VITTIL THALAKAT MAHOMED**, 28 M. 505=15 M.L.J. 416.

(16)—*Suit by—Power-of-attorney to institute suit not necessary.*—In a suit on behalf of the Secretary of State for India in Council, no power-of-attorney is required from the Financial Commissioner, Punjab in favour of the Collector, authorising him to institute and conduct the suit. **SECRETARY OF STATE FOR INDIA v. MEHR BAKHSI**, 160 P.L.R. 1905=84 P.R. 1905.

(17)—*Government department, Discretion vested in, by Statute, if arbitrary and uncontrolled—Colourable exercise, amounting to refusal—Court's power to interfere.*—The plaintiff, an employee in the Public Service of the State of New South Wales, on his retirement in 1905, became entitled, under s. 4 of the Public Superannuation Act of 1903, "to a gratuity not exceeding one month's pay for each year of service from the date of his permanent employment," the gratuity "to be calculated on the average of his salary during the whole term of his employment and to be payable, in the case of retirement, after the commencement of the Public Service Act of



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1902, only in respect of service prior to such commencement." The Public Service Board awarded him a gratuity based on the average of his salary, reckoning his service, however, up to a certain date in 1895. Plaintiff having asked his service to be reckoned up to the date of the commencement of the Public Service Act in 1902, he was first informed that in respect of that claim no further sum could be paid, but subsequently the Board allowed him one penny for each year of service subsequent to the said date in 1895. No fault was thereby admittedly intended to be found with the manner in which the plaintiff had discharged his duties when in service: *Held*—That the discretion which the Government purported to exercise (through the Public Service Board) was not an arbitrary uncontrolled discretion, but a discretion to be exercised reasonably, fairly and justly. An illusory award such as this—an award intended to be unreal and unsubstantial—though made under guise of exercising discretion, is at best a colourable performance and tantamount to a refusal by the Board to exercise the discretion entrusted to them by Parliament, *LESILE WILLIAMS v. HAINES THOMAS GIDDY*, 15 C.W.N. 669, P.C.=21 M.L.J. 641=10 M.L.T. 288.

Alterations made in Circular Order No. 8 of April last, regarding Government estates. *Rev. Cir. No. 4*, 20 W.R. *Rev. Cir.*, p. 5.

Plaint in suits against Government, form of—This circular draws attention to the manner in which plaints should be drawn up in suits against Government, &c. *Civ. Cir. Ord. No. 5*, 24 W.R. *Rs. & Ors. of the H.C.*, p. 4.

See ACT XXVIII OF 1860, s. 25, 1 M. 192, 3 M. 92, 7 M. 280.

Purchaser or lessee of waste land under—Title of—See ACT XXIII OF 1868, 12 C. 279.

Money payable by—In lieu of Sair Abkari—See ACT XXIII OF 1871, ss. 3, 4, A.W.N. 1887, 225.

Malikana dues payable by government suit relating to—Certificate under Act XXIII of 1871 necessary—See Act XXIII OF 1871, ss. 3, 4, 17 A. 1=21 I.A. 148, P.C.

Agreement between public servant and—Increase of pay for risky service—Suit to enforce agreement—See ACT XXIII OF 1871, s. 4, 15 C.W.N. 470=13 C.L.J. 360.

Right of a Taluqdar in Gujarat to recover trove—, right of—See ACT VI OF 1878, 19 B. 668.

Ex-proprietary tenants mortgaging trees to Government for takvi advances—Relinquishment of their rights to zamindar—Right of Government—See ACT XII OF 1884, s. 5, 26 A. 540=A.W.N. 1904, 101=1 A.L.J. 261.

Title let up to land already owned by adjudication—Secretary of State whether should be made a party—Government not a "claimant"—See ACT I OF 1894, ss. 9, 11, 18, 30, 9 Ind. Oas. 341=9 M.L.T. 272.

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Alienation by—Of immemorial waste lands—Shrotriendars—Acquisition of such lands by Government—Respective rights of Shrotriendars and Mirasidars to compensation money—See ACT I OF 1894, s. 30, 26 M. 371.

Right of. to acquire land necessary for convenient use of a house—See ACT I OF 1894, s. 49, 9 O.C. 311 (B).

See BEN. ACT XI OF 1859, s. 5, 5 B.L.R. 135=13 W.R. 381.

Grant of permanent gunti-tenure—Resumption by—and temporary settlement with heirs of former proprietor—Effect on right of lessee under grant—See BEN. ACT VIII OF 1879, s. 10, 30 C. 811, P.C.=7 C.W.N. 601.

Suit against Nawab of Surat—Sanction of—Not obtained before suit filed—Validity of suit—See BOM. ACT XVIII OF 1848, s. 1, 12 B. 496.

See BOM. ACT II OF 1863, s. 6 cl. 2, 2 B. 529, 1 Bom. L.R. 528.

Quit rent paid to—By inamdar under such settlement—Suit for refund—See BOM. ACT VII OF 1863, s. 32, 17 B. 407.

Two sets of accounts—False accounts kept to deceive—See BOM. ACT III OF 1875, s. 7, 20 B. 668.

Suit against, regarding rent free land, jurisdiction of Civil Courts—BOM. ACT X OF 1876, s. 4 (a), 6 Bom. L.R. 438=28 B. 435.

Suit against, *re* Saranjam lands—Jurisdiction—See BOM. ACT X OF 1876, s. 4 (a), 11 Bom. L.R. 1332.

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Suit against—Jurisdiction of Civil Courts—See BUR. ACT IV OF 1898, s. 41, 5 L.B.R. 163, F.B.

Right of Government to impose penal assessment—Jurisdiction of Civil Court—Limitation—See MAD. ACT XII OF 1851, ss. 1, 17, 22 M. 100.

Pargana surrendered to and re-grant by government—Rates of rent—Terms of patta—See MAD. ACT VIII OF 1865, ss. 9, 11, 18 M. 216.

License to—To fell timber—Notification by Government constituting the land as reserved forest—Refusal by settlement officer to offer commutation for Jenmi rights—Right of Jenmi to claim compensation—See MAD. ACT V OF 1882, ss. 4, 10, 23, 7 M.L.J. 13.

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Liability of Government to pay tax for importing timber—See MAD. ACT I OF 1884, ss. 170, 174, 338, 341, 12 M.L.J. 208=25 M. 457.

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Right of, over a new channel formed by a river changing its course—See ALLUVION—CHANGE IN COURSE OF RIVERS, 7 Bom. L. R. 872=2 A.L.J. 623=2 C.L.J. 185=9 C.W.N. 889=8 O.C. 293, P.C.=15 M.L.J. 349=32 I.A. 165=27 A. 655.

See ALLUVION—FORMATION OF CHURS OR ISLANDS, 6 B.L.R. 255, F.B.=14 W.R. F.B., 25, 6 B.L.R. 261, Note=13 W.R. 366, 6 B.L. R. App., 93=14 W.R. 424, 5 C.L.R. 154.

See CESSION OF BRITISH TERRITORY, 1 B. 367, P.C.=3 I.A. 102=1 A.C. 322.

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Secretary of State to be sued as defendant in suit against State Railway—Railway administration, meaning of—See CIV. PRO. CODE, 1908, ss. 80, 79, O. XXVII, rr. 1, 6, 4 O. C. 133.

Claim by—Maintainability—See CIV. PRO. CODE, 1908, O. XXI, r. 99, 8 Ind. Cas. 857=9 M.L.T. 166=21 M.L.J. 407.

Court-fees payable to—Withdrawal of pauper suit—See CIV. PRO. CODE, 1908, O. XXIII, r. 1, O. XXXIII, r. 11, 29 B. 102.

Sum recoverable by Government as stamp fees, first charge on proceeds of sale—See CIV. PRO. CODE, 1908, O. XXXIII, r. 10, 25 M. 733=12 M.L.J. 405.

Authority of Financial Commissioner, Punjab, over litigation in which, is concerned—Right of Government advocate to represent Secretary of State—See CIV. PRO. CODE, 1908, O. XXXIII, r. 11, 104 P.R. 1908=160 P.W.R. 1908.

Confiscation and release of property by—Limitation—See CONFISCATION, 4 C. 727, P.C.

Repairs to a tank, was bound to do—Zemindar interested—Suit for contribution against Zemindar—See CONTRACT ACT, 1872, s. 70, 18 M. 88=4 M.L.J. 205.

See COSTS—TAXATION OF COSTS, 17 M. 162.

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Rent, Enhancement of—Tenants holding directly from Government—Settlement for 30 years made with talukdar—Right to enhance after expiry of term—See ENHANCEMENT OF RENT—GENERAL, 9 C.L.R. 189.

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Liability of, to toll contractor for loss consequent upon plague regulations—See RIGHT OF SUIT—MISCELLANEOUS, 4 Bom. L.R. 874.

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Tributary Mehals—Mohurbhunj—Powers of Government, extent of—Jurisdiction—See TRIBUTARY MEHALS, 7 C. 523=9 C.L.R. 93.

Duty of—To maintain irrigation works in repair—Deficiency of water supply owing to non-repair—Loss to ryot in consequence—Whether suit lies against Government therefor—See WATER, 7 M.L.T. 397=6 Ind. Cas. 731=20 M.L.J. 869.

Burden of proof—Supply of water through—Source—Second crop cultivation—Liability of zamindar to pay water-cess—See WATER RIGHTS, 14 M.L.J. 350.

**Government Forests.**

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See ACT VII OF 1865.

**Government Kist.**

Whether enhancement in Government Kist payable by mortgagor or mortgagee—Law requires mortgagee to bear burden if not relieved by his contract—Question depends on construction of mortgage-deed—See DEED—CONSTRUCTION OF DEEDS, 18 M.L.J. 31.

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Meaning of—See BOM. ACT I OF 1865, s. 35, 1 B. 352.



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## Government Office.

Public debt, branch of Bank of Bengal, a—See BANK OF BENGAL, 5 C. 654=5 C.L.R. 586.

## Government Officers, Acts of.

(1)—*Acts of Government Officials binding Government—Act IX of 1859.*—Where, by a decree of the Court of the Special Commissioner established under Act IX of 1859, property was directed to be made over to a claimant, and the proceedings of the officials making over that property were followed by a suit against Government to obtain possession of a portion of that property, in which suit the Government raised no question as to the propriety of the decree, or to the making over of the bulk of the property under it, the Government was held bound as to the right of the decree-holder to the property. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. MUSSAMAT KHANZADI, 5 B.L.R. 312, P.C.=2 Sar. 570.

(2)—*Acts of Government Officers binding the Government to what extent—No ratification of Government servant's unlawful orders.*—The acts of a Government Officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or if he exceed that authority, when the Government, in fact or in law, directly or by implication, ratifies the excess. (8 M.I.A. 500, F.) Where the Officers of the Government have induced a belief in the Talukdar that a *Kabuliat* has been accepted by the Government, or that a permanent settlement has been sanctioned, this act of the officers will not bind the Government, if their conduct be in violation of their duty as such officers, or in direct contravention of the express orders of the Government. PROSUNNO COOMAR ROY v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 26 C. 792=3 C.W.N. 695. [F., 13 O.W.N. 235; R., 8 C.L.J. 470, 11 O.W.N. 928.]

Acts of—in official capacity, suit for damages for, not maintainable in Court of Subordinate Judge—Jurisdiction of District Judge—See JURISDICTION OF SUBORDINATE JUDGE, 21 B. 754, F.B.

Officers acting as agents of Government—See PRINCIPAL AND AGENT—AUTHORITY OF AGENTS, 2 Hyde 25, 36.

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(1)—*Construction of Government order—Release of nazul property—Limitation.*—The proprietary right in the site of a bazaar, and interests in the houses thereon, were disputed between the zemindar claiming them, and the resident occupiers, whose rights by agreement

## Government Order—concluded.

were to be determined by the decision in the case of the defendant who was one of them. In 1879 the Government released the bazaar from the nazul, it having been entered in the District Register of that property in 1860. In the written order of Government sanctioning the withdrawal of the entry in the Register, there were words as to the effect of which the Courts below differed; the Court of first appeal holding that the release was to the zemindar, the Court of second appeal holding that the occupiers of the houses were severally made proprietors of them. The words were "as the occupiers appear to have all along exercised proprietary rights without question of their power to do so, it is now too late to disturb their status." Held that the intention of the Government, as shown, was merely to annul the entry in the Register, and to restore the rights which existed when the entry had been erroneously made. More importance was attached to the act of the Government than to the words used in their order. The effect was a disclaimer of title and a release to those who would have been entitled but for the confiscation by the act of State of 1858; thus following out the policy at the general settlement of Oudh lands. There was no intention to benefit one party more than the other, or to confer title upon either as against the other, in this release. Held, also, that limitation did not apply. Before the annexation of the province there was no limitation causing either bar of suit or title to accrue. So long as the ownership was in the Government, and till the release, neither party had any interest to enforce. The earliest date from which limitation could commence was the date of the release. On question not yet disposed of below as to the titles of the parties, irrespectively of those supposed to have been conferred by the order of 1879, and as to the claim in regard to the materials, the suit was remanded to the first Court for trial upon issues. An official report forwarded with the application for sanction of the release of the property from the nazul was referred to as showing the material which the Government had before them for deciding to act as they did. MAQBUL HUSAIN v. LALTA PRASAD, 24 A. 1, P.C.=28 I.A. 169=8 Sar. 65.

## Government Promissory Notes.

(1)—*Renewal—Transfer of Government promissory note—Notice—Allonge, what is—Paper for writing receipts of interest whether allonge.*—The holder of a Government promissory note cannot arbitrarily ask the Government to have the note renewed; but when the back of the note has become covered with endorsements of the receipt of interest, so that there is no room to write an endorsement of the note distinctly on the back of it, the holder is entitled to have it renewed. He cannot claim such renewal if, by the renewal, an order of Court restraining him from parting with the note would be disobeyed. If any person has a right to prevent the legal holder of a Government promissory note from parting with it, that person ought to



**Government Promissory Notes—continued.**

take proper legal proceedings to obtain an order of Court restraining her from doing so. If such an order be obtained and the Government has notice of it, it would be bound to act in accordance with it. An allonge is a slip of paper annexed to a bill upon which, there being no limit to the number of endorsements, when there is not room to write them all distinctly on the back of the bill, the supernumerary endorsements may be written. It is annexed by the holder in order that he may write the endorsement. The term does not apply to a paper annexed by the officers of Government for writing the receipts of interest. *MONMOHINEE DEBI v. THE SECRETARY OF STATE*, 13 B.L.R. 359 = 22 W.R. 106.

(2)—*Gift of Government Notes—Necessity of endorsement to complete gift—Creation of trust by donor constituting himself trustee—Enforceability of trust against representative of donor—Practice among Parsis.*—A gift of Government stock cannot be completed without an endorsement or something equivalent to it; for where a particular form of transfer is prescribed by law, a transfer in another form is as inefficacious *inter vivos* as in a Will. And, to such a unilateral transaction, in a case where it is gratuitous, completion cannot be given by the Courts, as where a consideration has been paid and the contract must be enforced in order to prevent fraud. But an owner of such Notes may constitute himself a trustee of such Notes for another, which trust may then be enforced against him or his representatives. It is not even necessary that he must expressly constitute himself as such trustee; but it may be inferred also from his conduct, and from the practice obtaining in his community. In the present case, a Parsi woman sued her mother-in-law for the recovery of the value of certain Government Notes and interest due thereon, alleged to have been presented to the plaintiff at the time of her marriage for her sole and separate use. It was found in evidence, that the marriage of the plaintiff was in 1851; that from certain accounts opened at that time in the books of a firm of which the plaintiff's grandfather was a partner, it was clear that some presents were made to the plaintiff by her father-in-law: that there was an entry in that account dated August 1854, to the effect that the father-in-law of the plaintiff had bought two Government Notes for Rs. 1,500 in his daughter-in-law's (the plaintiff's) name and had obtained the interest on them, which was duly credited to her; and that there were other documents in the handwriting of the father-in-law and the grandfather of the plaintiff, wherein the said Notes were alluded as to the property of the plaintiff and as having been purchased with her moneys, and that in 1864 the father-in-law died without having endorsed the Notes over to the plaintiff or to any one on her behalf, and that they remained in his name in the hands of the grandfather till 1896 when the defendant got possession of the same. It was held under the circumstances that, although there was no valid gift of the Notes, there was a clear indication

**Government Promissory Notes—concluded.**

that the father-in-law held the Notes only as trustee for the plaintiff, and that the defendant, as the executrix and representative of the plaintiff's father-in-law, was bound by that trust. *MERBAI v. PEROZBAI*, 5 B. 268. [R., 10 Bom.L.R. 1209.]

(3)—*Hindu widow—Act XXVII of 1860—Certificate—Debts due to son—Authority to negotiate—Government promissory notes—Proof of possession.*—A Hindoo widow holding a certificate for the collection of debts due to her son, and applying for authority to negotiate certain Government Promissory Notes, the interest of which the son had been permitted to draw, but which stood in the name of her late husband, is bound to show how she got possession of them. *In the matter of BIDYA SOONDUREE DOSSEE*, 15 W.R. 267.

(4)—*Deposit of stolen note as security—Detention by Public Debt Office—Claim to return note upon suit for recovery of debt.*—Where a Government pro-note, stolen while in the custody of the Public Debt Office, has been deposited with the Bank of Bengal by the defendant, a purchaser for full value, as security for loan upon a promissory note and was detained by the Superintendent of the Public Debt Office on its being sent there by the Bank, at the defendant's request, for payment of interest, held that, in a suit upon the pro-note for the recovery of the amount of the loan, the defendant was not entitled to refuse payment till the stolen note was delivered up to him. *THE BANK OF BENGAL v. MENDES*, 5 C. 654 = 5 C.L.R. 586.

(5)—*East India Company pro-notes—Forgery—Acknowledgment.*—In an action against the East India Company by the holder of a forged limitation of one of their promissory notes issued by the Governor-General in Council at Calcutta, held that the Company were not bound by the acknowledgment of it as genuine by a clerk in their Accountant-General's office who was authorized by the Accountant-General to compare all such notes with the register, but not authorized to certify their genuineness, although it appeared that it was his practice to do so. *THE BANK OF BENGAL v. THE EAST INDIA COMPANY*, 2 Knapp 245.

See ATTACHMENT—SUBJECTS OF ATTACHMENT, 1 C.W.N. 170.

Contract of sale of—Tender, necessity for—See CONTRACT—MISCELLANEOUS, 9 C. 791.

See EVIDENCE—PAROL EVIDENCE, 17 M. 480.

See GIFT, 7 B. 229.

Neg. Instr. Act applicable to—Transfer of—Consideration—Burden of proof—See NEGOTIABLE INSTRUMENTS—PROMISSORY NOTE—GENERAL, 12 C.L.J. 470 = 8 Ind. Cas. 796.

Transfer of interest in—Applicability of Act XXVI of 1881—See NEGOTIABLE INSTRUMENTS ACT, 1881, ss. 14, 46, 48, 9 O.C. 174 (B).

Whether a "debt"—See SUCCESSION CERTIFICATE ACT, 1889, s. 4, 15 C.W.N. 1018.



**Government Resolution.**

Privilege attaching to a — See ACT OF STATE, 5 Bom. L.R. 30=27 B. 189.

See COLLECTOR, 18 B. 103.

**Government Revenue.**

See REVENUE.

Assignment of Government revenue—Rights of assignee—See MAD. ACT II OF 1864, 7 M. 258.

Payment of—By lambardar a — charge on the property in the hands of a subsequent purchaser—Notice to purchaser of such payment—Lambardar and co-sharer—See CHARGE, A.W. N. 1891, 9.

One co-sharer making payment of government revenue for another—Charge—See CO-SHARERS—GENERAL, A.W.N. 1886, 269.

Suit for contribution by co-sharer who had paid whole — See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF — GENERAL, B.L.R. Sup. Vol., 675=2 Ind. Jur. N.S. 155=7 W.R. 377.

**Government Securities.**

(1)—*Bequest of — Interest accruing before testator's death.*—The interest on Government securities bequeathed by will in certain specified amounts, accruing due before the testator's death, does not pass to the legatees. *GOOKCOL NATH GUHA v. ISSUR LOCHUN ROY*, 14 C. 222. [R., 10 C.L.J. 355=14 C.W.N. 18.]

(2)—*Government securities deposited in Court — Conversion into papers with lower interest, Effect of — Liability of parties.*—In this case, in pursuance of notice given by the agent of Government to the Registrar of the Sudder Court, certain Government securities deposited in Court, and at the time bearing 5 per cent. interest, had been converted into Government notes bearing only 4 per cent. interest. This had been done before the division of the notes amongst the parties entitled to the income, and though the delivery of the notes to the claimant was irregular, it did not affect the conversion of the securities which was the act, not of the parties, but of the Government and of the Court. The conversion, however, having reduced the Rs. 3,000, which the annuitants were entitled to receive, by one-fifth, the appellant, under his engagement, was liable to make it good and the judgment of the Sudder Court complained of was therefore recommended by the Judicial Committee to be confirmed. *RAJAH SUTTEESCHUNDER ROY v. SAMASOONDERY DEBIA*, 2 W.R., P.C., 48=4 Sar. 777.

Endorsement and delivery of—By Mahomedan father to son, effect of—Evidence of conduct of parties—See MAHOMEDAN LAW—GIFT, 19 A. 267, P.C.=24 I.A. 1.

**Government Servant.**

Acquisition of property in contravention of rules of department—Right to maintain suit against benamidar in respect of said property—See BENAMI TRANSACTION—MISCELLANEOUS, 7 M.L.J. 268,

**Government Servant—concluded.**

Liability of Secretary of State for damages occasioned by negligence of—Negligence which would render ordinary employer liable—See SECRETARY OF STATE, Bourke A.O.C., 166=5 B.H.C. App. 1.

**Government Solicitor.**

See MAD. ACT I OF 1884, ss. 103, 110, 23 M. 529.

See COSTS—TAXATION OF COSTS, 15 M. 405.

**Government Tenants Act, Punjab.**

See PUN. ACT III OF 1893.

**Government Wards Act, Central Provinces.**

See C.P. ACT XVII OF 1885.

**Governor.**

Cannot be sued in a Civil Court in respect of an act done by him in his official capacity—See ACT OF STATE, 5 Bom. L.R. 30=27 B. 189.

**Governor-General.**

Previous consent of, for a suit against a Sovereign Prince, necessity of—See CIV. PRO. CODE, 1908, s. 86, 2 C.L.J. 163.

**Governor-General-in-Council.**

Suit against Sovereign princes and Ruling chiefs—Consent of — required to be obtained before institution of suit—See CIV. PRO. CODE, 1908, s. 86, 21 B. 351.

**Governor-in-Council.**

Grant of waste land—Delegation of power by —to make grants under dharkast rules—Binding character of grant so made — Power of Civil Court to determine validity of grant—Revision of grant properly made—See ST. 22 & 23 VIC., C. 41, 26 M. 268=12 M.L.J. 453.

**Governor of Bombay in Council.**

(1)—*Legislative Council, Extent of powers of — Bombay Act, III of 1874, s. 10—Grant of certificate by Collector—High Court's powers of interference.*—Any Act of the Legislature proposing to cut down the jurisdiction conferred on the High Court by the Statute constituting it and by the Letters Patent, would, so far, be *ultra vires* and inoperative. That jurisdiction, however, relates only to the power of the High Court to ascertain and give effect to the law as it is, and, whereas the substantive law changes, the above jurisdictional power remains constant. So, any legislation, on the rights and the obligations of the subjects, made by the Bombay government, in no way infringes on the authority of the Bombay High Court. In granting a certificate under s. 10 of the Bombay Hereditary Offices Act (III of 1874), the Collector exercises a judicial function, and is so far subject to the superintendence and control of the High Court. But, except where there has been any violent misuse of authority or obvious



**Governor of Bombay in Council—concluded.**

bad faith, or wanton perversion of the law, the High Court would not interfere with the discretion of the Collector in the matter, and his certificate would therefore be decisive of the character of the property specified in it. **THE COLLECTOR OF THANA v. BHASKAR MAHADEV SHETH**, 8 B. 264. [R., 32 B. 634=10 Bom. L.R. 924.]

See **SERVICE TENURE**, 8 B.H.O. A.C. 195.

**Governor of Madras in Council.**

(1)—*Local Legislative Council, if competent to pass Act affecting provisions of Statute of Imperial Parliament.*—It is beyond the power of the Local Legislative Council to pass an Act in any way affecting the provisions of a Statute of the Imperial Parliament. **ABOO SAIT AND CO. v. ARNOTT**, 2 M.H.C. 439.

**Grain.**

See **MORTGAGE—GENERAL**, 21 C. 241.

Instrument evidencing a loan of—**Bond**—See **STAMP ACT**, 1879, s. 3 (4) (b), 7 B. 137.

**Grama Natham.**

(1)—*Right of Revenue authorities to grant portions of grama natham—Common Law of the country—User of the site by villagers.*—According to the Common Law of the country, the control of "Grama Natham" vests in the Revenue authorities, and they are at liberty to grant portions of it at their discretion to persons who apply for it for building purposes. Until it is appropriated in this way to the use of some definite person, it is usual for the villagers to make use of it in any way that suits them best. They throw rubbish on it, graze their cattle on it, use it as a latrine and the like, and they are rarely interfered with. But it is always understood, that this use is permissive on the part of the Government, and that the Government has the right at any time to appropriate it for any special public purpose, or grant it to an individual for building purposes. **THE COLLECTOR OF THE GODAVERI DISTRICT v. JANNAVULA PEDDA RANGAYYA**, 4 M.L.T. 440.

**Grandmother.**

Paternal, in Gujarat, inheriting to her maiden granddaughter, takes an absolute property—See **HINDU LAW—INHERITANCE**, 1 Bom. L. R. 574=24 B. 192.

**Granite Quarries.**

Proper methods of assessment of compensation under the Land Acquisition Act—Workmen employed on the land, not persons interested therein—See **ACT X OF 1870**, s. 42, 16 M. 369, P.C.=20 I.A. 80.

**Grant.**

1.—GENERAL.

2.—CONSTRUCTION.

3.—GRANTS FOR MAINTENANCE.

4.—RESUMPTION OF GRANTS.

5.—MISCELLANEOUS.

**Grant—continued.**

See **GIFT**.

See **MAINTENANCE**.

See **PRESCRIPTION**.

See **SANAD**.

**—1.—General.**

(1)—*Grant by Zemindar, how far valid.*—A grant made by a zemindar in 1804 of part of his zemindary, which he held at that time under an eight years' lease, and which was afterwards confirmed to him upon the permanent settlement, is valid as against himself. *Semble*, such a grant would not be valid against his successors or against Government. **RAJAH ENOOGUNTY SOORIAH v. RAJAH VENKATA NEELADRY RAO**, 3 Knapp 27, note.

(2)—*Zamindari — Revenue sale — Purchase by Government—Restoration—Effect—Implied grant—Common law rights of Government.*—When part of a Zamindari granted on a permanent sanad in 1803 was sold for arrears of revenue 1836 and was purchased by Government, but was restored again in 1859 under a permanent sanad to the son of the previous zemindar, the law will imply, in the absence of a special contract to the contrary, that this restoration or grant, carried all rights of water and other easements of necessity which existed at the time of the restoration or grant in 1859. The grantee is entitled to the customary supply to his tanks, and when the water arrives in his tanks he can do what he likes with it (*Chanham v. Fisk*, 37 R.R. 655; *Watts v. Kelson*, L.R. 6 Ch. A. 166, 2 M. 46, 24 M. 279, F.). The right to which the grantee is held to be entitled as aforesaid, is not at all inconsistent with the common law rights claimed by Government to the water flowing in all natural channels. The right which Government can claim or owns in the water flowing in the natural channels of the country must be subject to rights already acquired in such water. **MARIA SUSAI MUDALIAR v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL**, 14 M.L.J. 359.

(3)—*Reg. XIX of 1793—S. 37, Act XI of 1859—Sale of village in question under the provisions of Act XI of 1859—Suit by purchaser for recovery of possession or for assessment of rent and mesne profits—Right created under grant, an encumbrance.*—Some years before the grant of the Dewani to the East India Company, a zamindar, who held certain villages under the Mahomedan Government, made a rent-free grant of a certain village, the subject-matter of the dispute in the present case, to one D. The grant being rent free, D and his heirs continued to be in possession of the village as rent-free from the time of the grant to the date of the Dewani and thereafter until the present day. After the acquisition of the Dewani by the East India Company, attempts were made to re-assess all the lands in the Bengal Province, and in 1773, a settlement of the villages including the village in question was made and the said village was assessed at



**Grant—continued.****—1.—General—continued.**

a certain amount, the assessment being accepted by the zemindar. The zemindar took upon himself the liability to pay the revenue assessed on the village in dispute and continued to pay the same. The proprietors of the estate fell into arrears of the September kist of 1900, and the village was sold under Act XI of 1859. Whereupon the purchaser instituted a suit for recovery of possession or for assessment of rent of the said village and for *mesne profits*. *Held*, that the right created under the grant was an encumbrance and that the encumbrance was created before the Permanent Settlement. The purchaser (the plaintiff) could not be affected by the laches of the defaulter or his predecessors. He was entitled to hold all the lands of the estate in the same condition as they were at the time of the Permanent Settlement. He was entitled to recover the amount assessed at the time of the Permanent Settlement, with cesses according to the Cess Act. *Held*, also, that s. 37 of Act XI of 1859 does not avoid encumbrances of every kind nor does it allow the purchaser to assess rent higher than that paid from before the Permanent Settlement, notwithstanding that no rent was levied from a long series of years; the rent is not enhanceable according to the law now in force, as the lands must be considered to be comprised in a tenure existing from before the Permanent Settlement. **BRINDABAN BEHARI LAL v. BHAWANI SAHAI**, 35 C. 931 = 9 C.L.J. 119 = 3 Ind. Cas. 301. (11 M.L.A. 152, R.)

(4)—*Settlement—Jurisdiction of Civil Courts in questions connected with grants—Corrections or amendments made in deed of grant—Effect of grant made without proper notice, Validity of, as against Government and as against the grantee—Lower Burma Land and Revenue Act, s. 56; Rule II of the rules under the Lower Burma Land and Revenue Act.*—A grant of land as such is not a settlement within the meaning of s. 55, cls. (e) and (f) of the Lower Burma Land and Revenue Act, and the jurisdiction of Civil Courts in questions connected with grants is not barred by s. 56 of that Act. Where a grant is for land different from that in dispute and corrections or amendments are subsequently made in the deed of grant so as to include in it the land in dispute, *held*,—that, even assuming that such corrections or amendments were legal (which point is not clear), the grant as it then stands can only be taken to have effect from the date of the amendments made in the deed of grant. While it does not follow Rule II of the Rules under the Lower Burma Land and Revenue Act that because grants made without the issue of proper notice as required under Chap. VIII of that Act would be void, as against the Government, that such grants are not void as against the grantee, the mere failure of the Revenue Officer to comply with certain details of procedure before a grant is made should not make the grant invalid as regards the grantee. **MAUNG SO v. MAUNG KYIN NU**, L.B.R. 1893—1900, 473.

**Grant—continued.****—1.—General—continued.**

Inam granted by Peishwa—Grant with present and future cesses and taxes and assessments—Suit by inamdar to recover abkari revenue derived by Government—Want of jurisdiction in Court by reason of—*See* ACT XXIII OF 1871, 14 B. 573.

Of soil of a village, and not of land revenue—Applicability of Pensions Act—*See* ACT XXIII OF 1871, s. 6, 7 M.L.T. 53, P.O. = 14 C.W.N. 310 = 7 A.L.J. 165 = 11 C.L.J. 281 = 12 Bom. L.R. 267 = 20 M.L.J. 164 = 32 A. 148 = 5 Ind. Cas. 689

*See* ACT XXIII OF 1871, ss. 8, 11, 26 A. 617 = 1 A.L.J. 338.

Claim to resume—*See* U.P. ACT XVII OF 1876, ss. 52, 53, 25 C. 479, P.C.

By way of endowment to religious institution, if liable to resumption—*See* U.P. ACT XVII OF 1876, ss. 52, 53, 2 O.C. 295.

Resumption of—Grant held rent-free under judicial decision—*See* U.P. ACT XVII OF 1876, ss. 52, 53, 55, cl. (a), 4 O.C. 252.

By Government to compensate for resumption of rent-free land—Pension—Liability to attachment—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 8 C.W.N. 665.

*See* BURDEN OF PROOF—LANDLORD AND TENANT, 3 C. 501 = 1 C.L.R. 596, 8 C. 230 = 10 C.L.R. 41.

*See* CANTONMENT, 3 A. 369 = A.W.N. 1881, 45, 6 A. 148 = A.W.N. 1884, 6.

Grant due to fraud practised on revenue authorities—Grant, whether binding on Government—*See* DARKHAST, 13 M.L.J. 137.

Under Darkhast rules—Grant of house-site by Tahsildar—Grant not reversed on appeal by Divisional Officer—Validity—*See* DARKHAST RULES, 26 M. 742 = 12 M.L.J. 417.

Conveyance—Grant—Construction—Boundaries—Certain definition—Inaccuracy of dimensions—*See* DEED—CONSTRUCTION OF DEEDS, 1 Ind. Cas. 650 = 14 C.W.N. 268.

*See* DEED—CONSTRUCTION OF DEEDS, 23 A. 324 = 11 M.L.J. 160 = 28 I.A. 65, P.C.

Public way—Right of—Implied grant—Remission of revenue on land used as public way—Right of owner to claim compensation—*See* ESTOPPEL—ESTOPPEL BY CONDUCT, 125 P.L.R. 1902.

*See* FERRY, 18 C. 652.

Right of fishing in navigable river—Property—Grant from Government—*See* FISHERY, 2 B. 19.

*See* GHATWALI TENURE, 3 C. 251.

By Sanad in 1802 of Zemindari without change of rule of succession by primogeniture—Madras Regulation XXV of 1802—*See* HINDU LAW—INHERITANCE, 13 M. 406, P.C. = 17 I.A. 134.



**Grant—continued.****—1.—General—continued.**

Joint family property — Confiscation — Government grant of part of property to one member of the family—Nature of estate granted—See HINDU LAW—JOINT FAMILY, 12 Bom. L.R. 656, P.C.=14 C.W.N. 985=8 M. L.T. 193=12 C.L.J. 225=31 A. 415=7 Ind. Cas. 648=20 M.L.J. 900.

See HINDU LAW—MAINTENANCE, 4 M. 193.

In favour of temple—Presumption of—Annuity granted to defray temple expenses, a charge upon Village out of profits of which it was to be realised—See HINDU LAW—RELIGIOUS ENDOWMENT, 4 O.C. 61.

See HINDU LAW—WILL, 6 M.L.J. 75, P.C.=23 C. 670=23 I.A. 37.

Grant of Inam—Attached to office of Kazi—Inam held in grantee's family for 200 years—Succession—See INAM, 1 B. 638, Note.

Inam—Enfranchisement of karnam service inam—Grant to person holding office—Presumption as to nature of—See INAM, 7 M.L.J. 248.

Grant of income or of rents—Interest in land, measure of—Grant of life estate, in timber estate and mineral estate, if valid—Deforestation—Remedy—See KHORPOSH SANAD, 9 C. L.J. 421=13 C.W.N. 611=2 Ind. Cas. 641.

Killajat estates in Orissa—Grant of land to relations of proprietor on condition of paying "light tribute"—Position of grantees—See KILLAJAT ESTATES, 15 C.W.N. 266=9 Ind. Cas. 394.

See LANDLORD AND TENANT—LANDLORD TO GIVE AND MAINTAIN TENANT IN POSSESSION, 28 C. 693, P.C.=28 I.A. 211=5 C.W.N. 634=3 Bom. L.R. 505.

Mere long possession of homestead land insufficient to justify presumption of permanent grant—See LANDLORD AND TENANT—NATURE OF TENANCY, 25 C. 896.

Construction of—Conflicting description of subject-matter—See LEASE—GENERAL, 10 C. L.J. 570=37 C. 293.

See LIMITATION ACT, 1908, art. 120, 3 O. C. 55.

For life—Suit for recovery by grantor's heirs—See LIMITATION ACT, 1908, art. 144, 11 C. 121, P.C.=11 I.A. 218.

Of parganas by Milkiat Sanad—Effect—See MILKIAT SANAD, 9 C.L.J. 412=2 Ind. Cas. 646.

Punjab Ruling Chiefs — By the chief to second son for maintenance—Transfer of Government on the death of the chief, to his second son, of a portion of cash allowance allowed to the date chief—See NAWAB OF TANK, 30 C. 843, P.C.=67 P.R. 1903=112 P. L.R. 1903.

See OWNERSHIP, 15 M. 101=18 I.A. 149, P.C.

**Grant—continued.****—1.—General—concluded.**

Public highway—Diversion of road—Rights of adjoining landholders—By Municipality of abandoned road—Act XV of 1873 (N.W.P. and Oudh Municipalities Act), s. 38—See PUBLIC WAY, 7 A. 362=A.W.N. 1885, 56.

Sanad granting hak—Re-grant of hak by endorsement on sanad — Endorsement, if requires registration—Admissibility of other evidence as to alleged re-grant—Evidence Act, I of 1872, s. 92, proviso 4—See REGISTRATION ACT, 1908, s. 17, 14 B. 472.

See REGISTRATION ACT, 1908, s. 19 (d), 19 C. 742.

Evidence to show that grant is resumable—Presumption—See SERVICE GRANT, 10 M.L. T. 391=2 M.W.N. 1911, 406.

Ryotwari lands—Nature of right possessed by ryot in his lands—Right of Government to —To other ryots lands allowed to lie waste—See SETTLEMENT—SUBJECTS OF SETTLEMENT, 1 M.H.O. 407.

Of waste land — Delegation of power by Governor in Council to make grants under dharkast rules—Binding character of grant so made — Power of Civil Court to determine validity of grant—Revision of grant properly made—See ST. 22 & 23, VIC. C. 41, 26 M. 268=12 M.L.J. 453.

Non-mirasi waste land—Power of Collector to make grant—Right of former occupant—See WASTE LAND, 1 M.H.C. 12.

**—2.—Construction.**

(1)—Evidence — Ambiguity — Reference to another document for explanation—Admissibility.—The plaintiffs sued for possession of certain land which was acquired by them by grant from the zamindar of P and of which they were wrongfully dispossessed by the defendants. The defendants claimed the same land under a grant from a subsequent zamindar of P and his putnidar. It appeared that the date of grant to the plaintiffs was "25th Falgoun in the year 16th" and it was alleged that the "year 16" corresponded with 1165. Held, that the Court could admit in evidence another grant signed by the same official, dated in "the year 37," which showed that the year corresponded with 1186 B.S., for the purpose of proving that the "year 16" corresponded with 1165. *EQUITABLE COAL CO. LTD. v. GANESH CHUNDER BANERJEE*, 9 C. L.R. 276.

(2)—Grant of villages as jaghir—Construction of sanad—Power of grantee to alienate.—The question in this case was whether the grantee of the villages under the sanad in question had the power to alienate those villages beyond the period of his life. The sanad ran as follows:—"In consideration of the active and zealous performance of the duties entrusted to him by Government, the Honourable the Governor-in-Council hereby gives and bestows upon Ardesir Bahadur and his heirs for ever as jaghir, the



**Grant—continued.****—2.—Construction—continued.**

following four villages etc.” *Held*, that the question whether a particular *jaghir* is alienable or not must be governed by the terms of each particular grant in the construction of which the Court may seek for aid “in the surrounding circumstances and the object for which the *sanad* was granted.” In the present case, the sole object the Government had in view was to reward the grantee, on his retirement from the police, for the faithful services he had rendered to Government for many years in that force. Having regard to the special language of the *sanad*, which is the most appropriate mode in an English document of conveying an absolute estate in fee simple to the grantee, and also to the above object with which the grant was made, the introduction of the words “as *jaghir*” was held not intended to have the effect of controlling the right of alienation inherent in the other operative terms of the grant. *DOSIBAI v. ISHWARDAS JAGJIVAN-DAS*, 9 B. 561.

(3)—*Grant to a person for an indefinite period.*—If a grant be made to a man for an indefinite period, it enures, generally speaking, for his life-time and passes no interest to his heirs, unless there are some words showing an intention to grant an hereditary interest. [*F.*, 3 C. L.R. 417; *R.*, 8 O.C. 61.] The above rules of construction will not apply if the term, for which the grant is made, is fixed or can be definitely ascertained by reference to the interest which the grantor himself has in the property or otherwise such as the conduct of the parties etc. *LAKHRAJ ROY v. KUNHYA SINGH*, 3 C. 210=4 I.A. 223, P.C.=3 Sar. 758.

(4)—*Suit for division—Grant in name of head of family—Rights of other members.*—In a suit for division of a village by R against V, both of them being members of the same family, where V alleged that a former division relied on by R was nominal and never intended to be carried out, and that, subsequently, the village was expressly granted to his father for his sole use and benefit, and both these allegations were found untrue, and he again contended in appeal that the village which was an inam, was granted to him for his sole use after the death of his father, *held* that no fresh grant was issued, and that the continuance of the grant in the name of V could in no way affect the rights of R, founded on the ordinary principles of Hindu Law. *NATTAM VENKATARATNUM v. NATTAM RAMAIA*, 2 M.H.C. 470.

(5)—*Grant of pottah—Grantor, a mortgagee—Promise to grant pottah of another village in case of redemption—Representative of grantor, if bound by promise.*—A certain person granted a pottah of a certain village, which had been mortgaged to him, to his illegitimate son and promised, in case of redemption by the mortgagor to make over to him another village yielding an equal revenue. His legitimate son then confirmed the grant and made it rent free without making any reference to the substitution of another village. The village was

**Grant—continued.****—2.—Construction—continued.**

redeemed. *Held* that the legitimate son was bound by his father's agreement and must make over another village yielding an equal revenue. *BIJAI BHADOOR SINGH v. BHYRON BUX SINGH*, 6 C.L.R. 21, P.C.

(6)—*Claims relating to saranjams, applicability of rules laid down by British Government—Saranjam grant not a grant of soil—Burden of proof on party alleging grant of soil.*—Where Civil Courts have jurisdiction over claims relating to saranjams, such Courts would have to consider what were the terms of the grant by which the British Government continued the saranjam and to be guided by the rules of succession laid down in respect of such saranjams by the British Government. It is only in the absence of any such rules that the saranjam will have to be treated as impartible property. Also, a grant in jaghir or saranjam is very rarely a grant of the soil, and the burden of proving that it is, in any particular case, a grant of the soil itself lies on the party alleging it. *RAMACHANDRA v. VENKATRAO*, 6 B. 598. [*R.*, 29 B. 480=7 Bom. L.R. 497, 29 B. 415=7 Bom. L.R. 439, 30 B. 101=7 Bom. L.R. 659, 34 C. 753=12 C.W.N. 193=5 C.L.J. 583, 32 B. 432=10 Bom. L.R. 531.]

(7)—*Grants carved out of Zemindari.*—Lands granted by a Zemindar under an absolute hereditary *mokurai* tenure do not, on the death of the grantee without heirs, revert to the Zemindar, even where the lands granted were carved out of the Zemindari. *SONET KOOR v. HIMMUT BAHADGOR*, 1 C. 391, P.C.=3 I.A. 92=25 W.R. 339. [*R.*, 28 B. 276, 7 C.W.N. 810]

(8)—*Ss. 10, 111, cl. (g)—Transfer of Property Act (IV of 1882)—Lease—Covenant against alienation—Lease containing no proviso for re-entry in case of breach of covenant—Alienation voluntary or by act of law.*—Where a lease contains no clause giving the lessors a right of re-entry or providing that the lease shall become void, in case of a breach of the covenant against alienation, a condition in the lease, by which it is stipulated that the lessee will not transfer in writing the land leased to him, and that, if he does so, the sale shall become void, cannot be said to be for the benefit of the lessor and hence it is void under s. 10, Act IV of 1882, and the lease cannot be said to have determined under the provisions of s. 111, cl. (g) of the same Act. When the land has been sold against the will of the lessee by the Act of a Court, the lessee cannot be said to have voluntarily transferred his interest in writing. (7 B. 262, 6 M. 159, *F.*) Where a landlord grants a permanent and heritable tenure in land, he has no estate left in him unless he reserves to himself a right of re-entry or reversion. *NIL MADHAB SIKDAR v. NARATTAM SIKDAR*, 17 C. 826. (1 C. 391. *R.*) [*F.*, 26 M. 157=12 M.L.J. 189, 28 A. 400=A.W.N. 1906, 60=3 A.L.J. 196, *Appr.*, 18 B. 603; *R.*, 14 C.P.L.R. 114, 29 C.363=9 C.W.N. 856; *D.*, 7 C.L.J. 209, 36 C. 745=10 C.L.J. 49.]



**Grant—continued.****—2.—Construction—continued.**

(9)—*Appointment of hereditary Gumasta by deshmukh vatandar—Grant in perpetuity from annual vatan income, whether valid after death of grantor—Adverse possession against sons of grantor—Proceedings in execution of decree obtained against original vantandar without making sons parties—Sons not bound.*—Plaintiff's father who was a *vatandar deshmukh* had executed a *sanad* appointing defendants to be *vatan* gumastas hereditarily, and assigning to them in perpetuity, by way of remuneration, a certain portion of the annual *vatan* income. Plaintiffs instituted this suit praying for a declaratory decree that the defendants were not entitled to any portion of the profits of the *vatan* and for a perpetual injunction restraining them from executing a decree on a mortgage of the *vatan* property obtained by them against the plaintiffs' father. *Held*, that it is not competent to a *vatandar* to appoint a hereditary *vatan* gumasta assigning to the office a remuneration in perpetuity payable out of the income of the *vatan*. In the present case, having regard to the terms of the *sanad* to the defendants it was in the power, whether of the original grantor or any of his successors, to determine the office of the defendants and the said remuneration thereof at any time after the *vatan* services were discontinued by Government in 1864. Also, the appointment and assignment by the grantor were equally in derogation of the rights of his successors, at any rate, in the absence of proof of custom to the contrary. The defendants contended that they should be deemed to have been in adverse possession of the share of the income from the *vatan* since 1864 when the services were created, but it was held, assuming the grant to be invalid as against the successors of the original grantor, the plaintiff's father, on his death, that adverse possession would only run from that time as against them, and twelve years had not so elapsed before the present suit was filed. With respect to the proceedings in execution of the decree, to restrain which plaintiffs had prayed for an injunction, it was held that the latter, not having been parties to any of such proceedings, were not bound by them under the provisions of s. 244 of the Civ. Pro. Code, KRISHNAJI v. VITHALRAV, 12 B. 80. [R., 14 B. 92, 22 B. 422.]

(10)—*Hindu Law—Grant in favour of unborn persons—Restraint on grantor's power of alienation.*—A conditional grant by a Hindu owner of a future interest in property to persons yet unborn, who may happen to be the living descendants of the grantees named, at some future and indefinite period, upon the occurrence of an event which may possibly never occur, is altogether void and ineffectual, the reason for its invalidity being that he would thereby impose a restraint contrary to Hindu Law, upon his own power of alienating his estate, discharged of such future interest. Where the object of the grant was to oblige the grantor and his successors in a Raj estate to

**Grant—continued.****—2.—Construction—continued.**

give maintenance some way or other to the descendants of certain persons living at the time of the grant, by declaring that, on the failure of the Rajah of the day to so maintain such descendants, the latter were to have an immediate right to some of the villages belonging to the Raj, *held* that the grant may be regarded either as a present assignment to persons not yet in existence subject to a suspensive condition, which may prevent its taking effect at all or for generations to come, or it may be regarded as a covenant running with the Raj estate, and binding its possessor to give the villages to those persons in the event specified, and that in either view it was ineffectual. CHANDI CHURN BARUA v. SIDDHESWARI DEBI, 16 C. 71, P.C. = 15 I.A. 149 = 5 Sar. 231. [Rel. on. 4 C.L.J. 238 = 33 C. 1065 ; R., 18 M. 252, 24 M. 449.]

(11)—*Reg. XXXI of 1803, s. 6—Settlement of land by proprietor revenue free—Condition rendering other lands of grantor liable for the revenue of the lands granted, whether enforceable.*—A document by which the proprietor of a taluqa settled lands on his daughter revenue-free, contained the covenant that he and his heirs would pay the land-revenue on the lands so assigned along with the land-revenue for their own estate. The document provided that if, at any time, his heirs or whoever might be in possession of the rest of his estate, should demand from the daughter, or the person in possession of the lands assignee to her, the revenue assessed on those lands then, the daughter or her successors would become entitled to claim and take possession of the legal share in his estate to which the daughter would be entitled under the Muhammadan law of inheritance. Plaintiff had acquired portions of the settled lands by means of private sale and also at a Court sale, and as the defendants, the grantor's successors had, in violation of the terms of the grant, realised from him the revenue for the portion of the land granted in his possession, he claimed possession of a portion of the daughter's share of inheritance. The grant was, however, held to come within the purview of s. 6 of Reg. XXXI of 1803, so that the above condition imposed on the grantor's heirs was not enforceable as contravening that law, and consequently the breach of such a condition could not confer on the grantee or on any person, such as the plaintiff in this case, deriving title from the grantee, the right to claim the share which such grantee would have inherited out of the grantor's estate. SAHIB ALI v. SUBHAN ALI, 21 A. 12 = A.W.N. 1898, 149..

(12)—*Construction of document—Grant of land described as bounded by river or road—Presumption as to boundary—Grant by Crown or subject.*—If land adjoining a highway or river is granted, the half of the road or the half of the river is presumed to pass, unless there is something either in the language of the deed or in the nature of the subject-matter of the grant, or



**Grant—continued.****—2.—Construction—continued.**

in the surrounding circumstances, sufficient to rebut that presumption, and this, though the measurement of the property which is granted can be satisfied without including half of the road or half of the bed of the river; and although the land is described as bounded by a river or road, and notwithstanding that the map which is referred to in the grant does not include the half of the river or road. This rule of construction should not be departed from merely because it is shown that it would have been to the interest of the vendor to retain the half of the bed of the river. The rule equally applies whether the subject-matter be a grant from the Crown or a subject. *BALBIR SINGH v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL*, 22 A. 96 = A.W.N. 1899, 194. (*Micklethwaite v. Newlay Bridge Co.*, L.R. 33 Ch. D. 133; *Eeroyd v. Coulthard*, L.R. (1897), 2 Ch. D. 554; *Lord v. The Commissioner for the City of Sydney*, 12 Moo. P.C. 473, R.).

(13)—*Grant of village on khoti tenure under sunnad—Construction of sunnad—Rights of managing khot—His rights re maphi istava lands and suit lands within khotship tenure.*—A sunnad granting a certain village on khoti tenure to a certain person, and containing several clauses which provided for the payment of rent by the khot and regulated his relations with the maphi istava and suite tenants within the khotship in respect of cultivation of lands, etc., construed and explained. A managing khot has a right, without any express authorization, to create tenancies in land, even though the reversionary interest in it is vested in the person whose lessee he is. If such a khot himself takes up the land, he can do so consistently with the conditions of the khoti tenure, for, a khot, as regards lands in his private occupation, may be a tenant to himself qua khot. A grant of a certain village on khoti tenure includes the istava lands in the village. The khot's interest in them whatever may be the extent of it, is inseparable from the khoti estate. The khot has a reversionary interest in the maphi istava lands as well as in the suti lands which had been abandoned by their occupants. *FAKI ISMAIL v. MAHOMED ISMAIL*, 12 B. 595.

(14)—*Grant of village by Government—Existing rights of third persons not extinguished.*—The grant by Government, whether Native or British, of a village, is subject to all existing rights against Government, whether or not the deed of grant contains an exception or reservation of such rights. Government cannot, therefore, by the alienation of its own rights in a village, even where the sanad purports to grant the village as a whole, extinguish or affect any substantive right therein appertaining to third persons, or convey to the grantee any larger or better estate or interest than that vested in Government. *DESAI HIMATSINGJI JARAVARASINGJI v. BHAVABHAI KAYABHAI*, 4 B. 643.

(15)—*Hindu Law—Grant, Construction of—*

**Grant—continued.****—2.—Construction—continued.**

*Whether grant confers an absolute estate—Capacity of grantee to dispose of grant by will—Santana Sreni Krame, construction of.*—A grant, by the holder of an estate, to his sister in terms "you are my sister; I grant you a taluk for your support...do you and the generations born of your womb ('Santana Sreni Krame') enjoy the same, and no other heirs of yours shall have any interest in or right to it," confers an absolute estate, the latter clause, 'no other heirs, etc.', being only a reservation of the grantor's right in the event of the grantee dying issueless. That event not having occurred and the grantee having had, at the time of her death, a daughter and a grandson by adoption, they (the daughter and the grandson) were entitled to bring an action for possession of the estate, claiming under the will of the grantee. [*F.*, 4 Bom., L.R. 508; *D.*, 9 C. 952 = 13 C.L.R. 62, P.C. = 10 I.A. 51, 28 C. 720 = 28 I.A. 152, P.C.; *R.*, 12 C. 663.] The words, 'Santana Sreni Krame,' import an absolute estate, such as would have been given, had the words been 'your children and grandchildren.' [*R.*, 4 C. 397, 455, 2 C. 906, 31 C. 561, 10 C.L.R. 349 = 7 C. 304 = 8 I.A. 46, P.C.] The words, 'no other heir of yours shall have right or interest,' simply make the absolute estate given under the earlier part of the grant defeasible, in the event of a failure of issue living at the time of the grantee's death, in which event the estate was to revert to the donor and his heirs. There is nothing in such a condition repugnant to Hindu Law. *BHOOBUN MOHINI DEBIA v. HURRISH CHUNDER CHOWDRY*, 4 C. 23, P.C. = 2 C.L.R. 339 = 5 I.A. 138 = 3 Sar. 815. (9 B.L.R. 377, 9 M.I.A. 134, *F.*) [*R.*, 7 C. 304 = 8 I.A. 46, P.C. 16 C. 383 = 16 I.A. 29, P.C., 15 B. 326.]

(16)—*Mafee birt tenure—Meaning.*—Whatever the term "mafee birt tenure" might have originally meant, its prima facie significance now is a hereditary tenure. *RAJAE MAHENDRA SINGH v. JOKHA SINGH*, 19 W.R. 211.

(17)—*Absence of words of inheritance—Grant to be in perpetuity.*—When a deed of grant of land contains no words of inheritance it cannot be presumed that such grant was not intended to be in perpetuity but the hereditary character of the tenure may be inferred from evidence of long and uninterrupted enjoyment, and of the descent of the tenure from father to son. *GYAN SINGH v. KOOR PEETUM SINGH*, 1 N.W.P. 165. [*Diss.*, 9 A. 591.]

(18)—*A prima facie reference to a hereditary interest is made by the use of the word "taluk without any sort of restriction or qualification."—Quære.*—Is an investigation of a talukdar's title commenced in the Revenue Court, and either decided there or carried up in appeal to the Civil Court, a bar to a suit by him to recover possession and mesne profits. No Privy Council decision is binding on a question of fact. *KHAJA ASANOOLLAH v. KALEE MOHUN MOOKERJEE*, 18 W.R. 469. [*D.*, 2 C.L.R. 592.]



**Grant—continued.****—2.—Construction—continued.**

(19)—*Holder of a pattah from the Zamindar.*—Plaintiff holding under a pottah from the zamindar is entitled to recover land unless defendant can show that he holds under a grant derived directly or immediately from the zamindar. KRISHNO CHUNDER GOOPTO v. MEER SUFDUR ALI, 22 W.R. 326.

(20)—*Inami-i-Altamgha—Alienable estate—Classification of grants of land revenue.*—A grant in inam-i-altamgha to N and his children, "and their descendants lineal succession, for generation after generation, in perpetuity and for ever," which was unburdened with any condition as to prospective service, and free from any religious, charitable, or other trust, held, to confer an alienable estate. Grants of land revenue for religious and charitable purposes, or for the future rendition of civil or military service to the State, considered and to some extent classified; and the enactments and authorities, historical and legal, relating to the question of their alienability, mentioned. KRISHNARAV GANESH v. RANGRAV *et al.*, 4 B.H.C. A.C. 1. [Appr., 6 B.H.C. 191, 9 B. 198, F.B.; F., 10 B.H.C. 471, 29 B. 480=7 Bom. L.R. 497; D., 1 B. 523; R., 5 B. 393, 437, 630, 6 B. 598, 9 B. 561, 14 B. 82, 404, 15 B. 625, 22 B. 422, 31 C. 568, 29 B. 415=7 Bom. L.R. 439, 5 Bom. L.R. 983, 10 Bom. L.R. 994, 417.]

(21)—*Shilotri lands—Right to enhance rent—Burden of proof.*—Under an indenture dated the 29th January 1819, the Government granted to A and B and their heirs and assigns certain villages in the island of Salsette, with the exception of shilotri lands as might be therein, or on any part thereof which could only become the property of A and B, on their purchasing the same from the proprietors. Since 1819, the proprietors of these shilotri lands went on paying to the grantees and their heirs assessment (or rent) at a fixed rate which, prior to the grant they used to pay to Government. In an action brought by an heir of A and B, in 1869, to recover an enhanced rent or assessment levied on these lands: Held, that the effect of the exception in the indenture of 1819 being to throw upon the plaintiff the burden of proving his right to enhance the rent (or revenue) which he had failed to do, and Regulation I of 1808, s. 4. cls. 1 and 2, containing admissions by Government (which then was the immediate landlord of the shilotridars), that Government itself had no such right, the plaintiff had no right to enhance the rent. Held, also that though the language of the exception was so large that it might have been construed to exclude any right on the part of the grantees to receive rent (or revenue), yet that as the defendant or his predecessors had, ever since 1819, paid to the plaintiff and his predecessors the revenue paid before that time to Government, that revenue passed under the Indenture of 1819 to the grantees in the deed. DADIBHAI v. RAMJI, 11 B.H.C. 162. [Appr., 19 B. 391.]

(22)—*Sanad, Construction of—Grant for reli-*

**Grant—continued.****—2.—Construction—continued.**

*gious and charitable purposes—Inalienability.*—A sanad, after reciting that certain villages had been held as inam by C on account of the worship jubilees, and feeding of Brahmins in honour of the Shri (or deity) proceeded to confirm the inam as before and to direct that it be continued to him and to his sons and grandsons from generation to generation as it had been continued to the Shri from former times. Held that, on the true construction of that document, the grant may fairly be taken to have been made primarily as a grant to the religious foundation, and not to be particular individuals named, for their own benefit. [R., 20 B. 250.] Property granted in inam for religious and charitable purposes inalienable, except under special circumstances. And no person other than the duly authorized trustee, can alienate by sale or mortgage the property of a religious trust. SHRI GANESH DHARNIDAR MAHARAJDEV v. KESHAVRAV GOVIND KULGAVKAR, 15 B. 625. [R., L.B.R. 1893—1900, 645.]

(23)—*Reg. XIX of 1793 (Non-badshahi Lakhiraj grants)—Scope—Joutuck grant—Holding rent-free.*—Regulation XIX of 1793, refers to grants to hold land free of revenue, not grants made by a private individual free of rent. A party holding under a Joutuck grant containing no reservation of rent, is entitled to hold free. KAMESHUREE DASSEA v. THE COURT OF WARDS, 12 W.R. 251.

(24)—*Imperial grant of land.*—Ruling of the High Court in a suit against the Government and the Mutwallie brought by a descendant of Khajah Anwar Shahad, a descendant of the Delhi Emperor, for a share in the annual payment made by the Government in connection with certain lands granted by the Delhi Emperor to the family of the Khajah over, whose remains he had built a tomb, for the purpose of maintaining it in the manner usual among Mahomedans; this land having subsequently come into the possession of the Rajah of Burdwan, and the Government having, since the perpetual settlement, continued the payment on account of the Rajah. SHAHZADEE HAZARA BEGUM v. THE COLLECTOR OF BURDWAN, 23 W.R. 378. [D., 4 M. 341, 1 B. 523; Cons., 5 B. 408, P.C.]

(25)—*Fazendari tenure—Grant of land for habitation—Right to erect privy—Implied grant.*—The defendants granted to the predecessor-in-title of the plaintiff a plot of land in the centre of their oart on Fazegdari tenure for the express purpose of building a house to be occupied by the grantee. A hut was built on it but no privy was built with or attached to the hut. The occupants performed their natural functions in the oart itself or in the neighbouring oarts. The plaintiff bought the hut and attempted to erect a Privy. The defendants objected. Held that the plaintiff was entitled to devote the site to any purpose he thought proper, and, therefore, to build a privy on it. There was no evidence that the premises were originally oc-



**Grant—continued.****—2.—Construction—continued.**

occupied by the predecessor-in-title of the plaintiff on any understanding that a privy should not be built on the premises; nor was there anything in the *Fazindari* tenure which forbade it. The suitable enjoyment of the hut, when it was originally built admittedly for the purpose of being inhabited, implied the use of a privy and the accompanying necessity for sweepers to take away its contents, when the occupants should think proper to erect one. *ESUBAI v. DAMODAR ISHVARDAS*, 16 B. 552. [R., 20 B. 617.]

(26)—*Grant of Jaghir—Nature of interest taken by Jaghirdar—Construction of grant.*—When a Jaghir is granted in indefinite terms, it is taken to be for the life only of the Jagirdar. But where the grant is “to a man and his heirs” and there is nothing to control the ordinary meaning of the words, the grantee takes an absolute interest. The principle that Jaghirs are to be considered life tenures only “unless otherwise expressed in the grant” is laid down in s. 15, Reg. XXXVII of 1793 (Bengal). It is the law also in Bombay and other parts of India. *DOSIBAI v. ISHWARDAS JAGJIWANDAS*, 15 B. 222, P.C. = 18 I.A. 22 = 6 Sar. 10. [D., 7 C.L.J. 202.]

(27)—*Stipulation in deed—Retention of holding rent-free—Mortgagee of share by zemindar—Construction.*—The defendant’s ancestor on giving up a four-anna share which he had theretofore held in a zemindary and had mortgaged, stipulated for the retention of the holding in suit rent-free for maintenance. *Held*, that the retention of the holding was intended not only for the benefit of the old proprietor to enure during his life only, but also for the benefit of his heirs, and that words of inheritance are neither necessary nor customary in such cases, and no inference is to be drawn from their absence. *GUNGA DEEN v. LUCHMUN PERSHAD*, 1 N.W.P. 229.

(28)—*Conditional and personal grant—Death of grantee before taking under grant—Rights of heirs.*—Where a grantee dies before he takes under a conditional and personal grant his heirs cannot claim under it. *ANUND PANEGRAHI v. NOTTOBAR PANEGRAHI*, 1 W.R. 82.

(29)—*Grant to children in perpetuity—Transfer by sale or gift—Reg. XIII of 1795, s. 15—Reg. XXXVII of 1793, grant confirmed to grantee’s son only—Claim of family upon grantee—Succession—Act XIV of 1859, s. 1, cl. 3—Purchase of right of first auction—Purchaser—Defendant, not in possession for more than 12 years—Limitation.*—An estate granted to a person and his children in perpetuity, “*nuslan bad nuslan, butnan bad butnam*,” i.e., in regular succession, generation after generation, and similar grants which are hereditary, are declared transferable by gift, sale or otherwise, under the terms of s. 15, Reg. XIII of 1795 and s. 15, Reg. XXXVII of 1793. Where a grant, as in this case, was not for the benefit of the family, but was confirmed to the grantee’s son only, the family could have no other claim upon him

**Grant—continued.****—2.—Construction—continued.**

than a natural obligation to help them, and their title to succeed to the grant would only accrue, as it fell in, to the heirs in regular succession. The plaintiff’s suit for full possession of a mouzah would not be barred by general limitation if the defendants be not found to have been in possession for more than twelve years, nor would it be barred by special limitation under cl. 3, s. 1, Act XIV of 1859 where the plaintiff, having purchased the rights and interests of the auction-purchaser, was not required to sue to set aside the sale. *BITHUL BHUT v. LALLA RAJ KISHORE*, 2 Agra 284. [R., 3 B. 186 = 6 I.A. 186.]

(30)—*Settlement—Construction—Grant to a man and his descendants.*—The defendants agreed to pay a certain annuity to B and “his descendants” out of the profits of certain villages. On the death of B, the defendants paid the allowance to his widow who now assigned it by will to the plaintiff who was not a lineal descendant of B. *Held* that, under the terms of the deed, the allowance was payable to the lineal descendants of B and only so long as there were lineal descendants living; and the assignment by the widow who was herself not entitled to the allowance, as of right, was invalid. *GOBIND KRISHNA v. MADHO*, A.W.N. 1883, 218.

(31)—*Gift, Construction of—Life estate and absolute estate.*—Where in a deed of gift, the words used were “*apne bab ki zat ko chhor dia*,” i.e., “I have relinquished in favour of my father’s person.” The deed was executed by a son in favour of his father in order to avert his displeasure, who wanted to give it to his other sons. *Held*, that the word “persons” was not used as a word of limitation, and the father had acquired the property absolutely. *KHAI-RUNNISSA BIBI v. DILRUPA HUSAIN*, A.W.N. 1882, 168.

(32)—*Onus—Reg. VII of 1822, s. 6, cl. 3.*—Where Government, by a grant made over an entire taluk to a person, and subsequently formally sanctioned his possession by a settlement, it was held that neither act of Government could be disputed on the ground that Government had acted under a mistake in making over the whole, instead of a part of the taluk. Where general descriptive terms such as ‘Villages’ or the like are used in a grant, and both the parties have by their acts put a particular construction upon them and rights depending on that construction have been enjoyed for many years, it lies upon those who impugn that construction to show that it is erroneous. *SHEIKH ZAHURUDDIN v. THE COLLECTOR OF GORUCKPORE*, 4 B.L.R. P. C., 36 = 13 W.R. P.C., 31.

(33)—*Building site, rent-free grant of—Mortgage of site—Grantor’s right to recover.*—A received from B the use of his ground rent-free, which he thus acknowledged in writing: “Building a house thereon, I shall enjoy so long as I and my kinsmen live therein. I shall have no right to sell the ground to another.” A



**Grant—continued.****—2.—Construction—continued.**

house was built on the site and inhabited by A and his heirs for several years, until it was destroyed by fire, when the heirs commenced to build a new house upon a portion of the ground, having leased another portion of it for building upon, and having mortgaged the whole of it: *Held*, that the heir of B was entitled to recover possession of the ground, as the conditions of the grant had not been observed; and that the word *sell* must be construed as prohibiting alienation of any kind. **RAHLAKAR v. NARAYANBHAT, 3 B.H.C.A. C., 68.**

(34)—“*Altamgha inam*”—*Wukf*.—The term “*Altamgha*” or “*Altamgha inam*,” in a Royal Grant, does not, of itself, convey an absolute proprietary right to the grantee, where, from the general tenor of the grant, it is to be inferred, that a *Wukf*, or endowment to religious and charitable uses, was intended. **JEWAN DOSS SAHOO v. KUBEER-OD-DEEN, 6 W.R. 3, P.C. = 2 M.I.A. 390.**

(35)—*Grant—Construction, principle of construction—Godavari lankas, shifting nature of—Lease by Government—Description by indefinite—Extent to prevail—Lessee entitled to damages for short extent.*—The Government gave a lease of S. Lanka in the Godavari river, and the extent was given as 777.64 acres. The boundaries of the lankas are of a shifting character owing to the action of the floods in the river. The area being much less than the extent granted, the lessee brought his suit for damages, for the short extent. *Held*, that the fact that the boundaries are of a shifting character, and the property leased is liable either to diminish or increase by a process of accretion, entitles the man, who is contemplating taking the lease, to rely upon the area stated in the lease. The primary canon of interpretation of a deed or grant, where there is a conflict between the description of the boundaries of the land conveyed and the description of the quantity, unquestionably, is that the description of the boundaries, if it is precise and accurate dominates the description of the quantity. (10 C.L.J. 570, *F.*; 63 P.R. 569, *R.*) There is also a supplementary canon equally well-established, though instances of its application are much less frequent than those of the other, that, if the description of the boundaries is vague and uncertain, it yields to the description of the quantity. A party who lets premises agree to give possession, and if he fails to do so, the lessee may recover damages against him. **PERMMARAJU VENKIAH GAROO v. THE SECRETARY OF STATE FOR INDIA, 7 M.L.T. 390 = 6 Ind. Cas. 727.**

(36)—*Use of words “istemrari-mokurari” in lease—Words used in lease and deed or will—Different effects.*—A grant to a wife has generally been construed as one for life only, if apt words of inheritance are not added. (2 I.A. 7, 5 C. 684, 24 C. 646, 22 B. 499, *R.*) The mere use of the words “istemrari-mokurari” in a grant

**Grant—continued.****—2.—Construction—continued.**

(by way of a lease) by a husband in favour of his wife, is not sufficient to create a permanent and hereditary tenure. The observation of the Privy Council that an “istemrari-mokurari” tenure is not necessarily a perpetual hereditary tenure is general, and not limited to maintenance grants only. (13 B.L.R. 124, 133, 12 C. 117, 27 C. 156, *R.*) Words excluding the claim of, or right of interference by, the grantor or his representative, do not necessarily import the creation of a permanent and hereditary tenure, but may fairly be construed as only to mean that the grantor or his representatives would not have the power to disturb the grantee during his or her life-time. (12 C. 117, *F.*; 9 C. 830, 27 C. 44, 27 C. 649, 10 A. 495, 23 A. 309, *D.*) [*Rel. on*, 30 C. 883.] Words which when used in wills or deeds of gift create hereditary interests, may not do so, when used in a grant creating intermediate tenures, for, the duration of a lease depends upon the period fixed, either expressly or by implication, and when no time is fixed, the lease is ordinarily deemed to be one from year to year; transfers by deed or will ordinarily pass the entire interest of the transferor. **AGIN BINDH UPADHYA v. MOHAN BIKRAM SHAH, 30 C. 20 = 7 C.W.N. 314. (9 C. 830, 23 A. 309, *D.*)**

(37)—*Original purpose of grant—Subsequent dealing—If character of tenancy changed.*—If the original grant was *raiya*, any subsequent dealing cannot take away the true character of the tenancy. **BAIDYA NATH v. SUDHARAM MISRI, 8 C.W.N. 751.**

(38)—*Grant of land—Nature of grant as shown by documents and by conduct of parties—Grant whether for maintenance or absolutely—Grant of hereditary estate.*—The holder of an impartible estate was heavily indebted, in a large sum of money to various creditors and also to Government for arrears of revenue. A compromise was effected between him and his creditors including Government (represented by the Collector). In pursuance of the compromise, the estate was sold and purchased by Government who, after adjusting the claims of the various creditors, granted certain villages to the representatives of a younger branch of the zamindar's family who were entitled to maintenance out of the estate and to whom a considerable sum was owing for arrears. The question now was whether the grant of the said villages was a maintenance grant or a grant of an estate of inheritance. It appeared that in a partition which subsequently took place among the grantees, lands admittedly held by them on a permanent tenure and the lands the subject of the above grant were divided among them “through and in the presence of the zamindar” and on the assumption that all the lands were held on an absolute and permanent tenure. *Held*, on the construction of the documents evidencing the grant and on the circumstances of the case, that the grant was one of an absolute estate of inheritance and not for



**Grant—continued.****—2.—Construction—continued.**

maintenance only. *RAJAJI BAHADUR GARU v. PARTHASARATHI APPA RAU*, 26 M. 202, P.C. = 13 M.L.J. 123 = 8 C.W.N. 105 = 30 I.A. 14 = 8 Sar. 419. [R., 16 M.L.J. 178 = 29 M. 437.]

(39)—*Grant in Khairat Bishanpriti, construction of—“Al aulad,” interpretation of.*—A grant in *Khairat Bishanpriti* by the proprietor of a Chota Nagpur Raj, providing that the grantee and his *al aulad* should be in possession and enjoyment of the property, but containing no words importing a right of alienation, was construed as a grant resumable in the absence of male heirs. Though the words *al aulad* etymologically signify “offspring” or “progeny” (i.e., include female as well as male descendants), yet, they must be interpreted to mean “lineal male decedents,” having regard to the custom prevalent in the place. *PERKASH LAL v. RAMESHWAR NATH SINGH*, 31 C. 561. (15 W.R. 375, 501, 20 M. 375, D.)

(40)—*Construction of—Artificial channel, ownership in—‘Jala’ or waters, meaning of—Rights and liabilities of Government regarding the channel—Irrigation works, control and conservancy of—Customary supply of labour by landowner not indicia of proprietary right—Madras Compulsory Labour Act (I of 1858).*—The suit was for declaration of ownership in a channel, which ran through three inam villages granted to the plaintiff's ancestor and irrigated the said villages. It was an artificial channel conveying water from the bed of the Tamrapurani river to certain villages, and had been in existence long before the grant. Besides the Inam villages, Government villages, higher up and lower down, were also irrigated by that channel. It was found that the boundaries mentioned in the grant referred to various other channels, and there was also specific mention of tanks, wells, and waters as having been conveyed in the grant, but not the channel in dispute. *Held*, (1) that the grant does not convey ownership in channel to the plaintiff; (2) that word ‘*jala*’ or waters, used in the grant, cannot be held to include the channel; (3) that the channel remains the property of Government, and the Government has the right of entering on it and carrying out such repairs and improvements as are proper, but not so as to interfere with the customary supply of water to the plaintiff's lands or to cause damages thereto. The conservation and control of works of irrigation have, from the earliest times, been the special function and duty of Government in India. It is customary for landowners to contribute labour for ordinary repairs of irrigation works, by which they benefit, and such labour may even be enforced under the provisions of the Madras Compulsory Labour Act (I of 1858), but the contribution of such labour is no proof of any proprietary right in irrigation works. *AMBALAVANA PANDARA SANNADHI v. THE SECRETARY OF STATE FOR INDIA*, 18 M.L.J. 251 = 28 M. 539. [R., 32 M. 141 = 19 M.L.J. 131 = 5 M.L.T. 149.]

**Grant—continued.****—2.—Construction—concluded.**

(41 & 42)—*Grant for indefinite term—No passing of interest beyond life of grantee.*—A grant made for an indefinite term enures only for the life of the grantee and passes no interest to his heirs. *DADOO BRAHMIN v. KAOSAL PRASAD*, 4 C.P.L.R. 90.

(43)—*Jagir — Grant — Succession—“Aulad was ahfad,” meaning of.*—A grant was made in favour of one K for life and after him to his ‘*aulad wa ahfad*,’ that is, to his issues and descendants. *Held*, that the grant was not limited to the grantee's male descendants only. *NURULLAH KHAN v. HAYATUNNISSA*, 13 Ind. Cas. 155.

(44)—Where it was agreed between the parties that the proprietary right in the land claimed should follow the limitations of the *mafee* grant; *held* that a limitation of the right for the life of the *mafidar* only, was not a true construction of the agreement. *AMEER BUN v. SOOKHA RAM*, 2 P.R. 1870, Rev.

(45)—*A and “the heirs male of the body lawfully begotten” — Son made legitimate by acknowledgment included therein.*—Where a Jagir was limited to A and “the heirs male of his body lawfully begotten,” *held* that sons made legitimate by acknowledgment under Mahomedan Law were included. *MUSSAMMUT LALLI BEGUM v. NAWAB MAHOMED ARJMAT ALI KHAN*, 13 P.R. 1875.

Grant of village upon payment of a quit-rent—Grant of land or land revenue—*See ACT XXIII OF 1871, s. 6, A.W.N. 1905, 206 = 28 A. 104.*

Guzara land, suit for possession of—Estate for life—Grant for maintenance in perpetuity, how to be construed—*See GUZARA LAND, 7 O. C. 90.*

*See JAGIR, 108 P.R. 1901.*

*See JURISDICTION OF CIVIL COURTS, 1 P. R. 1876.*

Grants by state to subjects—Construction of such grants — *See KHOTI TENURE, 12 B. 534.*

Construction of doubtful grant—*See LEASE—CONSTRUCTION OF LEASE, 11 C.W.N. 809.*

*See LIMITATION ACT, 1908, art. 144, 15 B. 247.*

Reservation, by grantor, of minerals—Rights of grantor to have egress and ingress and to work mines—*See MINES, 1 C.L.J. 526.*

*See SERVICE TENURE, 10 M. 1.*

*See WILL—CONSTRUCTION, 11 M.L.J. 160, P.C. = 23 A. 324 = 28 I.A. 65.*

**—3.—Grants for Maintenance.**

(1)—*Grant for Maintenance—Nature of tenure—Resumption and assessment of lands.*—In a suit for assessment of rent on certain villages the defendant admitted that the villages formerly belonged to the plaintiff's predecessor,



**Grant—continued.****—3.—Grants for Maintenance—concluded.**

but were given over to them for their maintenance. *Held* that under these circumstances the defendant's tenancy was a mere tenancy at will, which the plaintiff's predecessor had a right to determine at any time. **GOVERNMENT V. LALL MOHUN NATH, 2 Hay 136.**

(2)—*Enjoyment of lands granted in lieu of maintenance—Nature of grant.*—Where members of a branch of a Zemindari family have for three generations held and enjoyed lands, made in lieu of maintenance, without any interference on the part of the Zemindar for the time being, the presumption to be raised is that the original grant was intended to be an absolute one. **SRI RAJA JAGANNADHA V. SRI RAJA PEDDA, 4 M. 371. [Appr., 4 C.L.J. 399.]**

(3)—*Maintenance grant, if resumable by zemindar.*—Land held as a maintenance grant, is resumable by the zemindar at the death of the grantees, whether it is in the hands of more immediate or in those of more remote members of the family. **RAJA WOODOY ADITTO DEB V. MUKOOND NARAIN ADITTOO BABOO, 22 W.R. 225. [R., 3 C.L.J. 521, 4 M. 193, 30 C. 20, 2 C.L.J. 20, 4 C.L.J. 399, 7 C.L.J. 202.]**

(4)—*By a zemindar to a member of his family.*—A grant by a former Maharaja of Pacheet of a Pergunna, part of the zemindary, or Raj of Pacheet, to a member of his family, held to be a grant for maintenance only, and resumption decreed to the Raja in possession. *Sembla.*—Grants made by the predecessor of the Raja in possession, whether in fee or for maintenance, enure only during the lifetime of the grantor, and are not binding on his successor. *Quere.*—Whether the zemindary of Pacheet constitutes an indivisible estate of inheritance, and as such inalienable. **ANUND LAL SINGH DEO V. MAHARAJA DHERAJ GURROOD NARAYUN, DEO, 5 M.I.A. 82.**

(5)—*Prohibition against alienation—Legality of sale in execution against grantee.*—Where a grant of land was made by way of maintenance with a prohibition against alienation by the grantee, the land was nevertheless held liable to be attached and sold in execution of a money decree against the grantee. **SINGAI PARMANANDSAO V. BAJI RAO BHAOO, 14 C.P.L.R. 114. (7 B. 262, 17 C. 926, 6 M. 159, Appr.; 10 B. 342, D.; 20 C. 273, R.)**

**—4.—Resumption of Grant.**

(1)—*Grant of land conditioned on service—Hereditary office, land granted as remuneration in respect of, when resumable.*—With regard to the resumability or otherwise of lands granted, distinction has always been made between land granted to the parties' ancestors with a condition of service attached to the grant and land granted as remuneration for service. In the case of a grant of the first kind, the land cannot be resumed when the service is no longer required, whereas in the case of a grant of the

**Grant—continued.****—4.—Resumption of Grant—continued.**

other kind, the land may be resumed. Further, in a case where there has been a grant of an hereditary office, the rule permitting resumption of land granted as remuneration for service can only be applied when the need of such service altogether ceases. In the present case, the services of a *kulkarni* were still required, so that, if the defendants had a right to the hereditary *kulkarniship*, they could not be deprived of the land held by them as remuneration for such office, on the mere ground of the plaintiff preferring to appoint some one else to officiate as *kulkarni*. Consequently, so long as the services of a *kulkarni* were required for the village of which the defendants were the hereditary gumasta *kulkarnis*, they were entitled to enjoy so much of the land as had been assigned to them as remuneration for such services whether their services be accepted or refused, provided they duly discharge the duties of the office should their services be required. **BHIMAPAIYA V. RAMCHANDRA, 22 B. 422.**

(2)—*Zemindar—Service tenure—Resumption of land.*—A Zemindar is *prima facie* entitled to resume lands granted to persons on condition of their rendering services and paying a certain sum to the grantor, when those services are dispensed with. The Zemindar may also, at his pleasure, enhance the quit-rent. **SANNIYASI V. SALUR ZEMINDAR, 7 M. 268. [R., 22 C. 938, 26 M. 403.]**

(3)—*Grant for maintenance, Nature of.*—A grant expressly made in lieu of maintenance is *prima facie* resumable on the death of the grantee. **BENI PERSHAD KOERI V. DUDH-NATH ROY, 27 C. 156, P.C. = 26 I.A. 216 = 4 C. W.N. 274 = 7 Sar. 580. [F., 1 C.L.J. 517; Appl., 2 C.L.J. 20; R., 6 C.W.N. 796.]**

(4)—*Grant of Jaghire by Government—Evidence of grant—Grant of Jaghire by Muhammadan Rulers—Alteration of grant by the East India Company—Act of State.*—In the absence of the original deed of grant of a Jaghire, it was held sufficiently proved by translations of the deed and produced from official custody, of which the correctness was long ago certified by competent officers. A grant made by the Nabob without any conditions, having been altered by the East India Company into one subject to the performance of certain services, was held to be an Act of State which cannot be interfered with by Municipal tribunals. **KARUNAKARA MENON V. THE SECRETARY OF STATE FOR INDIA, 14 M. 431.**

(5)—*Construction of gift—Resumption of lease—Evidence of intention to resume.*—An oral lease of villages, at a favourable rate of rent, and of indefinite duration by a talukdar, in favour of her daughter, was held, in the circumstances of the case, not to be one for life, but resumable at the lessor's pleasure. **[R., 5 O.C. 97.]** Where there was no evidence of the lessor's intention contemporaneous with the lease, a will, executed by her within two years



**Grant—continued.****—4.—Resumption of Grant—continued.**

of the lease and made known to the Government to show the future succession to the taluk, containing a bequest of the same villages to the lessee with express power to alter the disposition was held to be evidence on the question of intention. *NAJIBAN BIBI v. CHAND BIBI*, 10 C. 238, P.C. = 13 C.L.R. 401 = 10 I.A. 133 = 4 Sar. 472.

(6)—*Grant by Government—Subsequent proclamation cannot revoke grant made by previous proclamation—Donee's consent—Gift.*—Government cannot, by issuing a subsequent proclamation, resume a grant made by a previous proclamation, inasmuch as it cannot, any more than a private person, without the consent of the donee revoke a gift actually made. *THE COLLECTOR OF RATNAGIRI v. VYANKATRAV NARAYAN SURVE*, 8 B.H.C. A.C. 1. [F., 18 B. 670; R., 3 B. 452, 12 B. 534, 23 B. 518.]

(7)—*Mokurruree Pottah — Resumption.*—A Mokurruree Pottah, granted by a Rajah of Tipperah to a member of his family is resumable on the death of the grantor; and a female member does not cease to be a member by marrying into another race. *ROOP MOONJUREE KOOEREE v. BEER CHUNDER JOOBRAJ*, 9 W. R. 308.

(8)—*Lakheraj estate—Resumption and assessment—Separate Zemindary held from Government in perpetuity—Rent free grants.*—After resumption and settlement, a lakheraj estate becomes a separate zemindary held from Government in perpetuity, and the proprietors are capable of making rent-free grants; but grantees run the risk of losing their grants if the whole estate should be sold for default on the part of the zemindar. *DABEE PERSHAD v. JOY LALL CHOWDHRY*, 12 W.R. 361.

(9)—*Grants under amaram tenure, right of zemindar to resume.*—The respondents in this case held under amaram tenure grants under which tenure were certainly resumable at the pleasure of the zemindar. Possibly, the grant which had originally been amaram and resumable, as such, might, when the military service was dispensed with and circumstances changed, have been converted into a perpetual grant upon a fixed payment. Had this been the case, it ought to have been distinctly pleaded, and the grants themselves, if produced, would have shown whether such defence could be supported. It was the fault of the respondents themselves that they did not produce those very documents whose contents would have set the question of their resumability entirely at rest. Resumption usually consists in putting an end to the grant under which the grantees held, remitting the services and requiring them to pay the full assessment. No absolute dispossession was either attempted or intended, though means were taken to prevent the grantees reaping the crops. The respondents, in this case, if left in possession at all, were in possession as the servants of the zemindar, and on condition of collecting the revenue. The case was briefly

**Grant—continued.****—4.—Resumption of Grant—continued.**

this, that the respondents were grantees under resumable grants; that those grants were resumed; that they remained in possession without payment of the assessment they were legally liable to pay, and, it was for such arrears of assessment that the present suit was instituted. The Judicial Committee reversed the decision of the Sudder Adawlut and upheld the decree of the Zillah Court which held the respondents to be liable for such arrears. *UNIDI RAJAH RAJE VENKATAPERUMAL RAUZE BAHADOOR, ZEMINDAR OF KARVETI NUGGUR v. PEMMASAMY VENKATADRY NAIDOO*, 4 W.R. P.C. 121 = 7 M.I.A. 128. [R., 3 M.H.C. 59, 14 W.R. P.C., 28, 8 M. 72, 14 M. 365, 22 O. 938, 23 M. 262, 26 M. 403.]

(10)—*Palki Huq.*—An annual allowance for *Palki Huq* (Palanquin allowance) to the holder of the hereditary office of *Desai* of *Broach*, held under a *Jaghire* grant charged by former native Governments on the land revenues of that *Pergunnah*, is incident to the tenure of *Desai*, and is not resumable by Government. *THE GOVERNMENT OF BOMBAY v. DESAI KUL-LAINRAI HUKOOMUTRAI*, 14 M.I.A. 551.

(11)—*Resumption of grant—Old grant, not sufficient reason for resuming it in part only—Grantee entitled, to notice of Zamindar's intention to dispossess him and compensation for improvement—Act XVII of 1876, s. 53.*—Under the provisions of s. 53, Act XVII of 1876, the mere circumstance that a grant held at the pleasure of the grantor is an old one is not sufficient reason for holding it to be resumable in part only. All that the holder of a grant however old which is held at the pleasure of the Zemindar can fairly claim is that he shall receive reasonable notice of the Zemindar's intention to dispossess him and reasonable compensation either in cash or otherwise for recent improvements, if any, effected by him on the holding. *ALI ABBASS SHEIKH v. BAL GOBIND*, 6 O.C. 232.

(12)—*Resumption of—Grant at favourable rate of rent, conversion of rent-free grant into—Perpetual lease—Ejectment of grant-holder by notice under Oudh Rent Act—Possession, suit for.*—In 1837 Sambat B made a rent-free shankalap grant to his guru R of a certain village, and the guru and his descendants continued to hold it under the grant until about 1850 A.D., when, the estate being held *kham*, the Chakledar insisted upon the payment of Rs. 416 a year as rent or revenue, and this sum continued to be paid after 11, S., the talookdar, recovered possession. In 1871 he in a letter to the then holders of the grant said that "the village was granted as *shankalap guru dachchina*; that they were always to pay the rent, that neither he nor any one of his family would interfere, etc., etc." Subsequently on being ejected from the village by notice, issued under the Oudh Rent Act of 1886, the plaintiffs (the present holders of the grant) and the defendant (the present talukdar for recovery of possession and for a declaration



**Grant—continued.****—4.—Resumption of Grant—concluded.**

that they were entitled to remain in possession until the grant at a favourable rate of rent was resumed. *Held*, that the letter of H.S. did not create and was not intended to create a fresh grant, and that the assessment of rent on the land previously held rent-free did not constitute a resumption of the original grant, but merely modified its terms, so that what was a rent-free grant became a grant at a rent of Rs. 416 a year, the other terms of original grant remaining in force. The letter of H.S. created no perpetual lease, and the plaintiffs when they were ejected were holding the village under the grant at a favourable rate of rent. *Held*, therefore, that they had been illegally ejected by notice under the Oudh Rent Act, and were entitled to recover possession and to retain it until the grant was resumed. *BALGOVIND v. RAJA RAMPAL SINGH*, 4 O.C. 264. [Cited, 9 O.C. 37.]

(13)—*Grant of land by Collector—Favourable assessment—Long occupation by grantee—Sudden enhancement of assessment by Government—Illegality.*—Where lands are granted by the Collector, whether—with or without authority, at a favourable rate of assessment, and the grantee enjoyed them on such conditions for nearly a hundred years, and then full assessment was levied by Government; *held*, that the imposition of the full assessment was illegal and could not be levied. *THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. KOMANDUR NARASIMHACHARIAR*, 8 M.L.T. 378.

(14)—*Resumption of grants—Grant to relation as jagir for ever—No term restricting grant to life of grantee—Grant to enure for descendants of grantee also.*—Where a village was granted to a relation of the grantor as a jagir for ever the grant was made of the same village for three generations, in the absence of any term in the grant showing that it was intended to enure for the life of the grantee only it was proper for the Court to infer that the grant was intended to enure for the descendants of the grantee also. *RAJA HARBANS RAI v. DEBISING*, 4 C.P.L.R. 135.

Hindu religious endowment, royal grants made for, implied penalty for resumption of—Inalienability of endowed property—See *HINDU LAW—RELIGIOUS ENDOWMENT*, 6 B. 546, F.B.

See *RESUMPTION, RIGHT OF—GENERAL*, 15 W.R. 549.

See *SERVICE TENURE*, 22 C. 928.

**—5.—Miscellaneous.**

(1)—*Suits relating to lands held under Government grant—Nature of claim and title, determination of.*—In suits relating to lands held under a grant made by Government, the determination of the nature of the claim and title of the grantee must rest upon the terms of the grant as far as other person's rights in them are not affected thereby, irrespectively of the use

**Grant—continued.****—5.—Miscellaneous—continued.**

which the grantee may have made of the property conveyed by it. Government cannot, by the alienation of its own rights in a village, albeit that the *sanad* purports to grant the village as a whole, extinguish or affect any substantive right therein appertaining to third persons, or convey to the grantee any better estate or interest than was vested in Government. *RAVJI NARAYAN MANDLIK v. DADAJI BAPUJI DESAI*, 1 B. 523. [Appl., 18 B. 525; R., 3 B. 340, 4 B. 643, 6 B. 244.]

(2)—*Use of the word "dawami" in pottah.*—*Quære*:—Whether the use of the word "dawami" in a *pottah* necessarily imports a perpetual hereditary interest, or whether, notwithstanding the use of that word, it may be held, upon a consideration of the provisions and object of the *pottah* as well as the surrounding circumstances, that the intention was to grant a perpetual lease, does not sufficiently appear. *BENI PERSHAD KOEBI v. DUDHNATH ROY*, 27 C. 156, P.C. = 26 I.A. 216 = 4 C.W.N. 274 = 7 Sar. 580.

(3)—*Invalid grant of property by wife during husband's absence—Grantee's title perfect by twelve years' possession.*—The holder of a *mourasi* grant, from a woman, of the property of her absent husband, mistakenly supposed to be dead, though the grant was in excess of the wife's limited powers was not in the position of a lessee, and could acquire, as against the husband (the true owner of the property a perfect title thereto by twelve years' possession. *BEJOY CHUNDER BANERJEE v. KALLI PROSONNO MOOKERJEE*, 4 C. 327.

(4)—*Assignment of land for service—Act XVIII of 1873 (N.W.P. Rent Act), ss. 30, 95 (c)—Act XIX of 1873 (N.W.P. Land Revenue Act), ss. 79, 241 (h)—Reg. XIX of 1794, s. 1—Rent-free grant.*—An assignment of land, free of rent, to be held and enjoyed by the assignee so long as he should perform certain services, is not a rent-free or revenue free grant within the meaning of Reg. XIX of 1793, s. 30, Act XVIII of 1873 or s. 79, Act XIX of 1873. A suit for the possession of such land, on the ground that the services, for the performance of which it was assigned, are no longer performed, is cognizable by a Civil Court, and is not a claim to resume a rent-free grantor to assess rent on land, in respect of which an application might be made to the Revenue Court under ss. 30 and 95 (c) of Act XVIII of 1873, or ss. 79 and 241 (h) of Act XIX of 1873. *PURAN MAL v. PADMA*, 2 A. 732. [Appl., 8 A. 552 = A.W.N. 1886, 221.]

(5)—*Grant of land rent-free and revenue-free—Reg. XIX of 1793, s. 10—Reg. XLI of 1795, s. 10—Act XVIII of 1873 (N.W.P. Rent Act), s. 30, Act XIX of 1873 (N.W.P. Land Revenue Act) s. 79—Suit for possession of land granted rent-free and revenue free—Jurisdiction of Civil Court.*—A grant of land rent-free and revenue-free is null and void and liable to resumption, with reference to the above quoted laws and regulations. A suit for the possession of land



**Grant—continued.****—5.—Miscellaneous—continued.**

granted rent-free and revenue-free, or as it is called "Krishnarpan" land is cognizable by the Civil Courts. *JAGA NATH PANDAY v. PRAG SINGH*, 2 A. 545, F.B.

(6)—*Inam — Determination of tenancy by notice to quit.*—Where an Inam was created in 1811 by a Zemindar, which in its nature was a tenancy in perpetuity, and fifty years later, his successor either confirmed the tenancy on terms more favourable to himself or else made a fresh grant, similar in all respects to the old one except in the amount of rent, the tenancy is not determinable by the successor of the second grantor by a notice to quit. *VIZIA-NAGARAM MAHARAJAH v. SURYANARAYANA*, 9 M. 307. P.C. = 13 I.A. 32 = 4 Sar. 696. [R., 19 M. 100.]

(7)—*Government grant for family maintenance — Joint ownership — Survivorship — Hindu widow's rights.*—Where, after confiscation of the lands of three brothers, the Government assigned revenue-paying estates, for the benefit, in certain proportions, of the eldest brother's minor son, also of the widow, minor son, and daughter of the youngest brother (both these brothers being then deceased), and the second brother, who survived, was put into possession of a proportionate part of the property, held, the youngest brother's widow became, on the death of his son and daughter sole owner, by survivorship, of the estate so assigned for their and her benefit; so that an alienation of part, if made by her, could not be set aside by the second brother, who failed to show, on the above state of things, that the estate was heritable property of the son, as whose uncle and heir he claimed. *NARPAT SINGH v. MAHOMED ALI HUSSAIN KHAN*, 11 C. 1, P.C. [F., 27 P.R. 1891; Commented upon, 27 M. 498; R., 39 P.R. 1909 = 59 P.L. R. 1909.]

(8)—*Suit for possession of dubutter land—Mourosee pottah—Right of occupancy — S. 6, Act X of 1859—Title based on grant.*—Where a person sues for possession of dubutter land, and relies on a mourosee pottah given by a Poojaree when in office, he must prove a right of occupancy under s. 6, Act X of 1859; and his title is bad as based on a grant from a person having only a limited interest in the land. *GOOROO PERSHAD ROY v. RAM LOCHUN PAURAY*, 13 W.R. 241.

(9)—*Construction of sunnud — Jagheer — Service tenure.*—In this case the sunnud granted to the jagirdar, was only a confirmation by the Government and the Rajah of the tenure under which the jagheer was held, and authorized the jagheerदार to remain in possession and in performance of the services with his brothers, without describing the kind of service; held that the Rajah could not resume the land without proof that the services to be performed by the jagheerदार were personal

**Grant—continued.****—5.—Miscellaneous—continued.**

services only to the Rajah. *RAJAH NILMONEY SINGH DEO v. THE GOVERNMENT*, 18 W.R. 321. [R., 22 C. 938, 34 C. 753, 5 C.L.J. 583, 12 C.W.N. 178, 193.]

(10)—*Rent-free grants of tanks subsequent to 1790, liability of, to resumption, except when made for public benefit.*—The question in this case was regarding the validity of rent-free grants of tanks made subsequently to 1790. In a case where such a grant had been made avowedly for the benefit of the public owing to the scarcity of water and to prevent desertion, the grant was upheld by a majority of the High Court in a Full Bench case of January, 1865, because the use of the water by the tenants, of the zemindari was looked on in the nature of rent reserved to the zemindar. In the present case, there was nothing to warrant a finding that such was the condition of the grant or the intention of the grantor. The grant was not therefore one falling within the ruling in the above Full Bench case and, having been made admittedly subsequently to 1790, was one liable to resumption. *JUDOONATH SIRCAR v. BONOMALEE MITTER*, 2 W.R. 295. [R., 9 W.R. 1.]

(11)—*Resumption—Invalid grant—Tank—Public benefit.*—A zemindar is entitled to resume lands held under invalid grants or under no grant at all, in which a tank is dug with his leave not for the public benefit of the whole village, but for a bonus. *CHUNDER CANT CHUCKERBUTTY v. BUNKO BEHAREE CHUNDER*, 3 W.R. 177. (2 W.R. 15, D.).

(12)—*Claim between landlord and tenant—Claim to hold land rent free—Consideration.*—A Coal Company, had allowed certain villagers to settle on its lands; and a dispute arose about the conditions, in which the Coal Company wished to assess the lands, and the tenants claimed to hold rent-free. Held, that in the plot in which tenants had dug wells under an agreement with the Company, the water which the Company obtained from the wells was sufficient consideration for the rent-free tenures claimed by tenants; but that, in the case of another plot, the construction of temples was not so. *THE BENGAL COAL COMPANY, LIMITED v. HUR DYAL MAR-WAREE*, 25 W.R. 245.

(13)—*Prescriptive title—Enjoyment of allowance for four generations—Legal presumption—Reg. V of 1827, s. 1.*—Where the plaintiff's ancestors had enjoyed an allowance during four successive generations for a period extending over more than a century, the legal presumption, in the absence of the original grant, is that such grant was hereditary. The allowance having been continued by the British Government to the plaintiff's grandfather for the same reasons for which a village (admitted to be held on hereditary tenure) had been continued, and having been paid to the plaintiff's grandfather up to his deceased, and afterwards, as a matter of course, to the plaintiff's father,



*Grant—continued.**—5.—Miscellaneous—continued.*

it was held that the enjoyment of the plaintiff's grandfather and father was proprietary enjoyment, and as this enjoyment had continued uninterruptedly for more than thirty years, that under Reg. V of 1827, s. 1, a statutory and indefeasible title to the allowance had been acquired. *DESAI KALYANRAI HUKAMATRAYA v. THE GOVERNMENT OF BOMBAY*, 5 B.H.C. A.C., 1. [*Doubted*, 9 B. H. C. 222 ; R., 6 Bom. L.R. 131.]

(14)—*Prescription—Enjoyment of charitable grant for more than thirty years—Reg. V of 1827, s. 1—Proprietary right.*—Where a charitable grant in connection with a temple was proved to have been enjoyed by the incumbent, and those under whom he held, in regular succession for more than thirty years: It was held that the grantee had acquired a right of property in it, under Reg. V of 1827, s. 1, *By Warden, J.*, independently of the origin or nature of the grant. *By Gibbs, J.*, in the absence of it being shown to have been a personal grant, and by the conduct of Government in paying it to several generations in succession. *THE COLLECTOR OF KHEDA v. HARISHANKER TIKAM et al.*, 5 B.H.C. A.C., 23. [*Doubted*, 9 B.H.C. 222 ; R., 6 Bom. L.R. 131, 33 C. 1040=10 C.W.N. 857.]

(15)—*Holder of appanage, lease by—Validity—Mining leases—Their nature.*—The holder of a younger brother's appanage cannot alienate property of which he has only a limited tenure for maintenance, but could grant a lease to enure for the period of his life. Mining leases, like leases for building, are among those which the regulations particularly favour, as being in their nature such as to require a long time for profitable working. *MESSRS. GORDON STUART & CO. v. TIKAITEE SEOBAS KOWAREE*, W.R. 1864, 370.

(16)—*Claim to possession of lands as khamar lands, dismissal of—Action for resumption—Necessity of proof of alleged grant with its time and terms.*—The prayer in this plaint was to declare that the village in question was a portion of the *mal* lands of the plaintiff's zemindaree; and that the *lakhiraj* title set up by the defendant may be set aside and possession awarded to the plaintiff. The lower Court dismissed the case of the plaintiff on the ground that he had failed to establish that he or his ancestors ever held possession of the village for the last 60 years from the year 1803, when the claim of his ancestors to obtain certain rents of the village brought against the husband of the defendant was dismissed for want of proof. The plaintiff was bound to prove that the village had been given for maintenance of the husband of the defendant as alleged by him and was such as he had a right to resume after his death. Plaintiff was not authorised to ask for the resumption of any maintenance grant whatsoever, without showing its nature and conditions and the relationship of the party to

*Grant—continued.**—5.—Miscellaneous—continued.*

whom it may be said to have been originally granted. *MAHARAJAH NEELMONY SINGH DEO BAHADOOR v. RAJCOOMAREE THAKORANEE*, 2 W.R. 171.

(17)—*Superior holder not in possession, grantee from, not competent to raise question of his grantor's title.*—Plaintiff-appellant sued the defendant for possession of the lands in suit covered by a *Mourosee patta* of his. The lower appellate Court dismissed plaintiff's claim finding it not to be proved to its satisfaction that the grantor was in possession at the time of the alleged lease to the plaintiff; that, consequently, plaintiff's suit was untenable, and must be dismissed. On second appeal, plaintiff urged that the lower Court's decision was erroneous in point of law, and that, whether his grantor was in possession as putneedar or not of the lands covered by the grant, the grant to him should have been enquired into fully. But the High Court was of opinion that the ruling of the lower Court was correct and rejected the appeal, holding that it is not competent to a superior holder like a putneedar, by the grant of that which is not in his possession, to give opportunity to a party to raise the question of his title, and have it directly decided. In order to enable a lessee to defend any action, his grantor must have been in possession at the time of the grant; otherwise a suit for possession at the tenant's instance alone cannot be supported. *DINOMONEE BANERJEE v. GYRUTOOLAKHAN*, 2 W.R. 138, [R., 11 W.R. 80, 137.]

(18)—*Reg. XIX of 1793, s. 10—Reg. XLIV of 1793, s. 8—Land granted by Zemindar "rent free" for public purpose—Rent—Revenue.*—A Zemindar by a sunnud in 1850 (after reciting that there was no water in talook A, and that, the river being at a distance, great inconvenience was felt for want of water, in consequence of which desertions took place in the village) granted to B, 22 bigas of land rent-free, stipulating that B should dig a tank on the land, and continue to distribute water. In a suit to annul the grant, on the ground that it was void under s. 10, Reg. XIX of 1793, held by the majority of the Court (*dissentiente Levinge, J.*), that grants of land made by zemindars free of rent are void under the provisions of that enactment. But further held by the majority of the Court (*dissentientibus Trevor, J., and Lock, J.*) that the grant in question was valid, the reservation of a right to the use of the water by the tenants of the zemindaree being a benefit of the service in the nature of rent reserved to the zemindar; and that the grant was therefore either not one of those intended to be dealt with by s. 10, Reg. XIX of 1793, or was one which the zemindar was empowered to make by Regulation XLIV of 1793. *PIZIRUDDIN v. MADHUSUDAN PAL CHOWDHRY*, B.L.R., Sup. Vol. 75=2 W.R., F.B., 15. [*Appr.*, 25 W.R. 245; *Expl.*, B.L.R., Sup. Vol., 774=9 W.R. 1; *D.*, 3 W.R. 177.]



*Grant—continued.***—6.—Miscellaneous—continued.**

(19)—*Grant of land by Government to Military authorities for Military purposes—Power of Military authorities to grant such land for longer period—Right of Government to recover rent from grantees.*—Where Government had permitted the Military authorities to use certain land for Cantonment purposes (and subsequently resumed it), the Military authorities had no right to make a grant of the land for a period longer than it would remain in their possession, and Government was entitled to Collect rent from the grantees and not from the Military authorities. *BABOO RAM CHUND v. THE COLLECTOR OF MIRZAPORE*, 8 Agra 7. [D., 3 A. 669.]

(20)—*Seer land — Grant by zemindar to daughter to be held as seer—Rent-free grant—Right of zemindar to make grant—Liability of land of pay revenue.*—There is nothing to prevent a Mahomedan zemindar from making a grant of seer land to his daughter, on the occasion of her marriage, to be held by her as seer, i.e., free from payment of rent but not free of payment of revenue, and the grant is binding on the auction-purchaser of the zemindar's right. The auction-purchaser is only entitled so receive the revenue rate from the grantee. *AHMUD-OLLAH v. MITHOO LALL*, 3 Agra 186. [R., 2 A. 545.]

(21)—*Land granted by Maharaja of Dharbanga in lieu of maintenance to junior members of Raj family, alienability of—Guardian ad litem, allegations of collusion and negligence against.*—A suit was instituted to set aside certain mortgage-decrees obtained against the plaintiffs and their father and brother, on the ground that the plaintiff's guardians *ad litem* in those suits were negligent in their duties and had colluded with the then plaintiff and now first defendant, and that the property against which decrees were given in these suits, being *babuana* property was inalienable and not liable to sale or transfer of any kind. First plaintiff died subsequent to the suit. *Held*, there is no reason whatever for thinking that the plaintiff's guardians *ad litem* in the previous suits were guilty of collusion or negligence. They took instructions from proper persons and conducted the defence in a proper manner. The contention that they should have impeached the bond as purporting to transfer inalienable *babuana* property is not sustainable. For, the suits being on the basis of an instrument, in which the nature of the mortgaged property had not been specified such a defence could not naturally arise. Further, the plaintiff's father and brother did not take up this line of defence. No negligence or collusion can be attributed to the guardians *ad litem*. *Held*, also, that *babuana* property, the subject of the mortgage, was property given by the Maharaja of Dharbanga to the junior male members of the Raj family to be enjoyed by them in lieu of money-maintenance, but subject to the proprietary rights of the grantor (Maharaja) and to his ultimate claim as reversioner on extinction of the grantee's descendants in

*Grant—continued.***—5.—Miscellaneous—continued.**

the male line. It was also apparent that the grantee was bound to pay to the Maharaja, the Government Revenue, which the latter was paying into the Collectorate and that this payment could be enforced by suit. Such being the nature of the *babuana* property, there is no reason to refuse the recognition of a right to alienate that property subsisting in the holder. The estate created is, for practical purposes, an absolute estate. To refuse the right to deal with, and transfer, such an estate, would be tantamount to placing persons *sui juris* in the category of proprietors under disability and allowing them to incur obligations without responsibility. There were instances of alienations in favour of third persons. Consequently, the *babuana* property is alienable. *MAHARAJAH SIR RAMESHWAR SINGH BAHADUR v. BABU JIBENDAR SINGH*, 9 C.W.N. 567=32 C. 683. (6 M.I.A. 164, R.) [F., 33 C. 1158=10 C.W. N. 978, 35 C. 823=82 C.W.N. 958=8 C.L.J. 124, 12 C.W.N. 966.]

(22)—*Title from Government under sanad—Grantee under Government—Evidence that he is only trustee.*—Though the title conferred by Government under a sanad is absolute and overrides all other titles, nevertheless, the grantee under Government may, by an express declaration of trust or by an agreement to hold in trust constitute himself a trustee for another. [F., 1 O.C., Sup., Vol. 24 ; D., 3 O.C. 250.] The Courts cannot, on the ground that the title under a Government sanad is absolute, decline to consider evidence relied on by a party to a suit to show that the grantee really holds for him as a trustee. *THAKUR SHERE BAHADUR SINGH v. THAKURAIN DARIO KUAR*, 3 C. 645, P.C. [R., 9 O.C. 113, 10 C.W. N. 1065=4 C.L.J. 405=16 M.L.J. 440=2 A.L. J. 695=8 Bom. L.R. 722=8 O.C. 377=33 I.A. 158=28 A. 726=1 M.L.T. 265.]

(23)—*Grant of portion of impartible estate—Restriction of the ordinary Hindu Law of succession.*—When the holder of an impartible zemindari carves out a portion of his estate and grants it to his younger son in whose name it is registered as a separate estate in the Collector's books, the estate so carved out becomes the absolute estate of the grantee and of his heirs in succession, notwithstanding a provision in the instrument of grant that, in case of failure of self-begotten male issue in the grantee's line, the immoveable property should revert to the senior line, as such a provision contravenes the principle laid down in the *Tagore Case*, and is therefore inoperative. *SRI RAJA RAU VENKATA KUMARA MAHIPATI SURYA RAU v. SRI RAJA RAU CHELLAYAMMI GARU*, 17 M. 150. [R., 31 C. 561.]

(24)—*Grant of land by parol—License to build—Revocability of.*—A license by parol, coupled with a grant, is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol. In Burma outside Rangoon, a grant of any nature



**Grant—continued.****—5.—Miscellaneous—continued.**

may be made by poral and a permission to build upon land is a grant of the occupation of such land by the building. A licence to construct a work, which is attended with expense to the party using the license and which seems intended to be permanent and continuing, unless expressly limited as to its duration, is not countermandable after such work has been executed. *MA MIN THI v. SIT WHET*, L.B.R. 1893—1900, 107. (16 C. 641, R.)

(25)—*Rights of the baseedar.*—A *basee* or assignment by a Raja of his rights in the Revenue, confers upon the *bassedar* the rights of a superior proprietor. *RAM DIAL v. BAGAH*, 1 P.R. 1870, Rev.

Endowments for religious purposes and personal grants—Applicability of s. 4 of Pensions Act—See ACT XXIII OF 1871, s. 4, 17 M.L.J. 549=3 M.L.T. 104=31 M. 12.

Where tenure has been created by a deed which makes it resumable on the failure of the heirs of the grantee, the interest created is not inalienable—See BEN. ACT I OF 1879, s. 34, 1 C.L.J. 557.

Pargana surrendered to and re-granted by Government—Rates of rent—Terms of Patta—See MAD. ACT VIII OF 1865, ss. 9, 11, 18 M. 216.

Of village by Government to members of joint Hindu family—Joint Tenancy and not tenancy-in-common—See DEED—CONSTRUCTION OF DEEDS, 27 A. 310=A.W.N. 1904, 269.

Impartible zamindari—Right of zamindar to charge perpetual annuity on income of zamindari—See HINDU LAW—ALIENATION, 1 M.H.C. 455.

Impartible zamindari—Right of zamindar to alienate portion of zamindari in favour of his sister—Validity of alienation during lifetime of zamindar—See HINDU LAW—ALIENATION, 2 M.H.C. 349.

See HINDU LAW—RELIGIOUS ENDOWMENT, 18 M. 266=4 M.L.J. 223.

Relating to establishment and maintenance of Thakurs—Right of Hindu widow to question validity of such grant by her husband in his will—See HINDU LAW—WILL, 12 C.W.N. 808=8 C.L.J. 489.

For maintenance, duration of—See KHORPOSH GRANT, 1 C.L.J. 517=3 A.L.J. 59.

See MEHOMEDAN LAW—GENERAL, 18 M. 257.

Of surface rights—Reservation of mineral rights by lessor—Lessors right to prospect—Reasonable exercise of right—See MINERAL RIGHTS, 10 C.W.N. 17.

Interpretation of—Reservation of minerals—Rights of grantor to have egress and ingress and to work mines—See MINES, 1 C.L.J. 526.

**Grant—concluded.****—5.—Miscellaneous—concluded.**

Khorposh or maintenance grant in Dhal-Boom Estate—Nature and rights of such grant—See MINES, 2 C.L.J. 20.

Restriction upon alienation of zamindari lands—Permanent lease of such lands—Lease not valid as against Government and heirs and successors of Zemindar—See MAD. REG. XXV OF 1902, 1 M.H.C. 141.

See RESUMPTION, RIGHT OF—GENERAL, 1 W.R. 6.

See SERVICE TENURE, 6 W.R. 121, 7 C. 697=9 C.L.R. 233, 14 B. 82.

See STATUTES, CONSTRUCTION OF, 1 B. 523.

See YAUMIA, 11 M. 283.

**Grants, Crown Act.**

See ACT XV OF 1895.

**Grass.**

Damages for forcible cutting and carrying away of grass—See PROVINCIAL SMALL CAUSE COURTS ACT, 1887, sch. II, art. 31, 17 C. 707.

**Gratuitous Bailee.**

Gratuitous bailee, duty of—Non-delivery of goods—Onus—See BAILMENT, 1 B.L.R. O.C., 68.

**Gratuity.**

Sanctioned but not yet paid whether liable an attachment in execution—See ATTACHMENT—SUBJECTS OF ATTACHMENT, 6 A. 634=A.W.N. 1884, 210.

See ATTACHMENT—SUBJECTS OF ATTACHMENT, 6 A. 173=A.W.N. 1884, 16.

See RIGHT OF SUIT—OFFICE OR EMOLUMENTS, SUITS RELATING TO, 6 B.H.C. A. C. 250.

**Grazing Land.**

Free—set apart by Government for village cattle—Disposal of part of such lands by Government—Extent of right of pasturage, in Government waste lands—Relative rights of villagers and of Government, how far within Civil Court's jurisdiction—See JURISDICTION OF CIVIL COURTS, 21 B. 684.

See WASTE LAND, L.B.R. 1872—1892, 603.

**Grazing Right.**

Over jungle land—See CUSTOMARY RIGHT, 11 Ind. Cas. 88.

**Gregorian Calendar.**

See LIMITATION ACT, 1908, s. 25, 4 B. 103, 6 B. 83.

**Griha Pravesam.**

And *Ruthusanti* expenses of daughter defrayed by widowed mother—Suit to recover amount expended from husband's undivided brother—Right to maintain suit—See HINDU LAW—MARRIAGE, 26 M. 497=13 M.L.J. 25.



**Ground Rent.**

See RENT.

See RENT, SUIT FOR.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 166 P.R. 1883.

**Grove.**

See LANDLORD AND TENANT—PROPERTY IN TREES, ETC., ON LEASED PREMISES.

Resumption of grove land—See U. P. ACT XVII OF 1876, 2 O.C. 73.

Rent, Suit for—Rent of—let by grove-holder for cultivation—Landlord's consent, land held without—See U. P. ACT XXII OF 1886, ss. 108, cl. (2), 127, 5 O.C. 162.

Zemindar's right of—Groves belonging to absconding tenants—Wajib-ul-arz—*Bona vacanta*, meaning of—See ESCHEAT, 1 O.C. 42.

Right of pre-emption in—When seller has neither proprietary nor under-proprietary interest in land thereof—See PRE-EMPTION—RIGHT TO PRE-EMPT, O.C. 284.

Co-sharers in a—position of, after partition—Member of village community not residing in the village in which he has rights in land—See PRE-EMPTION—RIGHT TO PRE-EMPT, 7 O.C. 19.

Position of grove-holder of long standing—Legal force of—Settlement Circular No. 63 of 1863—See REMAND, 15 O.C. 33.

Land let for planting grove thereon—Transferability of—Applicability of the Tenancy Act—See TRANSFER OF PROPERTY ACT, 1882, Ch. V, s. 106, 9 A.L.J. 483.

Suit for possession of—Permanent buildings on—See VALUATION OF SUITS, A.W.N. 1886, 106.

**Grove-holder.**

Position of—Right to pre-empt—See PRE-EMPTION—CONSTRUCTION OF WAJIB-UL-ARZ, 13 O.C. 202=7 Ind. Cas. 613.

**Grove Tenure.**

(1)—*Cultivators right to*—Wajib-ul-arz—*Custom, Court taking judicial notice of.*—The plaintiff sued the defendants for possession of three groves together with mesne profits, alleging that as he had ejected the defendants from their cultivator holding on the 18th May 1894, they on the same date lost, according to law and the custom of the realm, all title to the groves in their possession. No evidence of the alleged custom was given.—*Held* (Per W. Blennerhassett, J.C.), that the general custom of the country is that the tenant retains his right to the trees until he dies without heirs or absconds from the village with the intention of totally abandoning the trees, and that ejectment from the cultivatory holding or residing in a neighbouring village does not amount to an abandonment of trees. *Held* (Per E. Chamber, A.J.C.), that the custom alleged by the plaintiffs is not so notorious or general as to justify the Court in

**Grove Tenure—concluded.**

taking judicial notice of it and treating it as part of the common law of the province. The incidents of the grove tenure discussed. UMRAO SINGH v. ALI RAZA KHAN, 1 O.C. 231. (Select Case No. 130, Diss.)

**Growing Crops.**

(1)—*Growing crops, immoveable property.*—Growing crops come within the category of immoveable property, notwithstanding that, for the purpose of Registration Act, they have been dealt with as though they constituted moveable property. GOPAL CHANDRA BISWAS v. RAMJAN SIRDAR, 5 B.L.R. 194=3 W.R. 275. [R., 22 C. 877.]

See STAMP ACT, 1879, sch. I, art. 44 (b), 8 M. 104, F.B.

**Growing Grass.**

If immoveable property—See STAMP ACT, 1879, sch. I, art. 5 (c), 13 B. 87.

**Guarantee.**

See CONTRACT ACT, 1872, SS. 124 TO 147.

See PRINCIPAL AND SURETY.

See SURETY.

See VENDOR AND PURCHASER—BREACH OF WARRANTY.

See WARRANTY, BREACH OF.

(1)—*Contract Act (IX of 1872), s. 131—Lease—Guarantee for rent—Indemnity—Continuing guarantee—Death of surety—Intention—Costs of imprudently defending suit.*—Even in the case of a continuing guarantee, where the intention of the parties to a lease was that the lessor should be guaranteed for all rent which might become due during the currency of the lease, and that such guarantor should, in his turn, be guaranteed by a third person for any of the rent, which, by reason of his contract of guarantee, he should be made to pay, the liability of such person is not determined on his death, and his estate will be liable on his contract. [R., 15 C.P.L.R. 136.] In a contract of lease, where the only thing guaranteed is the payment of the rent by the lessee, and the surety is, in his turn, guaranteed by a third person for such payment of rent alone, the surety, who imprudently, defends a suit for rent brought against him by the lessor, cannot recover the costs of such suit from that person, who was his guarantee only in respect of the rent. GOPAL SINGH v. BHAWANI PRASAD, 10 A. 531=A.W.N. 1888, 211.

(2)—*Agreement guaranteeing conduct of person employed as agent of guarantor—Liability for loss resulting from such agent's misconduct—Construction of contract.*—In an action brought against the guarantor, for damages for loss, based upon an agreement guaranteeing an employer against loss by the misconduct of a person employed as agent of the guarantor, *held*, upon a construction of the agreement, that the loss must be shown to have arisen from misconduct on the part of the



**Guarantee—continued.**

agent in connection with the business of the agency, and to be within the scope of the agreement. **SRI KISHEN v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 12 C. 143, P.C. = 12 I.A. 142 = 4 Sar. 659.**

(3)—*Condition precedent—Charter party—Damages, Measure of.*—The defendants, M.G. and Co., entered into a contract of guarantee with the plaintiffs, P. and C. N. C. & Co., which was contained in the following letter:—

"In consideration of your paying us on account of C, the owner of the ship *Caroline*, chartered by you to load at Rangoon with timber, as per charter party executed by him and your good selves, dated this day, the sum of Rs. 21,500, to be paid in advance and in part freight of the said vessel payable as follows:—*viz.*, Rs. 18,000 at Calcutta, and Rs. 3,500 at Bombay for the disbursement of the vessel there:—We hereby guarantee and engage to hold you harmless against all losses, damages, and consequences arising from the non-performance of any of the acts, covenants, or agreements to be done, kept, observed, or performed by or on the part of the said C, in terms of the said charter party; and we further agree to allow you interest at the rate of 10 per cent. per annum, to be charged by you for the said advance in the event of its being refunded by us. We also agree to see the voyage performed by the said vessel in full terms and conditions of the said charter party this day executed by C. in your favour?" To this the plaintiffs replied on the same day: "In consideration of your having guaranteed to keep us harmless for the advance made by us to C, owner of the ship *Caroline*, against freight of that vessel, to be earned by her on the anticipated voyage from Rangoon to Bombay, with a cargo of timber, as per charter party executed this day between ourselves and the said C. as per your letter of guarantee dated this day, we hereby agree and engage ourselves to make you over a mortgage-bond on the British barque *Moulmein* of 305 tons, executed in Moulmein by the said C in favour of N B of Rangoon, for certain debts due to him by the said C, duly transferred to you free from N B's claim on the said barque *Moulmein*." The charter party was of even date, and was made by C on the one part and the plaintiffs on the other part, and it was thereby agreed that the ship *Caroline*, "being tight, strong, and staunch, and in every way fitted for the voyage, and now at Bombay, shall with all convenient despatch proceed to the port of Rangoon in British Burma or so near thereto as she may safely get, and there load from the charterer's agents or their order a full and complete cargo of timber," etc., "and being so loaded shall proceed to Bombay, etc.," and deliver the same on being paid freight in the manner below at and after the rate," etc., "the act of God, etc., excepted." The freight to be paid as follows:—Rs. 18,000 in Calcutta on the signing of this charter party, Rs. 3,500 also in advance at Bombay towards defraying the disbursements of the vessel at that port, and the balance to be paid by trans-

**Guarantee—continued.**

fer on account and to credit of N B of Rangoon, for money due and owing to him by the said C," etc. "And the said C hereby binds himself," etc., "that the said vessel *Caroline* shall be ready to leave Bombay without any delay immediately upon the disbursements being satisfied; and in case she cannot leave the said port of Bombay within such time as shall be considered reasonable, or is otherwise detained either at Bombay aforesaid or at Rangoon, except for or by such causes as the act of God," etc., then and in such case this charter party shall be considered null and void, and the said charterers shall be entitled to recover from the said C, his heirs and representatives, the aforesaid sum of Rs. 21,500 together with interest thereon, calculated from the date thereof, at the rate of 10 per cent. per annum. The charterers to have the option of cancelling their charter party in the event of the vessel arriving at Rangoon in a disabled state, at the time for repairs to make the ship seaworthy in every respect exceeding twenty-five days. Penalty for non-performance of this agreement, the estimated amount of freight. The plaintiffs were acting on behalf of N.B., and the defendants on behalf of C during the whole of this negotiation, and C was at the time largely indebted to N B. The ship "*Caroline*" turned to be unseaworthy, and the charter party was not carried out. In an action by the plaintiffs against the defendants on the guarantee; *held*, that the covenant to transfer the mortgage of the *Moulmein* was independent, and not a condition precedent to the plaintiff's right of action. *Held* also on the facts that the representation in the charter party that the *Caroline* was, while lying at Bombay, "tight, strong, and staunch," etc., amounted to a contract that the ship would be so, and the defendant's guarantee covered it. *Held*, also that the defendants, not being parties to the charter party, and not having bound themselves to any assessment of damages, were not called on to pay the penalty specified in the last clause of the charter party, but that the damages against them must be the actual damages which the plaintiffs on N B's behalf suffered in consequence of C's breach of contract that is, Rs. 21,500 paid under the contract, and the balance of freight that would have gone to reduce N B's debt and interest on both sums from the date of the contract. The plaintiffs, however, claimed a less sum than those damages would amount to, and therefore the plaintiff's claim was decreed in full. **PRES-TOMJEE DHUNJEEBHAY v. GREGORY, 1 Ind. Jur. N.S., 412.**

(4)—*Surety — Material fact — Disclosure—Contract Act, s. 142—English and Indian law—Equity—Good conscience.*—It may be that the effect of the provisions of the Contract Act is to impose on a person, who seeks to obtain a guarantee from a surety, an obligation similar to the one imposed in cases of contracts of insurance on ships or lives; but independently of the Act, the contract of suretyship did not, in respect of the obligation of disclosure, differ



**Guarantee—continued.**

from other contracts. Assuming the *Contract Act* has had the effect of imposing a larger obligation on a party taking a guarantee than would be recognised in English law, it is an obligation of an arbitrary character, which need not be enforced by any considerations of equity or good conscience, and it would, on the contrary, be unjust to enforce it in a case when at the time the contract was made, the party sought to be affected by it could not have known the duty was incumbent on him. *THE SECRETARY OF STATE FOR INDIA v. NILAME-KAM*, 6 M. 406.

(5)—*Guarantee—Appropriation of payments.*—Where, in consideration of a certain advance by the bankers of a certain company, two of the directors of the company authorised the appropriation of the first moneys received by the bank on the company's accounts towards the repayment of the advance, and personally bound themselves to make good any deficiency therein, and where the bankers applied such moneys, instead, in payment of other debts due to themselves from the Company, the guarantee of the directors was held discharged. *NICHOLLS v. WILSON*, 4 C. 560 = 3 C.L.R. 361.

(6)—*Trade custom of Beawar—Local banker guaranteeing foreign merchant's dealings—Recovery of payments by guarantor.*—Where, in accordance with a local trade custom, a foreign merchant made purchases on the credit and suretyship of a local banker, and the stranger merchant omitted to enter the last and largest of the several transactions in the customary memorandum to the guarantor, sent after reaching his place, the guarantor, could recover the amount of such last transaction from the stranger merchant, on payment of the same to the vendors, though such guarantor might have for a time repudiated his liability on such transaction to the local trader. *SETH SAMUR MULL v. CHOGA LALL*, 5 C. 421, P.C. = 6 I.A. 238 = 4 Sar. 79.

(7)—*Promise to pay for other's debt—When binding.*—A promise to pay a debt when made by other than the borrower is binding in many cases, even though the amount of it may not be ascertained at the time. *PEAREE LALL SHAHA v. WOOMESH CHUNDER MOJOMDAR*, 9 W.R. 140.

(8)—*Surety, Liability of.*—The fact of a surety for the payment of the price of goods purchased, signing a voucher for them cannot make him primarily responsible. *AGUILAR v. WOOMESH CHUNDER SHAW*, 22 W.R. 209.

(9)—*Recommendation is not the same thing as making oneself surety.*—A mere recommendation by one party to another to lend money to a third party, does not render the first party liable to repay the loan. *JUGGAT INDAR NARAIN ROY CHOWDHRY v. NISTARINEE DASSEE*, 24 W.R. 445.

(10)—*Contract of guarantee—Nature of—Statute of frauds.*—A contract of guarantee is a "matter of contract and dealing," within

**Guarantee—concluded.**

the meaning of s. 17 of 21 Geo. III, c. 70, and therefore such a contract made by a Hindu is not affected by s. 4 of the Statute of Frauds. Where a defendant raises a claim of set-off, he must, on the trial of that issue, be considered as plaintiff. *SRIMATI JAGADAMBA DASI v. J. M. GROB*, 5 B.L.R. 639.

(11)—S. 129, *Contract Act—Guarantee for payment of instalments.*—*Quære*:—Whether a guarantee, on behalf of a lessee, not for the payment of the rental due *in toto*, but for the regular payment of the instalments, is not a guarantee extending to a series of transactions and so falling within the definition of a continuing guarantee given in s. 129, *Contract Act*. *JAGADINDRA NATH ROY v. CHANDRA NATH PODDAR*, 31 C. 242.

(12)—*Security on lease for a term of years—Death of surety before expiry of lease—Continuing liability of surety.*—Where a person became a surety for another on a lease for a term of years and the lessee died before the expiry of the lease, the liability of the surety did not expire with the death of the lessee, as the guarantee given by the surety was a continuing guarantee and could not at any time be revoked. *LALOO SAHIB v. MANRUPCHAND*, 3 C.P.L.R. 4.

See *BROKER*, 6 C.W.N. 429.

Oral contract of—See *NEGOTIABLE INSTRUMENTS—PROMISSORY NOTES*, L.B.R. 1872—1892, 657.

**Guardian.**

## 1.—GENERAL.

## 2.—APPOINTMENT OF GUARDIANS.

## 3.—DUTIES AND POWERS OF GUARDIAN.

## 4.—RATIFICATION OF ACTS OF GUARDIAN.

## 5.—MISCELLANEOUS.

See *ACT XL OF 1858*.

See *ACT IX OF 1875*.

See *CIV. PRO. CODE, 1908, O. XXXII*.

See *CUSTODY OF CHILDREN*.

See *GUARDIAN AD LITEM*.

See *GUARDIANS AND WARDS ACT, 1890*.

See *HINDU LAW—GUARDIANSHIP*.

See *LUNATIC*.

See *MAHOMEDAN LAW—GUARDIANSHIP*.

See *MINOR*.

## —1.—General.

(1)—*Suit for possession of property mortgaged and sold during minority—Minor—Limitation Act, sch. II, arts. 12, 91 and 144.*—The property of a minor was mortgaged by his father acting as his guardian. The mortgagee instituted a suit on the mortgage in which the minor was represented by his father as guardian *ad litem* and obtained a decree in execution of which the property was sold. The minor after attaining majority brought the present suit for



**Guardian—continued.****— 1.—General—continued.**

possession of the property sold, with a declaration that the mortgage and sale are not binding on him, being neither for his benefit nor for legal necessity. *Held*, that the suit having been instituted within 12 years of the date of mortgage is within time. *Held*, further, that such a suit is not barred by arts. 12 or 91 of sch. II of the Limitation Act. **BALBHADDAR SINGH v. JAWAHIR SINGH**, 11 O.C. 346. (16 B. 186, 33 C. 257, 14 M. 26, 34 C. 329, R.; 5 O.C. 197, *Expl.*)

(2)—*Guardian 'ad litem'—Appeal—Guardian 'ad litem'—Not made a party by appellant—Limitation.*—Where a guardian *ad litem* of a defendant respondent was not a made a party to an appeal filed by the plaintiff, until after the period of limitation for filing such appeal had expired, it was held that the appeal was not for this reason time barred. **RUP CHAND v. DASODHA**, A.W.N. 1907, 290=3 M.L.T. 58=30 A. 55. (4 A. 37, *F.*)

(3)—*Guardian and Ward—District Judge's incompetency to supersede his predecessor's order appointing guardian—Removal of guardian—Maintenance—Marriage—Appeal—Guardians and Wards Act (VIII of 1890), ss. 25, 39 and 47.*—On 9th June, 1905, E (District Judge) appointed D to be guardian of both persons and property of three minor daughters of G, nephew of D, and rejected the claim of Z and another. On 11th October, 1907, E's successor A granted D's application to arrange for the marriage of the eldest girl R. On 18th December, 1907, A superseded the arrangement. On the 23rd December, 1907, D again applied for assistance of the Court to enable him to regain control of R. On the 24th January, 1908, A, without assigning any good reason, passed an order to the effect that D's guardianship of R should be superseded in favour of Z, and D should pay one-third share of profits of Gulam Qadir's land, to N, son of Z, for maintenance of R. *Held*, that the order of 18th December 1907, is an arbitrary one and that of 24th January, 1908, is extraordinary and indefensible. A District Judge *suo motu* has neither power to remove a guardian nor to appoint a person whose claim has already been rejected by his predecessor. *Held*, also, that, where a duly constituted guardian is willing to maintain, the Court has no power, to pay out of the Ward's property maintenance charges to a person who on his own account chooses to support the minor. *Held*, further, that, without assigning very good reasons, the District Judge is not justified in refusing help for restoring the minor to the control of the guardian. **DULLA v. ALAHDH**, 150 P.W.R. 1908.

(4)—*Surety of guardian—Liability—Contract Act (IX of 1872), s. 128—Property not specified in the application for appointment of guardian, dealings with—Guardians and Wards Act (VIII of 1890), s. 35—Assignment of bond, if must be in writing—Mistake and misrepresentation, if ground for avoiding bond—Minor—Estoppel.*—When the bond executed by a surety

**Guardian—continued.****— 1.—General—continued.**

on the appointment of the guardian of a minor's properties under Act VIII of 1890 did not impose any limits. *Held*, that his liability extended to the guardian's dealings with properties other than those specified in the petition for the appointment of the guardian. Estoppel cannot be pleaded against a minor. An administration bond is not invalidated by reason of mutual mistake on the part of the Court and the surety, or misrepresentation by Court. (10 C.W.N. 673=33 C. 713, *F.*) The liability of the guardian extends to profits actually received, or profits which could have been received but for his gross and wilful default. He is not liable for the profits of property in the wrongful possession of a stranger. The law does not require a written assignment by the District Judge of a guardian's bond. **SARAT CHANDRA ROY CHOWDHRY v. RAJOINI MOHAN ROY**, 12 C.W.N. 481.

(5)—*Minor—Decree against a properly represented minor, when binding—Next friend—Guardian ad litem, fitness of person whose Act called in question—Civ. Pro. Code, s. 443.*—*Held* that, as a general rule, if a minor is properly represented in a suit or proceeding by a next friend or guardian *ad litem* and there is no fraud, collusion or gross negligence on the part of the next friend or guardian, the minor is as much bound by the decree or order passed in such suit or proceeding, whether it was for his benefit or not, as if he were of full age. *Held* further, that a minor cannot be held to have been not properly represented merely because the Court appointed as his guardian *ad litem* a person whose act was called in question in the suit. *Held* also, that a Court should not appoint as guardian *ad litem* a person whose act is called in question in the suit, even though it is a case to which s. 443 of the Code of Civil Procedure applies. **AMIR CHAND v. NARSING NARAYAN SINGH**, 11 O.C. 319. (5 O.C. 197, *D.*)

(6)—*Payment by guardian—Allocation of debt.*—A guardian and his ward, each owed certain sums of money to a creditor. The guardian made a payment to the creditor and did not claim to set off this amount in the minor's suits in mesne profits against her. *Held*, the payments should be allocated to that portion of the debt for which the guardian was liable. **AMBUGATYANNI SAMINATHA IYER**, 3 M.L.T. 321.

(7)—*Minor—Removal of certificated guardian, effect on attainment of majority by—Suit instituted without next friend, effect of—Irregularity—Civ. Pro. Code, ss. 440 and 578.*—*Held* that, where a guardian has been duly appointed, the word will not attain his majority till he attains the age of 21 years, even though the guardian be removed before the ward attains that age. (A.W.N. 1891, 188, R.; 4 A.L.J. 597, 28 A. 281, 12 C. 612, 10 O.C. 241, *F.*) *Held* further, that a suit should not be dismissed by reason of the fact that the plaint was presented by a person who was a minor at the



**Guardian—continued.****—1.—General—continued.**

time, but the proper course is to give an opportunity for steps being taken to have a next friend of the plaintiff brought upon the record and to prosecute the case if he so desires. *ABDUL KARIM v. MUHAMMAD AHMAD*, 11 O. C. 159. (7 O. C. 234, 13 C. 189, 21 C. 866, 23 C. 686, 19 M. 127, 30 C. 1021, 20 A. 162, 20 A. 90, R.)

(8)—*Limitation—Alienation of immoveable property by a minor's predecessor to one who was afterwards appointed the minor's guardian—Suit by the minor to recover that property—Cause of action—Onus on plaintiffs of proving suit is within limitation—Decision as to age of minor in appointment of guardian, proceedings not judgment in rem—Guardian when not estopped from disputing ward's age—Entry in birth register and register of vaccination—Former statement of a person as to date of his own birth—Paper of Tambol—Admission of a party—Previous statement of a witness—Power of guardian—Statement of legal practitioner binding on his client—Construction of the Law of Evidence—Indian Limitation Act, XV of 1877, s. 7 and arts. 142 and 144—Indian Evidence Act, I of 1872, ss. 10, 13, 18, 21, 33, 41, 43, 45, 155 and 157—Act XL of 1858, ss. 10 and 18—S. 561 of Act XIV of 1882 (= O. XLI, r. 22 of Act V of 1908.—Held that:—(1) The cause of action of a suit by a ward to recover his property, whether moveable or immoveable, misappropriated or alienated by the guardian, arises from the date of the guardian's removal. But where immoveable property has already been alienated and parted with by the ward's predecessor-in-title, the suit to recover it by the alienor himself or his successor, on the ground of invalidity of the alienation, is governed by twelve years' rule of limitation, and the right to sue accrues from the date of alienation, whether arts. 142 or 144 of Act XV of 1877 (now Act IX of 1908) applies. (2) One cause of action cannot come into existence by instalments on different dates. (33 P. R. 1897, R.) (3) It is generally for the plaintiff to show that his suit is not barred by limitation. So where a person, after attaining majority, sues to recover his property in the hands of his guardian or other persons, for which cause of action has arisen during his minority, he is bound to prove that the suit is within the three years' limit allowed by s. 7, Limitation Act, 1908. (4) The decisions of an issue as to the age of a minor, in proceedings relating to the appointment of the guardian for person or property or both of such minor or in curatorship proceedings, are not judgments *in rem* enumerated in s. 41 of Act I of 1872 which are declared to be conclusive against the world, although under s. 43 of this Act, these are relevant to prove that at or up to a certain time the said minor was under tutelage. (18 A. 478, 17 C. 849, R.) (5) In a suit by a ward to recover his property from the guardian appointed by a competent Court, the guardian is not estopped from disputing the age of the ward, unless it is shown*

**Guardian—continued.****—1.—General—continued.**

that the former (guardian), by his declaration, act or omission, has caused or permitted the latter (ward) to believe anything about the ward's age. (6) An entry in a Birth Register kept by some competent authority is relevant to prove the age of the person to whom it relates, provided it is not in any way suspicious. (7) An entry in a vaccination register showing the age of the person vaccinated can be relevant to corroborate the vaccinator's evidence as to the age, if otherwise reliable, but in itself it is of no value, because the age of a child is likely to be very cursorily recorded, as it is not a matter of importance for the operation. (8) Former statements of a person giving the date of his own birth, even if admissible under the combined operation of s. 21 (1) read with ss. 32 (7) and 13, cl. (a) of the Indian Evidence Act (I of 1872), do not possess any great probative force, because the source of his information after all is hearsay. (9) Under the combined force of ss. 10 and 18 of Act XL of 1858 (now ss. 29 and 30 of Act VIII of 1890), the only restrictions upon a certified guardian are, that he cannot sell or mortgage the ward's immoveable property or lease it for five years without permission of the Court; in other respects he has the full rights of a proprietor. (10) The statement of witnesses examined in a judicial proceeding cannot be used in any subsequent judicial proceedings, when any of the conditions laid down under s. 33 of the Indian Evidence Act (I of 1872), is wanting. But such statements can be used either to contradict them under s. 155 (3) or to corroborate them under s. 157 of the Act. (11) Under the provisions of s. 21 (2) or (3), only those admissions are relevant which are made by a principal party to the suit or that party's agent, but they do not apply to the statements of third parties, who subsequently are admitted as legal representatives of the original parties concerned. (14) A *tambol* register or paper is relevant to corroborate the testimony of a witness, who proves the happening or not happening of a certain event at or about the time of the wedding, on the occasion of which he is shown to have paid the *tambol* personally. (13) A statement as to relevant facts made by a legal practitioner on behalf of his client is to be treated as tantamount to that of his client, even if the former makes it without consulting the latter. (21 M. 274, R.) (14) The Evidence Act is in itself of the nature of the Code of the principles and the Law of Evidence which the Indian Courts are to observe, and the object of such enactments is that the law should be ascertained, as regards any point specially dealt within them, by interpreting the language used in those enactments and assigning to it its natural meaning, and not by searching for authorities elsewhere. (23 C. 563, P. C., F.). (15) Inadmissible evidence can be used to complete the narrative of a case, but decision of any issue cannot be based thereon. (16) Plaintiff can amend the plaint only to the extent allowed by the Court. So where a plaint is returned



**Guardian—continued.****—1.—General—continued.**

to add parties, a prayer for reliefs asked therein cannot be altered, and the plaint is to be treated as originally framed, although not expressly objected to either by the first Court or the other party. (17) Cross-objection or cross-appeal cannot be entertained for any relief not asked originally in the plaint, and cross-objection is admissible in so far only as it relates to matter opened up in the main appeal. (28 A. 95, 26 C. 114, R.) (18) If a plaintiff asks for "the following reliefs and such other reliefs as to the Court may seem just and proper to grant, namely," and follows this up with several prayers without any disjunctive adverb, the presumption is that they are intended to be cumulative and not alternative. (19) Six per cent. interest should be allowed on the sums withheld by the defendant from the date of institution of the suit to date of satisfaction of the decree. *HUSAINA v. SAHIB NUR*, 86 P.W.R. 1910=7 Ind. Cas. 503=213 P.L.R. 1910.

(9)—*Guardian and Ward—Minor—Guardianship—Religion—Marriage—Bigamy—Education—Special leave to appeal.*—A child born in India whose father was a European British subject and a Christian must be presumed to have the father's religion, and his corresponding civil and social status; and it is the duty of a guardian to bring up his ward in his father's religion. An infant, the child of a Christian father and the issue of a Christian marriage, having lost her father at very tender age, was brought up by her mother as a Christian during her early youth. Her mother, after co-habiting with a man having a wife and professing the Christian religion, became with him a Mahomedan, for the purpose as it appeared, of giving legal effect to a Mahomedan marriage between them, but which alleged marriage was not proved to have been duly celebrated. The infant, after attaining the age of 14 years and being with her mother, professed a desire to become a Mahomedan in religion, and adopted the Mahomedan mode of life. The Courts in India having been applied to under the circumstances by her relatives, to remove the infant from custody of her mother, made an order under the provisions of the Acts XL of 1858 and IX of 1861, and placed the infant under a Christian guardian. Such order, on appeal, was confirmed by the Judicial Committee. It is doubtful whether a marriage according to Mahomedan rites between a married Christian and a Christian woman, both of whom became Mahomedans in order to effect the marriage, is valid. *HELLEN SKINNER v. SOPHIA EVELINA ORDE*, 10 B.L.R. 125, P.C.=17 W.R. 77=14 M.I.A. 309. [F., 16 B. 307; Appr., 12 M. 67; R., 18 C. 264, U.B.R. 1897—1901, Vol. II, 488, 1 M.L.T. 347.]

(10)—*Illegitimate infant, mother when disentitled to custody of.*—Where the mother, the natural guardian of her illegitimate infant, is shown to be leading an immoral life so that the morals of the child might be corrupted, the

**Guardian—continued.****—1.—General—continued.**

Courts would interfere with her ordinary legal rights and refuse to restore to her the possession of the infant. *VENKAMMA v. SAVITRAMMA*, 12 M. 67.

(11)—*Existing liability—Guardian's bond—Binding on the minor.*—A guardian's bond, containing only a personal covenant by the guardian, without charging the minor's estate, will nevertheless bind the minor, if it is executed for a pre-existing liability which the minor is bound to discharge. *DURASAMI REDDI v. MUTHIAL REDDI*, 31 M. 458. (26 M. 330, R.)

(12)—*Civ. Pro. Code, 1882, s. 444—Guardian and minor—Parties to an appeal—Second appeal against decree in favour of minors, such minors not being parties to the decree in first appeal.*—One G filed a suit against M B in her own capacity and as guardian of the three minors, and obtained a decree against all the defendants. It was found that M B's interests were adverse to those of the minors, and that she had not been appointed guardian with her consent, and she did not in fact defend the suit on behalf of the minors. M B alone appealed. The appellate Court upheld the decree as to M B personally, but also made an order striking her name off the record as guardian of the minors. The plaintiff G then appealed to the High Court, making M B a respondent both in her own capacity and as guardian of the minors, but subsequently one Makhdum was, after notice to all the parties, appointed guardian of the minors. *Held*, that under the above circumstances the Court should act under the analogy of s. 441 of the Civ. Pro. Code, and remand the suit, so far as the minors were concerned for retrial *ab initio*. *GAJJU v. MANNI BIBI*, A.W.N. 1893, 104.

(13)—*Guardianship—Minor, having no property—Personal protection not needed—Appointment, object of—Orders nominally in conformity with statutory provisions—Effect of—Judge, arbitrator, not voluntarily chosen*—Where no guardian was needed for the protection of the person of the minor, who had also no property of which a possible guardian could take charge, and the machinery of law was set in motion by a person who induced his servant, the maternal grandfather of the infant, to make an application for appointment of himself as her guardian in order that she might be ultimately married to his son, the orders passed in proceedings so instituted and conducted, even if they were nominally in conformity with statutory provisions, were not invested with the efficacy of legal orders made on *bona fide* judicial proceedings. If the parties have treated a Judge as their arbitrator and have submitted to his decision, even though he had no jurisdiction to deal with the matter in controversy, his decision is binding on them, if as it were the award of an arbitrator. This rule has no application where the arbitrator was not voluntarily chosen by one of parties, who



**Guardian—continued.****—1.—General—continued.**

acted under judicial pressure of the highest degree to which he was not in a position to offer effectual and successful resistance. *SUBHADRA KOER v. DHAJADHARI GOSSAIN*, 15 C.L.J. 142=16 C.W.N. 447=13 Ind. Cas. 898.

(14)—*Civ. Pro. Code (Act XIV of 1882)*, s. 13—*Res judicata—Alienation by grandfather—Vendee suing minor grandson for possession—Guardian ad litem confessing judgment—Subsequent suit for possession by minor not barred—Inquiry into consideration and necessity—Negligence of guardian.*—Negligence on the part of a guardian *ad litem*, even apart from fraud or collusion, is sufficient to prevent the *quondam* minor from being bound by the decree passed in the suit. (A.W.N. 1894, 141, *Diss.*; 35 P.R. 1898, *F.*) A's grandfather alienated certain ancestral property. The vendee obtained possession of the property by a suit in which A, then a minor, was a defendant and was represented by his mother as his guardian. In that suit, the mother confessed judgment. Subsequently, A brought the present suit for possession of the property, on the ground that the alienation was not for consideration and necessity. The lower Courts held the suit barred as *res judicata*. *Held*, that the former suit did not bar the present suit, and that, in the interests of justice, A was entitled to claim an inquiry into the present suit. If on inquiry it should be found that the alienation was for consideration and necessity, then the suit would fall on the merits. If, however, it was not for necessity and consideration, the mother was negligent in not defending the suit, and the decree in the previous suit was not binding on A. *MOHAMMAD v. SUKHA SINGH*, 15 P.L.R. 1912=36 P.W.R. 1912=13 Ind. Cas. 20.

Major defendant—Representation by guardian *ad litem* as minor, Effect of—See *ACQUIESCENCE*, 21 M. 167.

Hindu widow—Re-marriage—Right to act as guardian of sons by first marriage—Good ground against appointment of guardian, if good ground for removal—See *ACT XV OF 1856*, s. 3, 15 C.W.N. 579=13 C.L.J. 553.

See *ACT IX OF 1861*, 1 M.L.J. 537.

Infant marriage among Parsis—Validity—Consent of father or guardian—Suit by party to marriage to declare marriage invalid—Jurisdiction of High Court—See *ACT XV OF 1865*, 13 B. 302.

Omission of, to take objection in lower Court—See *ACT X OF 1870*, 17 B. 299.

Minor defendant, power of guardian to accept plaintiff's oath—See *ACT X OF 1873*, s. 9, 12 M. 483.

Government Political Agent in Native State of minor chief, whether could sue for property in British territory—Political Agent not certificated guardian under Minor's Act XX of 1864—See *BOM. ACT XX OF 1864*, 11 B. 53.

**Guardian—continued.****—1.—General—continued.**

Minor and guardian—Decree binds minors even when—Obtains no certificate of administration—See *BOM. ACT XX OF 1864*, s. 2, 20 B. 534.

Of minor proprietor under Regulation V of 1804, s. 20—Minor proprietor causing default, service of notice on—See *MAD. ACT II OF 1864*, ss. 25, 27, 12 M. 445.

See *APPEAL—ORDERS*, 20 A. 433=A.W.N. 1898, 97.

"Sufficient cause" for non-appearance of guardian of minor—See *CIV. PRO. CODE*, 1908, O. IX, r. 13, 5 C.W.N. 58.

Notice to Collector as guardian of a minor—See *COLLECTOR*, 11 M. 317.

Compromise decree by—*Ad litem* suit based on allegation of fraud to set aside—Subsequent suit for the purpose on the ground of want of Court's sanction—*Res judicata*—See *COMPROMISE—GENERAL*, 21 M. 91=8 M.L.J. 28.

Instituting suit on behalf of minor—Compromise without Court's sanction—Validity—Minor's right to impeach decree after attaining majority—See *COMPROMISE—COMPROMISE OF SUITS UNDER CIV. PRO. CODE*, 13 B. 137.

See *COMPROMISE—COMPROMISE OF SUITS UNDER CIV. PRO. CODE*, 15 B. 594.

Contract by minor—Estoppel against minor—False and fraudulent misrepresentation by minor—Principles of liability—See *CONTRACT ACT*, 1872, s. 11, 5 A.L.J. 674=A.W.N. 1908, 267=31 A. 21=1 Ind. Cas. 704.

Suit *in forma pauperis*—Cause of action—Agreement by—Of minor to give ward in marriages for money consideration—Validity—See *CONTRACT ACT*, 1872, s. 23, 13 B. 126.

Questions as to legal—Of minors ought to be determined by Civil, and not Criminal Court—See *CRIM. PRO. CODE*, 1898, s. 476, 9 C.W.N. 1030.

Habeas corpus—Minor—Education and prospects—Change of religion—Natural guardian—Conduct—See *CUSTODY OF CHILDREN*, 16 B. 307.

Jurisdiction of High Court—Improper—See *CUSTODY OF CHILDREN*, 1 Hyde 143.

Alienation of minor's property by *de facto* guardian—Minor's liability extends only to the benefit he derives therefrom—See *CUSTOMS—PUNJAB—INHERITANCE*, 136 P.W.R. 1908.

Enhancement of rent—Acts of mother and guardian, how far binding on minor son—See *ESTOPPEL—STATEMENTS AND PLEADINGS*, 15 C. 8, P.C.=14 I.A. 178.

Purdanashin lady executing a mortgage for interest due under previous mortgages—Of minor—See *HINDU LAW—ALIENATION*, 26 C. 707, P.C.=26 I.A. 97=3 C.W.N. 573.



**Guardian—continued.****—1.—General—continued.**

Manager of joint Hindu family certifying payment of a decree in favour of himself and minor members—Power of Court to demand security from manager—Civ. Pro. Code, s. 258—See HINDU LAW—JOINT FAMILY, 11 O.C. 246.

Betrothal—Effect—Leprosy of father—Right to dispose of girl in marriage—Marriage—No consent of proper guardian—Effect—See HINDU LAW—MARRIAGE, 64 P.R. 1884.

Validity of marriage without consent of—See HINDU LAW—MARRIAGE, 15 C.P.L.R. 46.

See LIMITATION—GENERAL, 7 C.W.N. 594.

See LIMITATION ACT, 1908, ss. 4, 5, 14, 20, 104.

Decree obtained by—Of minor—Application for execution by guardian—Application by minor after attaining majority—Limitation Act, XV of 1877, s. 7—See LIMITATION ACT, 1908, ss. 6, 8, 7 B. 179.

See LIMITATION ACT, 1908, ss. 6, 8, 16 B. 536.

Relation between guardian and ward, whether that of an agent to a principal—Whether resembles that of trustee to *cestui qui trust*—Power of guardian to acknowledge debt due from minor—Fresh start for limitation—See LIMITATION ACT, 1908, s. 19, 5 A.L.J. 375, F.B.=A.W.N. 1908, 175=30 A. 422=4 M.L.T. 49.

Acknowledgment by—if binds minor—See LIMITATION ACT, 1908, s. 19, 20 B. 61.

See LIMITATION ACT, 1908, s. 19, 7 P.R. 1890.

Payment of interest by mother as natural guardian of minor son—Effect—See LIMITATION ACT, 1908, s. 20, 26 A. 598=A.W.N. 1904, 137=1 A.L.J. 302.

Alienation by *de facto* guardian of Mahomedan minor, not being legal guardian of minor and not authorised by custom to transfer ward's property—Validity—See LIMITATION ACT, 1908, art. 44, 132 P.L.R. 1908.

Suit to recover possession of property alienated by—Suit for declaration as to invalidity of alienation by guardian—Limitation—See LIMITATION ACT, 1908, arts. 44, 91, 7 M.L.J. 231.

Alienations by guardian—Nature and effect—Suit by minor to set aside—Limitation—See LIMITATION ACT, 1908, arts. 44, 91, 142, s. 18, 13 C.L.J. 277.

Suit to set aside sale by—See LIMITATION ACT, 1908, arts. 44, 142, A.W.N. 1888, 152.

Joint Hindu family—Right of mother to be guardian of minor—See LIMITATION ACT, 1903, arts. 44, 144, 10 O.C. 367.

Suit by ward against guardian—See LIMITATION ACT, 1908, art. 62, 56 P.R. 1883.

**Guardian—continued.****—1.—General—concluded.**

See MAHOMEDAN LAW—INHERITANCE, A.W.N. 1883, 115.

See MAHOMEDAN LAW—MARRIAGE, 51 P. R. 1888.

See MORTGAGE—REDEMPTION, 4 O.P. L.R. 128.

See MORTGAGE—MISCELLANEOUS, 5 B. 14.

Promissory note executed to—of minor, suit maintainable by minor on—See NEGOTIABLE INSTRUMENTS—PROMISSORY NOTES—ASSIGNMENTS, ETC., 21 M. 391.

Decree against infant—How to set aside on the ground of guardian's laches—See PRACTICE AND PROCEDURE, 12 C. 69.

Letters of administration cannot be granted to minors under guardianship of their father—See PROBATE AND ADMINISTRATION ACT, 1881, ss. 13, 33, A.W.N. 1908, 257=5 A.L.J. 736.

Registration Act, III of 1877, s. 21—Document relating to appointment of—and gift of immoveable property—Registration of document—See REGISTRATION, 13 M.L.J. 303.

'Res judicata'—Defence to plea of 'res judicata' that the prior decree was obtained through fraud and collusion—Guardian and minor—See RES JUDICATA—GENERAL, A.W.N. 1894, 141.

Fraud—Sale—Decree—Setting aside decree—Minor—Personal decree—Frame of suit—Form of decree—Party to suit—Execution of decree—Part payment—See SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 3 C.L.R. 17.

Agreement to sell land by guardian of minor—Contingent upon leave of Court—See SPECIFIC PERFORMANCE, 12 C. 152.

Contract for benefit of minor—Specific performance—See SPECIFIC PERFORMANCE, 27 C. 276.

See SPECIFIC PERFORMANCE, 22 C. 545.

Surety for—of a minor's estate—Release of surety—See SURETY—MISCELLANEOUS, 19 B. 245.

'Bona fide' purchase from—Of Hindu widow acting collusively—See VENDOR AND PURCHASER—MISCELLANEOUS, Marsh 313=2 Hay 196.

See WILL—CONSTRUCTION, 28 C. 621, P. C.=28 I.A. 159=5 C.W.N. 729.

**—2.—Appointment of Guardians.**

(1)—Act IX of 1861, ss. 1 and 6—Fresh application.—The refusal of a previous application for the guardianship of a minor, under s. 1, Act IX of 1861, does not preclude a Court from entertaining a subsequent application for the same purpose. NEHALO v. NAWAL, 1 A. 428.



*Guardian—continued.***—2.—Appointment of Guardians—contd.**

(2)—*Civ. Pro. Code, 1882, s. 443, appointment of guardian during enquiry under—Procedure.*—On the plea of minority being set up by the defendant in a suit, a guardian to represent him should be appointed for the purposes of the enquiry contemplated by s. 443 of the Civ. Pro. Code, 1882. A preliminary issue should be raised, relating to the question of the defendant's minority, and such issue ought to be tried and adjudicated on in the same way in which any other material issue is tried and decided. *KASI DOSS v. KASSIM SAIT, 16 M. 344.*

(3)—*Considerations for appointing guardian.*—A Hindu applied to be declared the guardian of his minor girl aged about five years and to recover her from her maternal grand-parents. No serious misconduct was proved against him. *Held* that, under the circumstances of this case, the applicant was not so entitled. In an application of his kind, the welfare of the child is the paramount consideration although 'regard must also be had to the recognized rights of guardianship under the law.' As a matter of fact the texts of the Hindu Law do not recognise any absolute rights of guardianship in any one, the sovereign being entrusted with the guardianship of all minors and entitled to appoint the person as a guardian in their interest. (32 B. 50, 33 A. 22, 29 A. 210, M.W.N. 1911, 365, 21 M.L.J. 195, 16 M. L.J. 357, R.) The fact, that owing to the minor's age, it is not possible to consult the minor's wishes, would not enhance the rights of the applicant, but it would make it the duty of the Court to come to its own conclusion as to what would best promote the minor's interests. When the petitioner himself is residing beyond the limits of the jurisdiction of the Court and it would not be very easy for the Court to control his conduct as guardian, the application is one which the Court is not bound to grant, unless it is satisfied that it is for the welfare of the child that an order should be made. *T. N. MUTHUVEERAPPA CHETTY v. T. R. PONNUSWAMI CHETTY, 10 M.L.T. 477.*

(4)—*Application for removal of guardian—Proof of malversation or misconduct.* Applications for the removal of guardians or parties appointed to take charge of the estate of minors must be supported by proof of malversation or misconduct, such as would afford sufficient ground for removal. *RAJESSUREE DEBIA v. JOGENDRO NATH ROY, 23 W.R. 278.*

(5)—*Practice of High Court.*—Where an application, without suit, is made to the High Court for the appointment of a guardian for an infant's property and person, the Court Receiver would be appointed Receiver to take charge of the property with power to sell it and invest the proceeds in Government paper and the matter would be referred to the Judge in Chambers for enquiry as to the appointment of a proper person as guardian. *In the matter of BITTAN, 2 C. 357.*

*Guardian—continued.***—2.—Appointment of Guardians—contd.**

(6)—*High Court Power of Court to appoint guardian of person and property of minor—Guardian and Ward—Power of guardian to sell minor's property.*—The High Court possesses the power of the Court of Chancery to appoint guardians to infants on a proper case being made out whether such infants have property or not, though its ordinarily not necessary for a Court to interfere in cases where there is no property. *Quære:*—Whether a guardian appointed by the Court (except under some particular Act) has any authority to sell the property of his ward, unless of course the express sanction of the Court is given. *Re JAGANNATH RAMJI, 19 B. 96.*

(7)—*Duties and powers of guardian—Property of minor in hands of Court—Brother's right to receive and apply funds.*—Where the Court has taken the property of a minor into its own hands, the guardian appointed by the Court, and not the brother, is the right party to receive and apply the money granted by the Court to defray the expenses of the kurnobade and marriage of the ward. *MONEMOTHONAUTH DEY v. ONOTHANAUTH DEY, 2 Ind. Jur. N.S. 24. In court below, Bourke O.C. 189.*

(8)—*Mahomedan Law — Guardianship of female minor—Reg. X of 1793, s. 21 and Act XL of 1858, s. 27—Act IX of 1861.*—Whatever may have been the provisions of the Mahomedan Law on the subject, s. 21 of Reg. X of 1793 and s. 27 of Act XL of 1858 lay it down that a person, other than a female, shall in no case be entrusted with the guardianship of a female minor. [*Doubted, 11 C. 574 ; D., 14 C. 615 ; R., U.B.R. 1892—1896, Vol. II, 540.*] The grandmother of certain female children, whose mother had forfeited her right to their guardianship by her marriage with a stranger, was held entitled to be appointed guardian to the exclusion of male relatives, notwithstanding that the proceeding was under Act IX of 1861. This Act which only regulates the procedure in such suits must follow the substantive law laid by the Regulation and the Act of 1858. *FUZEHUN v. KAJO, 10 C. 15. [Doubted, 11 C. 574 ; D., 14 C. 615 ; R., U.B.R. 1892—1896, Vol. II, 540.]*

(9)—*Mahomedan Law—Shiah sect—Female minor—Guardianship of the person of—Act IX of 1861.*—In the Shiah sect of Mahomedans, the father is entitled to the custody of a daughter more than seven years old, preferentially to the mother, 10 C. 15, which was decided under s. 27, Act XL of 1858, and in which the father of the minor was dead, has no application to a case in which the father claims the custody of his daughter. *LARDLI BEGUM v. MAHOMED AMIR KHAN, 14 C. 615.*

(10)—*Bengal Minors Act (XL of 1858), ss. 7, 11—Minor, appointment of guardian to—Bengal Civil Courts Act (XII of 1887), ss. 23, 24—Proceedings under Bengal Minor's Act (XL of 1853) transferred to subordinate Judge—Appeal from order therein.*—The grant of a certificate



*Guardian—continued.***—2.—Appointment of Guardians—contd.**

of guardianship under the Act should not proceed upon mere propinquity of relationship, and the Court in each case should consider the circumstances thereof, and should consult the interests of the minor. The appointment of a guardian of the person of a minor under s. 11, and that to manage the property of the minor under s. 7, are distinct things and subject to different considerations. [R., 4 O.C. 241.] The words, "subject to the rules applicable to like proceedings when disposed of by the District Judge" in s. 24 of the Bengal Civil Courts Act, include the rules relating to appeals, and since an appeal from a District Judge would lie to the High Court, therefore an appeal from an order of the subordinate Judge, when proceedings under the Bengal Minors Act (XL of 1858) have been transferred to him under s. 23 (2) (b) of the former Act, also lies to the High Court and not to the Court of the District Judge. *SOHNA v. KHALAK SINGH*, 13 A. 78 = A.W.N. 1891, 1.

(11)—*Act XL of 1858—Majority Act (IX of 1875)*, s. 3.—The making of an order appointing a guardian under Act XL of 1858, and not the subsequent taking out of the certificate, is that by which a guardian is appointed of the person and property of a minor within the meaning of s. 3 of the Majority Act. *CHUNEE MUL JOHARY v. BROJO NATH ROY CHOWDHRY*, 8 C. 967 = 11 C.L.R. 313. [F., 14 C. 55; R., 13 B. 285, P.L.R. 1900, p. 419; Diss., 12 C. 542, 13 C. 219.]

(12)—*Act XL of 1858, appointment of guardian under—Period of minority—Majority Act, 1875.*—A guardian of a minor under Act XL of 1858 having been once appointed, the minor must, by Act IX of 1875, continue to be a minor until he reaches the age of twenty-one, whether the original guardian continues to be his guardian or not. *RUDRA PROKASH MISSEER v. BHOLA NATH MUKHERJEE*, 12 C. 612. [Appr., 21 B. 281; Commented on, 17 C. 944, 9 Bom. L.R. 495 = 31 B. 590; Diss., A.W.N. 1891, 118; R., 17 M. 251, P.L.R. 1900, p. 419; Rel. on, 13 C.W.N. 643 = 36 C. 768.]

(13)—*Appointment of guardian under Act XL of 1858—Effect upon minor—Issue of certificate.*—Whenever a person is appointed guardian of a minor by an order of Court, upon an application under Act XL of 1858, the minor becomes a ward of Court, so as to extend the period of his minority to 21 years, notwithstanding that the person so appointed guardian may not have taken out a certificate. *GIRISH CHUNDER CHOWDHRY v. ABDUL SELAM*, 14 C. 55. (8 C. 714, 9 C. 901, Diss.; 8 C. 967, F.) [R., 13 B. 285, P.L.R. 1900, p. 419.]

(14)—*Certificate under Act XL of 1858, Application for—Inquiry by Collector proceeding—Deferring order of appointment.*—A Civil Court may defer passing orders on an application for a certificate under Act XL of 1858, pending an inquiry by the Collector as to the

*Guardian—continued.***—2.—Appointment of Guardians—contd.**

alleged fraud of the manager and the accounts and assets of the property. *MOHESH CHUNDER SEIN v. THE COLLECTOR OF DINAGEPORE*, 16 W.R. 312.

(15)—*Certificate under Act XL of 1858—Guardian's accounts—Guardian's fitness.*—A Judge may, for sufficient reason, cancel a guardian's certificate; but he cannot, on the allegation of an applicant for a certificate, require a guardian to produce his accounts. This can be done only by a regular suit by a relative or friend of the minor. Before appointing a guardian, the Judge should satisfy himself of applicant's fitness. *RAM DYAL GOOYE v. AMRIT LALL KHAMAROO*, 9 W.R. 555.

(16)—*Execution of bond by guardian appointed under Act XL of 1858—No sanction by Court—Removal of guardian.*—The execution by a guardian appointed under Act XL of 1858, of a bond without an order of the Court is not sufficient ground for having him removed from office. *BRIJENDRO NARAIN ROY v. BUSSUNT COOMAR GHOSE*, 13 W.R. 300.

(17)—*Certificate of guardianship under Act XL of 1858—When authority of guardian begins.*—Independently of the provisions of s. 6 of the Court Fees Act, however, the preparation of a certificate under Act XL of 1858 is not a purely ministerial act; after an order is made for its being granted, the grantee must apply for it. It is only from the date of the certificate being actually taken out, and not from the date of the order granting it, that a guardian of the person and property of a minor is to be considered as appointed under Act XL of 1858. *SAHAI NAND v. MUNGNIRAM MARWARI*, 12 C. 542. (8 C. 714, 8 C. 967, Diss.) [F., 13 C. 219.]

(18)—*Act VIII of 1890 (Guardians and Wards Act)—Joint Hindu family—Appointment of guardian of property of minor.*—Under the Guardians and Wards Act, 1890, it is not competent to a Court to appoint a guardian of the property of a minor who is a member of a joint Hindu family. *JHABBU SINGH v. GANGA BISHAN*, 17 A. 529 = A.W.N. 1893, 119. (19 B. 309, 19 C. 301, R.) [Appr., 20 A. 400; R., 6 C.L.J. 383; D., 21 M. 402.]

(19)—*Guardian cannot be appointed to property of minor belonging to joint Hindu family.*—When in the application to be appointed guardian it was stated by the intending guardian that he and the intended ward were members of a joint and undivided Hindu family, and that the ward had no property other than his interest in the joint property, it was not competent to the Court to appoint a guardian of the property of the minor, and the application, as far as it affected the property, should have been rejected. *BANDHU PRASAD v. DHIRAJI KUAR*, 20 A. 400 = A.W.N. 1898, 94. (17 A. 529, A.W.N. 1896, 30, R.)

(20)—*Act VIII of 1890 (Guardians and Wards Act)—Joint Hindu family—Appointment of guardian to property of minor.*—Ordinarily it is



**Guardian—continued.****—2.—Appointment of Guardians—contd.**

inexpedient that a guardian to the property of a minor should be appointed, when the minor, being a member of a joint Hindu family, does not possess any property or any interest in any property other than an interest in the joint property of the family. *GURJA v. MOHER SINGH*, A.W.N. 1896, 30. (A.W.N. 1895, 119, R.) [Appr., 20 A. 400.]

(21)—*Joint Hindu family—Guardian of minor member's property cannot be appointed by Court.*—A Court is not competent to appoint a guardian of a minor member's share in the property of a joint Hindu family. The minor's remedy is by partition, and after partition, a guardian can be appointed. *MURLI DHAR v. HARI LAL*, 165 P.L.R. 1906. (25 A. 407, F.)

(22)—*Co-parcenary property—Joint Hindu family—Guardian of property of minors.*—A guardian of the property cannot be appointed for a minor whose only proprietary interest is as co-parcener with adults in joint family property. This principle does not apply where all the co-parceners are minors and a guardian of the property is appointed for the whole number. *BINDAJEE v. MATHURABAI*, 7 Bom. L.R. 809=30 B. 152.

(23)—*Appointment of—Joint family property—High Court—Jurisdiction*—The High Court has, under its general jurisdiction and apart from the Guardians and Wards Act (VIII of 1890), power to appoint a guardian of the property of a minor who is a member of a joint Hindu family and where the minor's property is an undivided share in the family property, *In re MANILAL*, 3 Bom. L.R. 411=25 B. 353.

(24)—*Change of—Of member of joint Hindu family.*—Where a minor, whose parents are dead, is a member of a joint Hindu family consisting of his two cousins and their mother, all of whom living in the same house, very strong reasons ought to be shown for taking him out of his family and placing him with his maternal aunt, who is unfit to be appointed as a guardian. *BABU v. PARVATIBAI*, 1 Bom. L.R. 60.

(25)—*Co-parceners minors—Joint Hindu family—Minor co-parcener—Guardianship ceases when one of the members attains majority.*—Where a joint Hindu family consists of co-parceners who are all minors, the co-parceners forming one group, the Court has jurisdiction to appoint a guardian of the property for that group as a whole. But when subsequently one of that group arrives at the age of majority the guardianship of the person so appointed by the Court must cease; and the Court is bound to hand over the joint family property to the co-parcener who has become an adult, although the other co-parceners are minors. *RAM-CHANDRA v. KRISHNARAO*, 10 Bom. L.R. 279=32 B. 259.

(26)—*Minor belonging to Aliyasanthana family.*—The principle, that a guardian of the

**Guardian—continued.****—2.—Appointment of Guardians—contd.**

property of an infant, cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family, applies to the case of a minor belonging to an *Aliyasanthana* family, where the only right of the infant is a right to be maintained in the family house. *KAJIKAR LAKSHIMI v. MARU-DEVI*, 4 M.L.T. 462=32 M. 139=1 Ind. Cas. 999. (19 C. 301, 35 C. 561, 25 A. 407, F.)

(27)—*Guardians and Wards Act, 1890, ss. 7 & 17—Guardian, Appointment of—Guardian of minor, fit person to be appointed as—Act XL of 1858—Revocation of appointment of guardian—Hindu Law.*—In an appeal from an order of the District Judge under s. 7, Act VIII of 1890, appointing B.P. guardian of the property of a minor, it was contended firstly, that the appointment of a guardian under the Act depended entirely upon relationship, and under that Act relatives of the minor could not be discarded, even if unfit, in favour of a friend who was a fit and proper person, and secondly that it would be more agreeable for the appellant if some one else was appointed than B.P. *Held*, that the appointment of B.P. as guardian of the property of the minor was not one not authorised by Act VIII of 1890, merely because there happened to be in existence guardians indicated by the law to which the minor was subject who were willing to act. S. 17 of the Act merely enacts in plain and distinct terms what was apparently intended but not clearly expressed by Act XL of 1858, namely, that the Court should make a selection consistent with the law to which the minor is subject, provided that the selection is for the welfare of the minor. *Held*, further, that the Court could not revoke an appointment, which appeared to be for the welfare of the minor, merely because it would be more agreeable for the appellant if some one else were appointed than B.P. *BASANTA v. CHEDI LAL*, 4 O.C. 241.

(28)—*Guardians ad litem, appointment of—Court in which litigation is pending.*—Guardians *ad litem* should always be appointed by the Court in which the litigation is pending. *ANONYMOUS*, 5 M.H.C. App. 8.

(29)—*Guardian ad litem—Act XL of 1858, s. 3—Civ. Pro. Code, 1877, s. 443.*—If no relation or friend of the minor can be found who is willing to take out a certificate and appear as guardian, the Judge should appoint an officer of the Court or some respectable nominee of the minor. *ISSUR CHUNDER GUPTO v. NOBO KRISTO GUPTO*, 7 C.L.R. 407.

(30)—*Suit against minors improperly framed—Irregular order appointing guardian ad litem—Effect.*—Where a suit (intended to be brought against some minors) was instituted against the defendant as the mother and guardian of the minors, and an order was obtained, at the time of filing the plaint, making her guardian for the purposes of the suit, the defendant not being guardian of the person and



**Guardian—continued.****—2.—Appointment of Guardians—contd.**

property under Act XL of 1858, *held*, the minors were no parties to the suit, and the suit should be dismissed as against them. Neither the Civ. Pro. Code, nor the proviso of s. 3 of Act XL of 1858 give to a plaintiff the power of instituting a suit against a person named by himself as guardian *ad litem* on behalf of a minor; nor do they give to the Court the power of transforming an irregular proceeding into a suit against the minor by a mere *ex parte* order. GURU CHURN CHUCKERBUTTY v. KALI KISSEN TAGORE, 11 C. 402. [R., 14 C. 754.]

(31)—Civ. Pro. Code, 1877, s. 443—*Amending Act XII of 1879—Suit against minor—No administrator appointed for minor's estate under Act XX of 1864—Appointment of guardian ad litem for purpose of suit—Power of Court to appoint guardian against his will—Costs—Appointment by Small Cause Court of guardian ad litem—Jurisdiction to try suit—Act XV of 1880, s. 3, cl. (b).*—Where there has not been any administrator of the minor's estate appointed under Act XX of 1864, there is no valid objection to the appointment of a guardian *ad litem* under s. 443 of the Civ. Pro. Code, 1877 (as amended by Act XII of 1879) for the purpose of defending a suit against the minor. S. 2 of Act XX of 1864 has not any bearing in the case of a next friend or guardian *ad litem* not claiming charge of the estate of the minor. (9 B.H.C. 310, R.) Neither Act XX of 1864 nor Act X of 1877 (as amended by Act XII of 1879) empowers any Court to appoint, against his or her will, any person to be a next friend, guardian *ad litem*, guardian of the person or administrator of the estate, of a minor. (5 B. 310, Note, R.) S. 458 of Act X of 1877 does not, so far as regards payment of costs, appear to be properly applicable to any person appointed to act as guardian *ad litem* without his previous consent. As to the question whether a Small Cause Court, if it appointed one of its own officers to be guardian *ad litem* under s. 456 of the Civ. Pro. Code, 1877, in a suit against a minor, would thereby lose its jurisdiction to try the suit, an answer is given by s. 3, cl. (b) of Act XV of 1880, the effect of which is to preserve to the Court of Small Causes its jurisdiction notwithstanding such appointment. That enactment, viz., Act XV of 1880, s. 3, cl. (b), supersedes the law as laid down in the decision in *Mohun Iswar v. Haku Rupa* (Civil Reference No. 10 of 1874), in so far only as that decision affects officers of the Court appointed under s. 456 of Act X of 1877, as amended by Act XII of 1879. JADOW MULJI v. CHHAGAN RAICHAND, 5 B. 306.

(32)—Guardian *ad litem*, appointment of, how far to be in force—Petition on behalf of minor for change of guardian, duty of Court on.—Where a person is appointed guardian of a minor for the purposes of a litigation, that means he is to be the guardian in the matter of such litigation in all its ratifications, and so long as it subsists, whether in the Court of

**Guardian—continued.****—2.—Appointment of Guardians—contd.**

first instance or in the Court of appeal, unless he takes the necessary steps to have himself discharged from that position which has been put upon him by the Court. But, where a petition has been put in on behalf of the ward praying in terms for the removal of the guardian once appointed and for the appointment of another in his stead, the Court would be bound to proceed in accordance with such wish expressed by the minor, unless it saw that the guardian he asked to be newly appointed was an undesirable and unsuitable person, and to invest with power the person that the minor wished to be his guardian. JWALA DEI v. PIRBHU, 14 A. 35=A.W.N. 1891, 192. [R., 22 M. 187, 2 A.L.J. 489, 1 N.L.R. 128; R., 5 C.L.J. 434.]

(33)—Civ. Pro. Code, 1882, s. 582—Minors—Appeal by person other than guardian *ad litem*.—The minor defendants in a suit were represented in the first Court by the Sheristadar who was appointed guardian *ad litem*. A decree was passed against them and an appeal was filed on their behalf by their mother, without any order obtained by her constituting her their guardian, and without any previous removal of the former guardian. *Held* that, as a guardian *ad litem* continues as such through the subsequent stages of the litigation, the appeal presented by the mother could not be heard. VENKATA CHANDRASEKHARA RAO v. ALAKARAJAMBA MAHARANI, 22 M. 187. [F., A.W.N. 1899, 203, 1 N.L.R. 128; R., 2 A.L.J. 489, 5 C.L.J. 434.]

(34)—Minors Act (XX of 1864)—Nazir appointed guardian of minor's estate—Officer of Government—Bombay Civil Courts Act (XIV of 1869), s. 32.—The only officers of Government whom Act XX of 1864 contemplates as guardians of the estate of a minor in their official capacity, are the Collector of the District and the public curator appointed, as such, under Act XIX of 1841. Consequently the mere fact that the Nazir was appointed, under Act XX of 1864, administrator to the estate of certain infant defendants in a suit, does not deprive the Court of jurisdiction to entertain the suit or to execute its decree. *Quære*.—Whether, upon an application for execution of a decree, an objection, apparent on the face of the record, to the jurisdiction of the Court which made the decree, can be entertained. MOHAN ISHWAR v. HAKU RUPA, 4 B. 638. [R., 5 B. 306, 14 C.P.L.R. 92.]

(35)—Act XIV of 1869 (Bombay Civil Courts), s. 32—Collector in-charge of minors estate—Act XX of 1864—Officer of Government.—On the objection taken in special appeal in this case, that, as the suit was against the Collector in his official capacity as an administrator, the suit should have been brought in the District Court and not in a Subordinate Judge's Court and that the proceedings in the lower Courts should be set aside for want of jurisdiction, the High Court held that the Collector, as administrator of the minor's estate being an



*Guardian*—continued.

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officer of Government within the meaning of s. 32 of Act XIV of 1869, the Subordinate Judge had no jurisdiction to entertain the suit, and directed the return of the plaint to the plaintiff for presentation in the District Court. *BHASKARRAV v. GUROPA*, 4 B. 642, Note, 1. [F., 4 B. 638.]

(36)—*Nazir of Court as administrator of minor estate under Act XX of 1864, suit against, maintainable only in District Court.*—On appeal to the High Court, in this case, preferred by the Nazir of the District Court as administrator of the minor defendant's estate under Act XX of 1864, allowing the objection taken by him to the jurisdiction of the Subordinate Court wherein the suit was filed, the High Court annulled the proceedings of the lower Courts and ordered the return of the plaint for presentation to the proper Court. *VASUDEV VISHNU DIKSHIT v. NARAIN JAGANNADH DIKSHIT*, 4 B. 642, Note 2. [R., 4 B. 638.]

(37)—*Nazir appointed guardian ad litem, jurisdiction of Court to proceed with suit.*—A subordinate Judge, who has, under the provisions of s. 456 of the Civ. Pro. Code, 1877, appointed the Nazir or any other officer of his Court to act as guardian for the suit of a minor defendant, could not have jurisdiction to hear the suit and pass a decree against that officer as guardian *ad litem* of the minor defendant. *TRIMBAK NIMBAJI BHASE v. SHIVRAM*, 4 B. 643, Note. [R., 4 B. 638.]

(38)—*Civ. Pro. Code, 1882, s. 458—Suit against minor—Appointment of Nazir as guardian ad litem—Court's power to order deposit of fees by plaintiff for enabling Nazir to communicate with natural guardian.*—There is no power in the Court to order the plaintiff to pay a fee for the purpose of enabling the Nazir, who has been appointed guardian *ad litem*, to put himself in communication with the natural guardians and other friends of the minor, but the Court may well and indeed ought to refuse to go on with the suit if it should be of opinion that the Nazir has been unavoidably prevented from making himself acquainted with the case against the minor. *NARAYANDAS RAMDAS v. SAHEB HUSEIN*, 12 B. 553. [R., 22 M. 314, 28 B. 626.]

(39)—*Minor's Act (XX of 1864)—Certificate of administration—Minor defendant.*—An order, under Act XX of 1864, for the issue of a certificate of administration to any particular individual, ought not to be made until it is ascertained whether that individual is willing to take it. Whether the order for the issue of the certificate was made on default of the mother of the infant to appear and show cause why the certificate should not be issued to her, held, that such default in appearance ought not to be accepted as an assent to the issuing of the certificate to the non-appearing party; and that if no relative or friend is found who is willing to take out a certificate, the District Judge would be under the necessity of naming some officer

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of his Court or some respectable nominee of the suing creditor of the minor. *BABAJI v. MARUTI*, 5 B. 310. [R., 5 B. 306, 13 B. 656.]

(40)—*Guardian ad litem—Appointment by Court.*—It is open to a Court to appoint any competent person as guardian *ad litem*, provided that there is no antagonism between his interest and that of the minors in the subject-matter of the suit. *SUBRAMANYA PANDYA CHOKKA TALAVAR v. SIVASUBRAMANYA PILLAI*, 17 M. 316=4 M.L.J. 152.

(41)—S. 443—*Civ. Pro. Code, 1882—Guardian ad litem—Procedure—Appointment of guardian ad litem invalid—Effect of invalidity on decree passed against minor defendant.*—The provisions of s. 443 as to the appointment of a guardian *ad litem* for a minor defendant are imperative, and where those provisions are not substantially complied with, the minor is not properly represented and any decree which may be passed against him is a nullity. *HANUMAN PRASAD v. MUHAMMED ISHAQ*, A.W.N. 1903, 229=2 A.L.J. 615=28 A. 137. [D., 28 A. 416=3 A.L.J. 187=A.W.N. 1906, 73; R., 5 C.L.J. 434.]

(42)—*Civ. Pro. Code, s. 444—Duty of Court as regards appointment of a guardian ad litem.*—Where the defendant or respondent to a suit or appeal is a minor, it is the duty of the Court not only to appoint a guardian, but to satisfy itself that the proposed guardian, is a fit and proper person to represent the minor, to put in a proper defence and generally to act in the interests of the minor. The duty of the Court is not a mere matter of form. *RAMACHANDRA DAS v. JOTI PRASAD*, A.W.N. 1907, 225=29 A. 675. (30 I.A. 182, D.)

(43)—*Guardian Ad litem appointed by Court—Appointment continues until revoked—Duty of, to minor—Inference from natural father's declining to appeal.*—A guardian *ad litem*, appointed as a fit and proper person by the Court, continues as guardian so long as the *lis* subsists, whether in the Court of first instance or in the Court of appeal, unless and until the appointment is revoked by the Court. A guardian may quite do his duty to the minor by not filing an appeal, and the inference to be drawn from natural father who is also guardian *ad litem*, declining to file an appeal is that the guardian *ad litem* does not think it advisable in the interest of the minor to carry on the litigation any further. *In the matter of the application of SUKHDEO RAI*, 2 A.L.J. 489. (14 A. 35, 12 M. 187, R.)

(44)—*Appointment of—Ad litem enures for the whole of the lis till revoked by Court—Removal of guardian, application for, to be made by next friend.*—Where a guardian *ad litem* has once been appointed, his appointment enures for the whole of the *lis* in the course of which it has been made unless and until it is revoked by the Court. (14 A. 35, 22 M. 187, F.) An application for the removal of a guardian should be made on behalf of the minor by some person



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named as next friend or guardian *pro hac vice*. MT. KISNI v. GHULAJI TELI, 1 N.L.R. 128.

(45)—*Minor, Proper representation of—Guardian ad litem, propriety of the appointment of the person who executed the mortgage-deed which was the subject of suit—Decree or order made against minor.*—The general rule is that, if a minor is properly represented by a next friend or guardian *ad litem* and there is no fraud or collusion on the part of the next friend or guardian or of the opposite party, and the next friend or guardian is not guilty of gross negligence, a minor is as much bound by the decree or order made in the suit, whether it was made for his benefit or not, as if he were of full age. Where the person appointed guardian *ad litem* of the present plaintiff in a previous litigation was not only his certificated guardian, but also his father and natural guardian who had the power to mortgage the plaintiff's property for his benefit, *held*, that the plaintiff was properly represented, notwithstanding the fact that the aforesaid guardian *ad litem* was the person who had on behalf of the minor executed the mortgage-deed which was the subject of suit. MADARI v. HAR DAYAL, 13 O.C. 158=7 Ind. Cas. 538.

(46)—*Nazir as guardian—Powers of Court to relieve him.*—There is nothing that compels the Court to retain as guardian one of its officers, where the circumstances of the case make it clear that the interest of the minor will be thereby imperilled and the Court has power to relieve a Nazir, who finds no funds for the purpose of conducting adequately the defence of the minor. GOPILAL v. AGARSINGJI, 6 Bom. L.R. 544=28 B. 626.

(47)—*Absence of formal order appointing guardian ad litem—Effect on suit.*—The want of a formal order appointing a guardian *ad litem* is not fatal to a suit when it appears on the face of the proceedings that the Court has sanctioned the appointment. SYED YASIN v. MT. GODHI BAI, 9 C.P.L.R. 50. (14 C. 204, F.; 13 M. 480, R.)

(48)—*Appointment of Tahsildar as guardian—Legality of s. 12 of Act XL of 1858.*—A Civil Court has no power to appoint an official *virtute officii* as manager of a minor's property except under the provisions of s. 12 of Act XL of 1858. MUSSAMMAT PAREMON v. HIRA, 124 P.R. 1889.

(49)—*Appointment—Applicability of Act IX of 1861 to European British subjects.*—Under Act IX of 1861, the Punjab Court had jurisdiction as to the appointment of guardians, but the Act did not apply to European British subjects. *In re TWITCHEN*, 23 P.R. 1867. [R., 146 P.R. 1888.]

(50)—*Court fixing a date for appointment of guardian—Non-appearance of plaintiff or his pleader—Suit dismissed for non-prosecution—Application for restoration rejected—Dismissal*

**Guardian—continued.****—2.—Appointment of Guardians—contd.**

*of suit improper.*—Where the Court granted time to the plaintiff to decide what course to take in the matter of appointing a guardian for a certain minor, and on the date fixed for this purpose neither the plaintiff nor his pleader appeared in Court, whereupon the Court dismissed the suit for want of prosecution, and the plaintiff's application filed on the same day asking that the case might be re-admitted was rejected as not showing sufficient cause therefor. *Held*, that the Court had acted improperly in dismissing the whole suit, as the only matter before it was the appointment of a guardian. DEBI SAHAI v. SARASWATI, 8 A.L.J. 612.

(51)—*Guardianship of minor—Fitness—Relationship—Interest in welfare.*—The main question for the Court to determine in appointing a guardian for a minor under the Guardians and Wards Act of 1890 is, what is for the welfare of the minor. Other things being equal, nearness of relationship is a test of the interest in the welfare of the minor likely to be evinced. MUSST. BHIKUO KOER v. MUSST. CHAMELA, KOER, 2 C.W.N. 191.

(52)—*One relative appointed guardian—Another petitioning to be appointed in preference—Referred to a fresh petition—Res judicata—Principles guiding the Court in appointing guardians.*—Where V, the paternal grand uncle of the minor, had already been appointed guardian, and E, his paternal grand-mother, applied to be appointed in preference, but she was referred to a fresh petition. *Held*, that her claim was not *res judicata* by reason of the prior order. Assuming that the paternal grand-uncle had a preference over the father's mother, it is not the only consideration by which the Court is guided in considering the question of the appointment of a guardian. The Court has a direction to appoint a person other than the party who, on the ground of relationship, may have a prior claim. VENKATASAN CHETTI v. ETHIRAJAMMAH, 5 M.L.T. 208.

(53)—*Guardians and Wards Act (Act VIII of 1890, s. 7)—Hindu mother, whether can appoint under Will a guardian for minor son.*—A Hindu mother has no authority to appoint a guardian for her minor son by means of her Will. So, where an application has been made under the Guardians and Wards Act for the appointment of a guardian for such minor son, the appointment of a guardian made previously by means of the Will not being such an appointment as would come within s. 7, cl. 3 of the Act, it is the duty of the Court to enquire under s. 7 as to the necessity for the appointment of a guardian, and, if necessary, to appoint a fit and proper person as guardian. VENKAYYA GARU v. VRNKATA NARASIMHULU, 21 M. 401=8 M.L.J. 112.

(54)—*Remarriage of Hindu widow—Guardianship of children of deceased husband—Act XV of 1853, s. 3.*—When a Hindu widow remarries, if no provision has been made for the



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guardianship of her deceased husband's child, who has property of his own sufficient for his support and education during his minority, such child should ordinarily be regarded by the Court as a child "who has neither father nor mother" within the meaning of s. 3 of Act XV of 1856. In such a case, a proper male relative of the deceased father would presumably be the child's guardian in preference to his re-married mother; and the Court's power to appoint him, which is no doubt discretionary, should ordinarily be exercised, falling good cause shown to the contrary. *KHUSHALI v. RANI*, 4 A. 195 = A.W.N. 1882, 5. [R., 24 B. 89.]

(55)—Cl. 17, *Letters Patent*—Ss. 4, 7, 9, Act VIII of 1890 (*Guardians and Wards*)—Appointment of guardian outside jurisdiction—High Court's jurisdiction.—The High Court has no power either under cl. 17 of the Charter or under Act VIII of 1890, to appoint, in a summary proceeding, a guardian of the person or property of a ward, not a European British subject, living outside its original jurisdiction, where there is a testamentary guardian in existence and no application or suit has been filed to remove him. *In the matter of SRISH CHUNDER SINGH*, 21 C. 206.

(56)—Application for appointment as guardian of minor children—One of the minors resident in England—High Court's jurisdiction—One of the three minor children on behalf of whom the petitioner in this case applied to be appointed guardian, happened to live in, and was described in the petition as residing at Ealing, near London, the other two residing at Poona where the petitioner was living, and, on the question arising whether the High Court at Bombay had jurisdiction to entertain the application, it was held that it was competent to the High Court to make the order prayed for. The jurisdiction of the High Court depends on the Supreme Court Charter, ss. 41 and 42, the powers under which sections have been continued to the High Court by Stat. 24 and 25, Vict., c. 124, s. 9. The High Court has the same powers in matters relating to infants that the Court of Chancery had over the whole Presidency of Bombay, and the power to appoint a guardian for an infant residing abroad was among such powers of the Court of Chancery. *In re THE ESTATE OF H. G. MEAKIN*, 21 B. 137.

(57)—S. 14, Act VIII of 1890, *Scope of*—Proceedings relating to appointment of guardian in High Court and District Court—References and reports to the High Court—Rule 3, ch. II, Rules of High Court, appellate side.—S. 14, Act VIII of 1890, is inapplicable to the High Courts in the exercise of their original jurisdiction. When proceedings for appointment of a guardian have been taken on the Original Side of the High Court and also in a District Court, the section does not apply.

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There is no power, either in a Division Bench of the Appellate Side of the High Court, or in the Chief Justice, to stay such proceedings before the Original Side. The "report" mentioned in cl. (2) of the section does not mean a judicial reference; it indicates a purely ministerial act. Rule 3, Ch. II, Rules of the High Court, Appellate Side, deals with only such references as are to be heard and determined judicially, whereas under s. 14, all that the District Judge has to do is to report the case and not refer it. *Per Ameer Ali, J.*—The Original Side of the Court is an integral part of the High Court. It is not subordinate to any other part of the same Court. *FAKA-RUDDIN MAHOMED CHOWDHRY v. G. I. GARTH*, 26 C. 133 = 3 C.W.N. 91. [R., 8 C.W.N. 797.]

(58)—Civ. Pro. Code (Act XIV of 1882), ss. 244, 457—"Party," means party duly represented—Minor represented by married woman or person with adverse interest as guardian ad litem if bound by decree—Appointment of married woman as guardian of person under *Guardians and Wards Act* (VIII of 1890), s. 53. if removes disqualification—Construction of statutes—S. 244, Civ. Pro. Code, 1882, applied to questions arising between parties to the suit in which the decree was passed, that is to say between parties who had been properly made parties in accordance with the provisions of the Code. Where decrees, were passed against a minor, represented in the proceedings either by a married sister or an uncle whose interest was adverse to the minor's, held that the minor was never a party to any of these suits in the proper sense of the term, and a suit on her behalf, for a declaration that the decrees and sales in execution thereof were invalid as against her, was maintainable. A married woman was disqualified by s. 457 of the Code from being appointed a guardian ad litem on behalf of a minor. The fact of her having been appointed the guardian of the person of the minor under s. 53 of the *Guardians and Wards Act* of 1890, did not remove the disqualification. The later enactment left s. 457, Civ. Pro. Code, untouched, the effect of the two statutes read together being, that a guardian of the person of a minor, if properly qualified, might be preferred as guardian in the suit. *MUSSAMMAT RASHID-UN-NISA v. MUHAMMAD ISMAIL KHAN*, 13 C.W.N. 1182, P.C. = 10 C.L.J. 318 = 6 A.L.J. 822 = 11 Bom. L.R. 1229 = 6 M.L.T. 279 = 19 M.L.J. 631.

Remarriage of widow—Her right to guardianship of minor children—See ACT XV OF 1856, s. 3, 10 M.L.J. 309.

Divorce suit by Pausi husband—Minority of wife—Appointment of guardian—Procedure—See ACT XV OF 1865, s. 30. 18 B. 366.

See RES JUDICATA—PARTIES, 66 P.R. 1873.

Contract for purchase of immoveable property by guardian or manager—Want of mutuality—



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Position and powers of guardian and manager if similar—See SPECIFIC PERFORMANCE, 16 C.W.N. 74, P.C.

(1)—*Guardian and Ward—Appointment by Civil Court—Liability to render accounts—Barred debts—Discharge—Liability of guardian—Production of false documents.*—All guardians appointed by the Civil Courts are required by law to render accounts of the estate, annually. A guardian discharging certain debts barred by limitation is not necessarily liable to account for sums so paid. The production of a false deed by a guardian in support of certain payments made by him cannot be considered as a good ground for decreeing the sum covered by the deed, if the payment of the money be established by other evidence to the satisfaction of the Court trying the case. CHOWDHRY CHUTTAR-SAL SINGH v. THE GOVERNMENT, 3 W.R. 57.

(2)—*Act IX of 1861—Testamentary guardian—Application to remove ward for purpose of education—Maintainability of application.*—A testamentary guardian applied to the District Court for permission to remove his wards for the purpose of having them educated. Held that, as the guardian derived his authority from the Will of the minor's father, and did not come within the meaning of the Regulations and Acts previous to Act IX of 1861, he could not thus apply to the District Court. SREE SESHADRY AIYANGAR v. PERIA NATCHIAR, 8 M.H.C. 94.

(3)—*Injuries done to minor son—Damages—Guardian's right of suit.*—A suit for damages for personal injuries received by the son can be maintained by a father as guardian of his minor son. MODHOO SOODUN v. KAEMOLLAH BISWAS, 9 W.R. 327.

(4)—*Liability of guardians—Retaining attorney for minor—Liability of minor for costs—Privity of contract.*—If a guardian or next friend of an infant retain an attorney to act for the infant, no contract is created between the attorney and the infant upon which the attorney can sue the infant for costs. RADHA NATH BHOSSE v. SUTTOPROSONO GHOSE, 2 Ind. Jur. N.S., 269.

(5)—*Minor's education—S. 12, Act XL of 1858—Power of Collector—Jurisdiction of Civil Courts.*—Held that, so long as the certificate granted to the Collector under s. 12, Act XL of 1858, was not recalled, the Collector acting as Court of Wards had power to make arrangements for the education of the minor and was not so far amenable to the jurisdiction of the Civil Courts. RAMENDRO BHUTTACHARJEE v. THE COLLECTOR OF RAJSHAHYE, 14 W. R. 113.

(6)—*Suit against heirs inheriting equally—Joint-decree—Widow defending minor son's suit as guardian—Personal liability.*—In a suit against heirs inheriting equally, a joint decree

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may be passed without determining the liability of each. A widow defending a suit as guardian of her minor son cannot be made liable in her own person as well as representing her husband's heirs. BROJO MOHUN MOJOMDAR v. ROODRONATH SURMAH MOJOMDAR, 15 W.R. 192. [Expl., 24 W.R. 264.]

(7)—*Suit by mother on behalf of minor son for recovery of minor's share from Manager—Malversation—Guardian—Relief by Court.*—The only ground upon which a mother can maintain a suit on behalf of her minor son to recover from her step-son, the managing member of the family, the minor's share in the family property, is that of malversation. The Court may relieve the minor from the guardianship of his step-brother and appoint a new guardian, if a case requiring relief is made out. ALIMELAMMAL v. ARUNACHELLAM PILLAI, 3 M.H.C. 69.

(8)—*Mortgage—Decree against minor—Suit improperly constituted—Suit by lawful guardian.*—A decree against a minor and his property represented by his uncle without any legal authority to defend or protect the minor's interests as his guardian, is wholly without effect against the minor and his estate, and the lawful guardian of the minor is entitled to set aside such decree (though obtained without fraud or collusion). MUSSUMAT KHOOSHALO v. SUB-SOOKH, 1 Agra 175.

(9&10)—*Reasonable act of guardian—Binding nature—Payment to guardian before grant of certificate.*—The act of a guardian is binding on the minor unless it be proved that it was an unreasonable one. The payment by the debtor to the guardian before any certificate is obtained is not an invalid payment. MOTEE RAM SAHOO v. NAWAB KHULEEL-OOL-LAH, 2 Agra 338.

(11)—*Manager—Family property—Alienation by Hindu widow—Bom. Act XX of 1864.* Alienations for family purpose of the ancestral estate by a Hindu widow (the mother of a minor son), though not appointed an administratrix under Act XX of 1864, are valid as made by a *de facto* manager. BAI AMRIT v. BAI MANIK, 12 B.H.C. 179. [Appr., 14 B. 562 ; R., 2 B. 573, 12 B. 686.]

(12)—*De facto guardians, Powers of.*—A *de facto* guardian has not larger powers than one appointed under Act XL of 1858, and is, therefore, not competent to grant a lease for ten years without an order of Court previously obtained. KHETTUR NATH DOSS v. RAM JADOO BHUTTACHARJEE, 24 W.R. 49.

(13)—*Hindu Law—Power of de facto manager to sell ward's property—Power to sell and power to mortgage, distinction between.*—A *de facto* guardian of a Hindu minor is empowered to sell the ward's property for legal necessity and for the minor's benefit. (6 M.J.A. 412, R.



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[R., 4 N.L.R. 20.] No distinction in principle can be drawn between the power of a Manager of an infant's estate to mortgage and his power to sell, for in some cases selling a portion of the infant's estate for paying off existing mortgages may be more beneficial than mortgaging the same at a high rate of interest. *MOHANUND MONDUL v. NAFUR MONDUL*, 26 C. 820 = 3 C.W.N. 770. (10 W.R. 106, 4 C. 929, R.)

(14)—*Alienation by de facto guardian—Necessity.*—A deed of sale (where full consideration is paid) executed by a member of a Hindu family, acting *de facto* as the guardian of his minor brothers, is not invalid by reasons of the father being alive at the time. Where a guardian sells part of an estate, and applies the purchase money to the expenses incurred in a suit undertaken and found, in fact, to be for the benefit of the whole property, the sale is valid. *GANGA PRASAD v. PHOOL SINGH*, 10 B.L.R. 368, Note = 15 W. R. 106. [R., 26 C. 820.]

(15)—*Mortgage of minor's property by mother—Guardian de facto, Powers of—Act XL of 1858, s. 18*—Since the passing of Act XL of 1858, no greater powers can be exercised by a *de facto* guardian, who has not legally completed his right to manage a minor's estate, than can be exercised by a guardian duly appointed under that Act. [Not F., 3 A. 535; R., 27 B. 390 = 5 Bom. L.R. 301]. There is no authority for saying that one person may borrow money on behalf of another and give a bond in that other's name, when that other is wholly incompetent to contract for himself. If a contract is to be made by one to bind another, who cannot bind himself, it can only be under some express authority of law and such authority is not to be found in s. 18 of that Act, (10 B.L.R. 364 = 19 W.R. 164, 15 B. L.R. 350, 2 C. 283, 6 M.L.A. 393, F.) [N.B.—But see 4 C. 76, which decides that the mother and guardian of a Hindu minor, though not a guardian appointed under Act XL of 1858, when acting *bona fide*, and under the pressure of necessity, may sell his real estate to pay ancestral debts and to provide for the maintenance of the minor. *ABHASSI BEGUM v. MOHARANEE RAJROOP KOONWAR*, 4 C. 33 = 2 C.L.R. 249.]

(16)—*Minor—Money borrowed by de facto guardian for minor's benefit—Liability of the minor—Equity—Punjab Courts Act (XVIII of 1884), s. 70 (a).*—Held, that money borrowed by the *de facto* guardian or agent of a minor for the minor's benefit, as, for instance, to pay the Government Revenue for which the minor is liable as *lambardar*, is legally recoverable from the minor's estate, although he is not personally liable therefor. The High Court is not justified to interfere on revision where substantial justice is done to the parties. In such a case, revision under s. 70 (a) of Act

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XVIII of 1884 does not lie, even where the lower appellate Court has erred in law. *UMAR HAYAT v. DEVI DAS*, 5 P.W.R. 1910 = 5 Ind. Cas. 590.

(17)—*Guardian and ward—Alienation by natural and de facto guardian—Alienation for legal necessity—Acquiescence of testamentary guardian—Validity of alienation*—An alienation may be validly made by a *de facto* guardian. Where a natural and *de facto* guardian of a minor made an alienation of the minor's property for necessary purpose, the alienation was not invalid merely because there was a testamentary guardian appointed by the Will of the minor's father, especially where the latter had acquiesced in the alienation. *ARUNACHALA REDDI v. CHIDAMBARA REDDI*, 13 M.L.J. 223.

(18)—*Alienation by de facto guardian—Minority of husband of minor Hindu wife—Legal necessity—Income of property not sufficient to meet necessity—Alienation if valid.*—The acts of a *de facto* guardian in alienating the estate of a minor married Hindu female, during the minority of her legal guardian the husband, will be valid, if a necessity for the money sought to be raised is established, as for instance, that it is wanted for repairs, and if the income of the property be not sufficient to provide the requisite funds. *ADHAR CHANDRA DUTT v. KIRITIBASH BAIRAGEE*, 6 Ind. Cas. 638 = 12 C.L.J. 586. (10 C. 823, F.)

(19)—*De facto guardian—Purchase.*—A person purchasing property from the *de facto* guardian of a minor, who has at the date of the sale also a certificated guardian appointed by the Court, cannot, on the sale being set aside, claim refund of purchase money from the minor. *NATHU v. BALWANTRAO*, 5 Bom. L. R. 301 = 27 B. 390.

(20)—*Agreement by on behalf of minor.*—If a *de facto* or actual guardian has entered, into an agreement on behalf of the minor, and it is shown to have been for the minor's benefit, a Court of Equity will hesitate to disturb it; but if the agreement is not shown to have been for the benefit of the minor the Court will certainly refrain from giving effect to it. *AMIRBIBI v. ABDUL LATIF*, 3 Bom. L.R. 658.

(21)—*Hindu widow guardian of son's widow—Alienation by natural guardian—Minor's Act—Alienated property to be made over to ward.*—A Hindu widow is the proper guardian of her deceased son's widow in the absence of any person claiming a preferential title to succeed to the estate of the latter. An alienation, by the natural guardian, of a ward's immoveable estate made without having obtained a certificate under the Minor's Act is invalid. The Court, while declaring such an alienation invalid, will, under special circumstances, order the ward to re-pay the amount of the purchase money paid to the guardian, before setting



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aside the sale and directing the alienated property to be made over to the ward. *BAIKESAR v. BAI GANGA*, 8 B.H.C. A.C., 31. [Appr., 6 A. 417; F., 3 B. 234 16 C. 584; R., 12 B.H. C. 79, 281, 5 B. 2, 15 B. 259.]

(22)—*Suit by minor to recover property sold by guardian—Benefit acquired to be refunded.*—Where in a suit to recover property sold by plaintiff's guardian during plaintiff's minority, defendants fail to show a good title, but the purchase was applied in any way to the minors benefit, the latter is not intitled to a decree for immediate possession without refunding the said money with interest, a set-off being allowed for net rents and profits for the time of the defendant's possession. *MUTHOORA DOSS v. KANOO BEHAREE SINGH*, 21 W.R. 287.

(23)—*Special appeal—Compromise affecting immoveable property—Guardian of minor under certificate—Consent of Court granting certificate.*—Before accepting a compromise affecting rights in immoveable property filed by a guardian appearing under a certificate on behalf of a minor, the High Court requires the certificate-holder to procure the consent of the Court, by which the certificate was granted, to the filing of the compromise. *SHEONUNDUN SINGH v. MUSSUMAT KAHSIA KOOER*, 6 N.W.P. 179.

(24)—*Pledge by guardian.*—It is irregular for a guardian to pledge the property of a minor without obtaining the sanction of the Court. But the irregularity ought not to prevail when the mortgage-transaction was a proper one, and there was subsequently a decree in a suit in which the minor was represented under which the property was sold. *SREEMUTTY AHFUTONNISSA v. GOLUCK CHUNDER SEN*, 22 W.R. 77.

(25)—*Act XL of 1858, s. 18—Mortgage of property by guardian without obtaining sanction.*—The father of the plaintiff and his two brothers executed a mortgage, and after the death of the father, the obligee obtained a decree on the bond. One of the brothers of the plaintiff (who was a minor) had obtained a certificate of guardianship to their brother's estate, and in order to save the mortgaged property from sale, the brothers, on behalf of themselves and of the minor, executed a mortgage of other property, and with the money raised thereon, saved the property from sale. The mortgagee under this second mortgage obtained a decree and in execution sold the properties covered thereby. The plaintiff now sued through his mother, who had been appointed guardian in the place of his brother. It appeared that no sanction had been obtained from the Court to the mortgage executed by the brothers. *Held* that, inasmuch as the mortgage transaction was a proper one, and as there was a decree in a suit in which the minor was represented, under which the property had been sold, the objection on the ground that the sanction of the Court under s. 18, Act XL of

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1858 had not been obtained before the property was mortgaged, ought not to prevail. *TIL KOER v. ROY ANUND KISHORE*, 10 C.L.R. 547. (22 W.R. 77, F.)

(26)—*Minor—Act done by guardian turning out to disadvantage of minor—Effect—Relinquishment of jote by guardian—Obiter.*—The mere fact of an act done by a guardian for a minor turning out to the disadvantage of the minor, is not a sufficient reason for declaring such act to be null and void. If the act were one which at the time it was done appeared to be for the interest of the minor and was done in good faith, but the result was injurious to the minor such result would not be a sufficient ground for setting aside the act of the guardian as invalid. —*Per Loch, J.* In a suit for recovery of possession of an hereditary jote of which the plaintiff alleged that he had been dispossessed by the defendant during his minority, the defendant contended that the relinquishment was by the plaintiff's grandmother and guardian. The lower Court decided on the merits against the plaintiff. The High Court, on special appeal, held that, as it was not shown that the relinquishment was for the benefit of the minor, the decree must be reversed. *On review, Loch, J., held* that the judgment of the High Court, on special appeal, must be reversed as being *ultra vires* as it went beyond the record when it determined that, as the resignation of the jote by the grandmother of the minor was not for the minor's benefit, such resignation was of no force. *Per Glover, J.*—The conclusion of the High Court, on special appeal was justified. The case, if it be thought worth while, might be remanded to the Judge to find the fact, whether or not the relinquishment by the guardian was made in good faith for the interest of the minor. *MATHURANATH DUTT v. KEDAR NATH MOOKERJI*, 2 B.L.R. A.C. 126 = 11 W.R. 520.

(27)—*Act XL of 1858—Ss. 2 and 30, Act VIII of 1890—Retrospective effect—Mortgage by guardian without Court's sanction.*—A mortgage by a certificated guardian under Act XL of 1858, without the previous permission of the Court, is null and void. S. 30, Act VIII of 1890, which is not retrospective in its operation (see s. 2), cannot destroy its void character and render it voidable. A statutory prohibition could have no reference to transactions which had been completed before the Act came into force. *LALA HURRO PRASAD v. BASARUTH ALI*, 25 C. 309. [R., 2 O.C. 233, 17 C.P.L.R. 13.]

(28)—*Bengal Minors Act (XL of 1858), s. 18—Transaction by certificated guardian—Absence of sanction of Court, effect of—Contract Act, s. 65—Minor seeking to set aside mortgage by guardian bound to make restitution.*—A sale, mortgage, or lease for more than five years made by a certificated guardian without the necessary sanction of the Court is not *ab initio* void. The effect of the provisio to s. 18 of the



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Bengal Minors Act (XL of 1858) is merely this, that the certificated guardian, who, otherwise, would have all the powers which the minor would have if he were of age, shall, on account of the want of Court's sanction, be relegated to the position which he would occupy if he had possessed no certificate of guardianship. The result is, that, *qua* certificated guardian, he would have no power without such sanction to sell or mortgage or grant a lease for a period exceeding 5 years. Such a transaction could, therefore, operate only to the extent to which it would avail if no certificate at all had been granted to the guardian. [*R.*, 22 M. 289, 28 A. 30 = A.W.N. 1905, 176 = 2 A.L.J. 507, 10 O.C. 321; *D.*, A.W.N. 1894. 89.] Where a plaintiff comes into Court and says that an agreement of mortgage is void, by reason of s. 18 of Act XL of 1858, he cannot claim a decree for the possession of the property concerned, except on condition of this making restitution, under the provisions of s. 65 of the Indian Contract Act. to the extent of any monies which the defendants had advanced under the mortgage-deed and which had enured to the benefit of the plaintiff or his estate. GIRRAJ BAKHSH v. KAZI HAMMID ALI, 9 A. 340 = A.W.N. 1887, 62. (3 A. 852, *D.*; 15 B.L.R. 350, N.W.P. 1875, 201. N.W.P. 1874, 268, 1 A. 57, A.W.N. 1881, 16, *R.*) [*F.*, 18 A. 373; *R.*, 15 O. 40, 25 A. 59, 3 C.L.J. 260.]

(29)—*Act XL of 1858, s. 18—Guardian's power to grant lease.*—A lease granted by a certificated guardian, for a term exceeding five years, without the sanction of the Court obtained under s. 18 of the Act, is invalid. BHUFENDRO NARAIN DUTT v. NEMYE CHAND MONDUL, 15 C. 627. [*F.*, 20 B. 150.]

(30)—*Guardians and Wards Act, VIII of 1890 ss. 29, 30—Mortgage by guardian without permission of Court—Voidable.*—The effect of ss. 29, 30 of Act VIII of 1890, is to render a mortgage by a guardian without the previous permission of the Court not absolutely void, but voidable only. The minor, desiring to have the mortgage avoided, should restore any benefit he has received thereunder to the person from whom he has received it. He cannot be held personally liable for the debt, but his estate is liable. SINAYA PILLAI v. MUNISAMY AYYAN, 22 M. 289 = 9 M.L.J. 64. [*F.*, 25 A. 59; *R.*, 3 C.L.J. 260, 19 M.L.J. 737 = 33 M. 397 = 4 Ind. Cas. 1082.]

(31)—*Act XL of 1858, s. 18—Guardian's power to mortgage minor's property—Rate of interest—Duty of Court—Duty of lender in such cases—Burden of proof.*—A Court, which has thrown upon it the responsibility of authorising loans to be raised upon the security of infants' estate should, where possible, specify the rate of interest or the maximum rate of interest at which the loan should be raised. On an order of this kind, which authorises the raising of a principal sum but says nothing about the interest, the proper construction, or at all events the most favourable construction to the lender, is that it

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authorises a loan at a reasonable rate of interest. [*F.*, 30 A. 188 = 5 A.L.J. 260 = A.W.N. 1908, 75.] When such an order has been made, the lender of the money is entitled to trust to that order, and he is not bound to inquire as to the expediency or necessity of the loan for the benefit of the infants' estate, except when any fraud or underhand dealing is brought home to him. But if he lends the money without an order that binds the infants' estate, then it is for him to show the necessity or the expediency of the transaction. GANGAPERSHAD SAHU v. MAHARANI BIBI, 11 C. 379, P.C. = 12 I.A. 47 = 4 Sar. 621. [*F.*, 30 A. 188 = 5 A.L.J. 260 = A.W.N. 1908, 75, 5 C.L.J. 542; *R.*, 6 C.L.J. 490.]

(32)—*Partition of joint family property—Minor's rights and liabilities.*—A partition in respect of which no formalities have been observed, and no record preserved, except a list representing the result arrived at, is not in itself obligatory on the minor who has the option of repudiating it when he comes of age or within a reasonable period after that date. A minor can only be held to have accepted a partition if he has acted in such a way to the plaintiffs as to lead them naturally to suppose that he has done so. KALEE SUNKUR SANNYAL v. DENENDRO NATH SANNYAL, 23 W.R. 68. [*D.*, 19 B. 593.]

(33)—*Grant of land in perpetuity.*—It is not open to a guardian to grant his ward's lands in perpetuity, except on clear proof of benefit to the ward. ODDOYTO CHUNDER KOONDO v. PROSUNNO COOMAR BHUTTACHARJEE, 2 W.R. 325.

(34)—*Liability of minor's estate for bonds of guardian.*—A minor's estate is not liable under bonds contracted by his guardian, where there is no evidence whatever that these bonds were contracted for the minor's benefit, and under legal necessity. DEOPUTTEE KOONWAR. v. DHUNNOO LALL, 11 W.R. 240.

(35)—*Mother as guardian of her minor daughter entering into compromise—Validity—Age of majority—Regulation XXVI of 1793.*—A mother can enter into a compromise on behalf of her minor daughter, as her guardian, only when the compromise is beneficial to the daughter's interests. Regulation XXVI of 1793 extends not only to proprietors out of possession but also to a co-sharer as well as to the proprietor of an entire estate. RANEE ROUSHUN JAHAN v. SYED ENAET HOSSEIN, W.R. 1864, 83. [*R.*, 7 B.H.C. C.C., 27, 26 W.R. 36.]

(36)—*Limitation Act (XV of 1877), s. 19, art. 64—Acknowledgment by guardian—Minor—Account stated against minor—Guardian's act beneficial to minor.*—As, under s. 19 of the Limitation Act, 1877, an acknowledgment in writing must be signed by the party against whom any right is claimed, the signature of a guardian on behalf of a minor acknowledging a debt cannot, under that section, be considered such an acknowledgment in writing as



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would give a new period of limitation against the minors. [F., 20 B. 61, 26 C. 51.] A suit upon an account stated against a minor cannot succeed unless it be shown that the act of the guardian in the matter of the settlement of the account was beneficial to the interests of the minor. **AZUDDIN HOSSAIN v. LLOYD, 13 C. L.R. 112.**

(37)—*Acts of guardian.*—The guardian of a minor is fully competent to assert a right of pre-emption, and to refuse of accept an offer of a share in pursuance of such right; and the minor would be bound by his guardian's acts, if done in good faith and in his interest. **LAL BAHADUR SINGH v. DURGA SINGH, 8 A. 437.** [F., 35 C. 575; Appr., 23 A. 129; R., 23 P.W. R. 1907=43 P.L.R. 1907, F.B.]

(38)—*Award as to division of property left to minor sons when reversible.*—An award as to division of property left to minor sons, though assented to by the guardian of the minors, was set aside so far as it affected those sons on proof that the partition was injurious to them. **RAMNARAIN PROMANICK v. SREEMUTTY DOSSEE, 1 W.R. 286.** [R., 19 C. 334, 14 C.L.J. 188.]

(39)—*Suit for possession of landed property of father—Act done by widow and decree against her as sole proprietor—Estoppel of plaintiff.*—In a suit for possession of landed property which belonged originally to plaintiff's father: *Held*, that any act done by the widow and any decree given against her as sole proprietor of the lands, and not as guardian, will not bind the plaintiff. **BAHUR ALI v. SOOKEEA BIBEE, 13 W.R. 63.**

(40)—*Expectancy, Sale of—Hindu law—Power of guardian—Quere.*—Whether a mere expectancy can be the subject of a sale, and if so, of a sale by guardian acting or purporting to act on behalf of an infant. **DOOLI CHAND v. BIRJ BHOOKUN LAL AWASTI, 6 C.L.R. 528. P.C.** [R., 8 C. 12, 8 C. 135, 10 C.P.L.R. 5.]

(41)—*Hindu Law—Guardian and ward—Power of guardian to refer to caste panchayat, question of customary partition.*—All acts of the guardian which are such as the infant may, if of age, reasonably and prudently do for himself are upheld when done for him by his guardian. A guardian may refer the question of customary partition to a panchayat consisting of members of the caste of the disputants. A Sudra died leaving two wives, a son by one wife and two sons by the other. The guardian of the son by one of the wives referred the question whether the estate of the deceased was to be divided according to *patni-bhaga* or *putra-bhaga*. *Held* that it was competent to the guardian to refer the matter in question. **TEMMAKAL v. SUBBAMMAL, 2 M.H.C. 47.** [R., 1 M.L.J. 30, 19 C. 334, 16 M.L.J. 178=29 M. 437, 10 B.H.C. 311; D., 7 M.L.J. 191.]

(42)—*Widow in possession of zemindari—Bond executed by widow, liability of adopted son under—Admissions by adopted son—Estoppel.*—The

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appellant in this case was the adopted son of a zemindar, having been adopted by his widow after his death. Subsequent to the adoption and during the minority of the appellant, the widow remained in possession of the zemindary. The debt-bond sued on was executed by the widow whilst she was thus in possession. In these circumstances, the adopted son being entitled to the zemindary and having his residence there, it was reasonably supposed by the plaintiff that the money due to him on the charge on the estate was payable by the appellant and applied to him for payment. A letter was produced and proved with the signature of the appellant which contained a recognition of the plaintiff's demand and an excuse or non-payment, *viz.*, that his mother was still in possession of the zemindary, and a distinct statement that, on enquiry, the appellant found that the suit bond was genuine. This letter was impeached as a forgery but, in the opinion of their Lordships, there was not any evidence whatever to support the charge, nor any the least improbability, under the circumstances, in such a letter having been written. Both Zillah Court and the Sudder Adawlut drew the inference that the bond was given for debts which the defendant, as owner of the zemindary, was liable to pay, and that, by his own acts, he had admitted his liability to the payment; and their Lordships of the Judicial Committee agreed in the above conclusion. **CHETTY COLUM COOMARA VENKATACHALA REDDYAR v. RAJAH RANGASAWMY IYENGAR BAHADOOR, 4 W.R.P.C., 71=8 M.I. A. 319.** [R., 14 B.L.R. 21, 18 B. 631.]

(43)—*Hindu Law — Alienation — Minor's interest—Necessity for loan—Enquiries—Onus.*—*Prima facie* there can be no alienation of a minor's interest by a manager of the family. The alienee is bound to prove that the money was advanced after due inquiry as to the necessities for the loan, and satisfying himself that the manager was acting in the particular instance for the benefit of the estate. But it is not necessary for the defendant to show that such necessities actually existed, but if he could establish this, it would be cogent evidence on the issue which he is bound to prove, *viz.*, that he made reasonable inquiry as to the existence of such necessities, and the object for which the loan was intended. **POOLUNDER SINGH v. RAM PERSHAD, 2 Agra 147.**

(44)—*Duties and powers of guardian—Transaction by guardian—Responsibility of lender to guardian of a minor.*—A lender to the manager of a minor's estate is bound to satisfy himself that the loan is for the benefit of the estate. **LALLAH BUNSEEDHUR v. BINDE-SEREE DUTT SINGH, 1 Ind. Jur. N.S., 168.**

(45)—*Suit by Hindu widow as guardian of her minor child to set aside alienations made by the minor's father.*—A suit brought by a Hindoo widow as guardian of her minor child, to set aside alienations made by her late



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husband, the minor's father, is governed by the principle laid down by the Privy Council in the case reported in 22 W.R., p. 56. **MUSSA-MUT SANJOGEE KOOR v. HUR PERSHAD, 24 W.R. 274.**

(46)—*Debts contracted by the guardian of minor—Duty of creditor.*—The lender of money to the guardian of a minor is bound to enquire into the necessity for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the guardian is acting for the benefit of the estate. But, if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably created necessity is not a condition precedent the validity of his charge; and, under such circumstances, he is not bound to see to the application of his money. **MAHA BEER PERSHAD SINGH v. DUMREERAM OPADHYA, W.R. 1864, 166.**

(47)—*Property belonging to minor — Sale during minority by mother, as guardian—Suit to set aside—Duty of purchaser.*—In a suit to set aside the sale of certain immoveable property belonging to a minor (the sale having been made by his mother during his minority), it was held that the purchasers were not bound to enquire whether there were goods and chattles sufficient to redeem the mortgage and so to obviate the necessity of a sale, and that they were also not bound to see to the application of the purchase-money. *Held*, further, that the sale, in this case, should be set aside, the purchasers, not having proved any necessity for sale, or not having satisfied themselves of the existence of a sufficient pressure or necessity, and of the unwillingness of the minor's mother to dispose of the property during his minority. **GOMAN SIRCAR v. PRANNATH GOOPTO, 1 W.R. 14.**

(48)—*Admission against infant, practice as to.*—The Court should take nothing as admitted against the infant unless it is satisfied that the admission is made by some one competent to bind the infant and fully informed upon the facts. **SYUD ABDOOL HYE v. BANEE PERSHAD, 21 W.R. 228. [R., 23 W.R. 348.]**

(49)—*Alienation of minor's property made through intervention of Court, if can be questioned.*—An alienation of property during the owner's minority is open to be questioned, when the minor comes of age, even if it was effected partly through the intervention of a Civil Court. **BUZRUNG SAHOY SINGH v. MUSSA-MUT MAUTARA CHOWDHRAIN, 22 W.R. 119.**

(50)—*Lender to mother as guardian must prove unavoidable necessity.*—Where one of two minors sues to set aside a sale made by their mother of a part of their estate to meet an *ex parte* decree against them obtained by the lender to the mother and guardian of money to defray the marriage expenses of the minors: *Held*, that it was obligatory on the defendants to prove that, in selling the property, the

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mother acted under an unavoidable necessity in the interests of her minor sons, and that the decree against the minors was such as would bind their interests. **SYUD LOOTF HOSSEIN v. DURSUN LALL SAHOO, 23 W.R. 424.**

(51)—*Enhancement of rent — Acts of mother and guardian, how far binding on minor son.*—Where a putnidar obtained decrees for enhancement of rent against the widow of his deceased tenant, and the widow, on behalf of her minor son, executed kabuliyats agreeing to pay the enhanced rent, *held*, that, as the putnidar was entitled to sue for enhancement and, presumably, the mother did not hold adversely to the son, and as the mother had, according to her own belief, come to a proper arrangement, the son was bound on his attaining full age, by kabuliyats. The addition to a woman's name of the words "mother of—minor" must be considered as meaning that she was contracting as the mother and guardian of her infant son. **WATSON & Co. v. SHAM LAL MITTER, 15 C. 8 P.C. = 14 I.A. 178 = 5 Sar. 66.**

(52)—*Limitation Act, XV of 1877, s. 20 — Payment of interest — Agent duly authorised—Payment by mother managing estate.*—Where a mother, as guardian of her minor son, borrowed money for a purpose binding on him, and even after his attaining majority continued in the management of his estate and paid money towards interest on the debt within the period of limitation, it was held that authority to manage the affairs of the son included an authority to make the payment, and that such payment being made by a person duly authorised, served to save limitation under s. 20. **KAILASA PADAYACHI v. PONNUKANNU ACHI, 18 M. 456. [R., 30 A. 422. F.B. = 5 A.L.J. 375 = 4 M.L.T. 49 = A.W.N. 1908, 175, D., A.W.N. 1904, 137 = 26 A. 598 = 1 A.L.J. 302.]**

(53)—*Guardian and minor—Minor's marriage—Debt by guardian—Necessity—Minor, when bound by it.*—The marriage of a Hindu minor is a legitimate cause of expense, in regard to which his guardian has power to bind him. But if the minor can show that the amount of the loan was extravagant for the purpose, considering the social and pecuniary circumstances of the minor or that it was not duly applied and expended, then he may not be bound by the act of his guardian to that extent. **JUGGESSUR SIRCAR v. NILAMBUR BISWAS, 3 W.R. 217. [R., 6 A. 417. 20 B. 61, 35 C. 320 = 12 C.W.N. 256 = 3 M.L.T. 156. 13 C.W.N. 643, 36 C. 768.]**

(54)—*Mahomedan Law—Sale of son's share by mother during minority—Claim for possession by son without payment of his share of mortgage debt not maintainable.*—A deed of sale whereby the mother of a Mahomedan minor has sold his share in the estate of his deceased father is invalid, but his claim to recover possession of the share from the purchasers, who had redeemed the mortgage existing on the estate



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created by his father, without tendering payment of his share of the mortgage-debt, is liable to be dismissed. *MIRZA PANA ALI v. SAIYAD SADIK HOSSEIN*, 7 N.W.P. 201. [R., 1 A. 533, 7 A. 822, F.B. = A.W.N. 1865, 248, 9 A. 340 = A.W.N. 1887, 62.]

(55)—*Sale by guardian—Setting aside of sale—Rights of vendee.*—When a sale made by a minor's guardian is set aside and the bona fide purchaser is ordered to be reimbursed, the minor is liable for the purchase-money. *AGOO-REE HURRIHUR CHURN v. GUNGA PERSAD OOPADHYA*, W.R. 1864, 208.

(56)—*Sale certificate passing the rights and interests of father—Effect.*—A sale certificate, which in express terms passes the rights and interests of a father does not necessarily transfer the interest of his minor sons, unless the latter have benefited by the decree or sale, in which case the purchaser has to that extent an equitable claim against them. *SIRDAR PYAL SINGH v. BABOO RAM BUDDUN SINGH*, 17 W.R. 434. [F., 24 W.R. 99.]

(57)—*Sale during minority—Suit to set aside sale—Refund of sale-proceeds.*—Where a sale was made by the guardian of a minor as well as the minor when he was sufficiently advanced in years to understand the nature of the transactions and he had received the full amount of the purchase-money from the defendant, held that the minor could not, after attaining majority, recover the property, without refunding to the purchaser the amount of the consideration-money paid by him. *PARAN CHANDRA PAL v. KARUNAMAYI DAS*, 7 B.L.R. 90 = 13 W.R. 268. [Appr., 6 A. 417 = A.W.N. 1884, 144.]

(58)—*Act X of 1870—Power of guardian in land acquisition proceedings—Right to waive compensation money—Suit for possession—Court of Wards, whether, can act for the minor ward.*—Where land belonging to a minor is taken by Government under the Land Acquisition Act, it is not open to the guardian of the minor to waive the right to compensation or to any portion of it, although the minor himself, if of age, might have made a present of the land to the Government, for the purpose for which it was proposed to be used. Where such a waiver has been made, the minor may, on attaining majority, sue for possession of the property. [Appl., 30 C. 576; Diss., 7 C.W.N. 249 = 30 C. 36.] The Court of Wards is competent to act for the minor in land acquisition proceedings; and such proceedings will bind the minor if the provisions of the Land Acquisition Act be complied with. *LUCHMESWAR SINGH v. CHAIRMAN OF THE DHARBHANGA MUNICIPALITY*, 18 C. 99, P.C. = 17 I.A. 90 = 5 Sar. 564.

(59)—S. 525, Civ. Pro. Code, 1882—*Power of guardian to submit matters to arbitration, on behalf of minor—Reference to Registrar—Practice.*—Where a natural guardian had,

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on behalf of her minor sons, submitted certain matters to arbitration, the Court ordered that a reference must be made to the Registrar to enquire and report whether the submission to arbitration, and the award were or were not for the benefit of the infants. *ROMAN KISSEN SETT v. HURROLAL SETT*, 19 C. 334.

(60)—*Guardian's acknowledgment of debt on behalf of minor—Validity.*—A guardian may acknowledge a debt on behalf of the minor, provided that at the date of acknowledgment it is not barred by limitation. *SOBHANADRI APPA RAU v. SRIRAMULU*, 17 M. 221. (5 M. 169, F.; 13 C. 294, Dissappr.) [Diss., 20 B. 61; F., 18 M. 456; R., 26 M. 330, 27 M. 243 = 14 M.L.J. 84, 35 C. 320 = 12 C.W.N. 256 = 3 M.L.T. 156, 30 A. 422 = 5 A.L.J. 375 = A.W.N. 1908, 175 = 4 M.L.T. 49.]

(61)—S. 19, Limitation Act, 1877—*Guardians and Wards Act, 1890—Acknowledgment of debt.*—There is no difference between an acknowledgment given by a certificated guardian and by an uncertificated guardian. A guardian appointed under Act VIII of 1890 has no power to acknowledge a debt so as to give a fresh start of limitation against the minor. *CHHATO RAM v. BILTO ALI*, 26 C. 51 = 3 C.W.N. 313. (13 C.L.R. 112, 13 C. 292, F.) [R., 23 P.W.R. 1907 = 43 P.L.R. 1907, F.B.; D., 26 B. 221 = 3 Bom. L.R. 817, F.B., 29 C. 647 = 6 C.W.N. 729.]

(62)—*Guardian, Acknowledgment by.*—A guardian appointed under the Guardians and Wards Act, 1890, can sign an acknowledgment of liability in respect of, or pay in part, the principal of a debt, so as to extend the period of limitation against his ward in accordance with ss. 19 and 20 of the Limitation Act, 1877, provided it to be shown in each case that the guardian's act was for the protection or benefit of the ward's property. *ANNAPAGAUDA v. SANGADYAPA*, 3 Bom. L.R. 817 = 26 B. 221.

(63)—*Guardian and ward—Power of guardian to bind minor by personal covenant—Bombay Minors Act, XX of 1864, ss. 18, 19—Distinction between mortgaging or charging minor's property and creating personal liability—Minor's personal liability when arises—Debts contracted for minor's necessities—Contract Act, IX of 1872, s. 68—Guardian's power to pledge minor's property—Debts contracted by guardian for marriage of ward—Necessity of sanction of District Court—Debts contracted for pilgrimage expenses if for necessities—Limitation Act, 1877, s. 19—Acknowledgment by guardian if binds minor.*—There is not in Indian law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English Law. In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances. It would be a very improper thing to allow the guardian to make covenants in the name of his



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ward, so as to impose a personal liability upon the ward. (11 B. 551, R.) And Act XX of 1864 certainly gives no power to a guardian or administrator to bind the ward by personal covenants. No doubt, s. 18 of the Act gives the administrator the same powers, subject to certain restrictions, in the management of the estate, as might have been exercised by the proprietor if not a minor; but as this section merely deals with the management of the estate, it does not confer any power of rendering the minor personally liable for the debts contracted. There are cases in which mortgages and other dispositions of the property by a guardian have been held binding on the ward; and these do not affect the question of the minor's personal liability, for, the power of the guardian subject to certain restrictions to alienate the property for certain purposes cannot be questioned. [R., 7 O.C. 46, 35 C. 320=12 C.W.N. 256=3 M.L.T. 156.] While the minor cannot be bound personally by contracts entered into by a guardian which do not purport to charge his estate, it does not follow that he is necessarily exempt from liability. If the debts were incurred for necessities, the minor would be bound to pay them on the general principle embodied in s. 68 of the Contract Act, as his liability would not probably be affected by the fact that the loans were advanced at the instance of the guardian. (3 W.R. 217, R.) The guardian's contract on the minor's behalf might be ineffectual like one entered into by himself, but the liability to discharge debts incurred for necessities would remain. And the necessity for them would determine whether or not he was bound to repay them, and not the reasonable belief of the lender that they were for necessary purposes. The case of *Hanooman Persaud* (6 M.L.A. 393) where a guardian had exercised his powers of mortgaging the estate, and where it was ruled that in respect of such a transaction a *bona fide* creditor should not suffer when he had acted with due caution, cannot be extended to a case in which it is sought to make the ward personally liable for the debt. To the latter case, the decision of *Barnes v. Zoya* (12 Q.B.D. 410) is more applicable, in which it was held that where an infant was sued for the price of goods supplied to him on credit, he might, for the purpose of showing that they were not necessities, give evidence that when the order was given he has already sufficiently supplied with goods of a similar description and that it was immaterial whether the plaintiff did or did not know of the existing supply. [R., 17 C.P.L.R. 57, 2 N.L.R. 25, 31 M. 47=17 M.L.J. 553=3 M.L.T. 95.] A guardian appointed under Act XX of 1864 has power to pledge the ornaments of his ward for purposes beneficial to the minor, but not as security for money previously borrowed, which the minor was under no obligation to pay. The general rule is that a Hindu guardian can pledge the property of his ward for beneficial purposes, and in respect of moveables there is

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no prohibition in s. 18 of Act XX of 1864. But the contracting of debt for marriage expenses without the sanction of the District Court is forbidden. The object of s. 29 of the Act was evidently to limit marriage debts to the extent which the District Court may consider reasonable. It would be inconsistent with the simple words of the law, which declares that marriage expenses shall in no case, without the sanction of the Civil Court (*i.e.*, the District Court, *vide* s. 34), involve the minor's estate in debt. Nor can the guardian, in incurring the marriage expenses, fall back on her powers as a Hindu mother, as was the case here, after she had thought proper to accept the position of guardian and administratrix under Act XX of 1864. (15 B.L.R. 350, R.) The question as to what are necessities for the minor, must be decided according to Hindu ideas, in the case of a Hindu minor. And although a pilgrimage may be according to Hindu ideas looked upon as beneficial, it would be extending the meaning of the term "necessaries" very much beyond the meaning hitherto assigned to it if the Court were to sanction, as a binding charge on the minor, a debt contracted by his guardian for a pilgrimage not undertaken in discharge of any urgent spiritual duty, which it was obligatory on the minor to perform. In such a matter, a guardian ought to exercise ordinary prudence. Expenditure that might be proper, if money were plentiful, ceases to be so when it has to be met by borrowing, as was the case in the present instance. A guardian has no power to acknowledge a debt on behalf of his ward so as to give the creditor a fresh starting point for the period of limitation, as he cannot be treated as the agent of his ward within the meaning of s. 19 of the Limitation Act. The analogy of the manager of a Hindu family who could by his acknowledgment prolong the period of limitation under the section, does not apply to the case of a guardian. *MAHARANA SHRI RANMAL SINGHJI v. VADILAL VAKHAT CHAND*, 20 B. 61. (5 M. 169, 17 B. 512, R.) [Overruled, 26 C. 221=3 Bom. L. R. 817, F.B.; *Not F.*, 4 Bom. L.R. 812, 30 A. 422, F.B.=5 A.L.J. 375=A.W.N. 1908, 175=4 M.L.T. 49; R., 26 A. 598=A.W.N. 1904, 157=1 A.L.J. 302; D., 29 C. 647=6 C.W.N. 729.]

(64)—*Guardian's act—Liability of estate.*—In the case of an act by a guardian arising naturally out of the management of a minor's estate and concurred in by other co-sharers, the liability attaches to the estate. *GIREWAR SINGH v. MUDDUN LALL DOSS*, 16 W.R. 252.

(65)—*Security bond from guardian. whether demandable and assignable--Act XL of 1858—Act IX of 1861—Act X of 1865, s. 257—Suit by succeeding guardian against sureties on unsigned security bond.—Quære.*—Has the Court power to demand security from a guardian appointed under Act XL of 1858, or Act IX of 1861, and can it assign a security bond thus obtained, to another person, so as to entitle



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him to sue upon it? Where a person, to whom a certificate of guardianship in respect of the estate of a minor has been granted under Act XL of 1858, gives the Court a security bond for the due and honest performance of his duties, and, on the withdrawal of such certificate, another guardian is appointed, the succeeding guardian cannot maintain a suit, on behalf of the minor, against the sureties of the first appointed guardian in respect of the minor's property entrusted to him, on the security bond given to the Court, which is not assigned to him by the Court. For, the contract embodied in the security bond not having been entered into with him or any other person as the legal representative of the minor, he has no legal status to maintain the suit; nor could it be said that any equitable rights in favour of the minor were created by the bond so as to enable his legal representative to sue on it. **AMARNATH v. THAKUR DAS**, 5 A. 248 = A.W.N. 1883, 12.

(66)—*Burden of proof—Minor and guardian—Sale by guardian—Bona fides.*—It is true that guardians who have not obtained certificates may, for necessary purposes, alienate the estates of minors, but unless the purchaser can show that he purchased *bona fide*, his purchase cannot be supported. **RANNOO PANDEY v. SHEIKH BUKHSH ALI**, 3 N.W.P. 2.

(67)—*Certificated guardian—Power to grant lease—Act XL of 1858, s. 18—Transfer by certificated guardian before issue of certificate.*—A lease for a term of 12 years, renewable thereafter and transferable in its character, granted by a certificated guardian without the authority of the Court, is void *ab initio*, and will not be valid even for the period of five years for which the guardian can grant a lease; so, where such a lease of *ijmali* property was granted by the guardian, whether jointly with the minor's co-sharers or separately, *held* that the minor was entitled to eject the lessee as trespasser in respect of his own share, without making his co-sharers parties to the suit. [R., 18 C. 259; D., 33 C. 273 = 10 C.W.N. 126, 36 C. 675 = 9 C.L.J. 523.] A transfer made by a certificated guardian as such, before the actual issue of the certificate, but after the orders for its issue have been made and after his recognition as such, is a transfer under s. 18 of Act XL of 1858. Whether an unauthorised lease granted by a certificated guardian, conjointly with the co-sharers of a minor thereby creating one and the same tenancy, is not also void as against the co-sharers? **HARENDRA NARAIN SINGH CHOWDHRY v. MORAN**, 15 C. 40.

(68)—*Powers of guardian of minors—Admissions.*—Although the guardian of two minors may have authority to manage the estate or possibly even to make a partition, it does not follow that he would have power to make admissions of previous transactions. **SURUJ MOOKHI KONWAR v. BHAGWATI KONWAR**, 10 C.L.R. 377, P.C. [R., 4 O.C. 31.]

(69)—*Act XL of 1858—Mortgage by certifi-*

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*cated guardian without sanction—Void.*—A mortgage of the property of a minor, brought about by his mother who had obtained a certificate of guardianship under Act XL of 1858 without the sanction of the Civil Court previously obtained, is absolutely void, and a decree obtained by the mortgagee against the certificated guardian cannot be executed against the property of the minor. **BUCHRAJ RAM v. RAM KISHEN SINGH**, 11 C.L.R. 345. (2 C. 283, F.) [Appl., 15 C. 627; R., 15 C. 40.]

(70)—*Compromise by guardian on behalf of minor—Leave of Court not previously obtained—Suit to set aside decree.*—The guardian *ad litem* of certain minors assented to a compromise on their behalf, and the Court made a decree thereon. There was no fraud in the obtaining of the decree, nor was the decree in any respect disadvantageous to the minors. *Held*, that under such circumstances the minors could not maintain a suit to set aside the decree on the ground that the previous leave of the Court was not obtained to the compromise. There is a difference between a case in which the validity of a decree made upon a compromise in a suit in which a minor is a party is challenged in appeal from that decree, and a case like the present, where the validity of a decree which has become final is sought to be questioned in a separate, subsequent and independent suit between the parties. **AMAN SINGH v. NARAIN SINGH**, 20 A. 98 = A.W.N. 1897, 205. (17 A. 531, D.) [Doubted, 3 C.L.J. 119; F., 8 C.L.J. 274 = 13 C.W.N. 163; R., 31 C. 111; D., 2 O.C. 45, 6 O.C. 175.]

(71)—*Minors Act (XX of 1864), s. 18—Applicability—Alienation of property of minor—Sanction of District Court—Assignment by widow as guardian of minor—Consideration for assignment being partly a decree amount due to assignee—Leave of Court not obtained under s. 462, Civ. Pro. Code, 1877—Effect—Validity of assignment.*—S. 18, Act XX of 1864 (Minors Act), which requires the sanction of the District Court to any alienation of property belonging to a minor, applies only to persons to whom a certificate has been granted under the Act. [F., 15 B. 259; R., 20 B. 286.] An assignment of mortgage by a widow acting as natural guardian of her minor son, part of the consideration for the assignment being a sum due, under a decree to the assignee, is not invalid merely because of the failure of the guardian to obtain the Court's leave under s. 462, Civ. Pro. Code (Act X of 1877) to the compromise. Assuming that section to be applicable to the compromise of a decree, the circumstance that the compromise was voidable would only affect the consideration for the assignment of the mortgage by reducing its amount. Where the assignee under the above circumstances sued the mortgagors for recovering the mortgage debt, and the lower Courts dismissed the suit holding that the assignment was without adequate consideration, because one item of the consideration (*i.e.*, the amount due under



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the decree) was not certified and as such invalid; *held* that, owing to the peculiar circumstances of the case, the ordinary rule that where an assignee sues on his assignment and proves it, an adverse party cannot take the objection that there was no consideration was not applicable. *N.B.*—Under the peculiar circumstances of the case, the High Court reversed the lower Courts' decree and remanded the case with a direction that the minor should be joined as a defendant to the suit, that the point as to the legality of the assignment should be determined as between him and the plaintiff, and thereafter to determine the suit on the merits as between the plaintiff and the present defendants. *MANISHANKAR PRANJIVAN v. BAI MULI*, 12 B. 686. [*R.*, 1 Bom. L.R. 58, 2 O.C. 149, 1 S.L.R. 60.]

(72)—*Hindu Law—Putting out of caste—Guardianship*—A Hindu, who is outcasted by his community for attempting to marry his daughter, eleven years old, for a money consideration to an impotent old man of seventy, does not thereby lose his right to her custody as guardian. Even assuming that there is a rule to that effect, it cannot be enforced by the Courts, (Act XXI of 1850.) *KANAHI RAM v. BIDDYA RAM*, 1 A. 549. [*F.*, 167 P.L.R. 1901, 28 A. 233=2 A.L.J. 663=A.W.N. 1905, 205.]

(73)—*Relation of manager of ancestral estate to minor co-proprietors—Act XL of 1858.*—The manager of an estate under the Mitakshara Law, though he may have the power to manage the estate, is not the guardian of infant co-proprietors of that estate, for the purpose of binding them by a bond, or of defending suits against them in respect of money advanced with reference to the estate, in the absence of a certificate under s. 3 of Act XL of 1858. According to the Act, the care of minors' persons and property—if not under the protection of the Court of Wards—shall be subject to the jurisdiction of the Civil Courts. *DURGA PERSHAD v. KISHO PERSHAD SINGH*, 8 C. 656, P.C.=11 C. L.R. 210=9 I A. 27=4 Sar. 32. [*F.*, 23 A. 459; *D.*, 8 B. 395, 11 C. 509, 11 M. 309, F.B., *D. & Expl.*, 19 C. 301; *Expl.*, 10 B. 21; *R.*, 6 B. 593, 12 B. 18, 14 A. 498, 19 B. 309, F.B.]

(74)—*Guardian and minor—Suit for money—Minor's benefit—Liability of guardian.*—A suit to recover money lent for the benefit of a minor to save his estate from sale for arrears of Government revenue, was brought against his present guardian as well as his former guardian. *Held*, that the former guardian was not liable at all. The present guardian was liable to pay the debt to the extent to which he held funds belonging to the minor. *SHEIKH AZEEMOOD-DEEN AHMED v. MOONSHEE ATHUR ALI*, 3 W.R. 137.

(75)—*Decree against widow—Execution against minor's property—Pre-emption.*—A decree against a widow to the effect that the money due shall be realized from property

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pledged by the bond given by her, and from her personally, cannot be executed against the property of her minor son. A guardian cannot assert a right of pre-emption and make a contract of purchase, borrowing money for the purpose, in behalf of a minor. *NUBO KANT DOSS v. SYED ABDUL JULEEL*, 20 W.R. 372.

(76)—*Act XL of 1858, s. 3—Certificate refused—Representation of minor.*—Under s. 3, Act XL of 1858, where a decree has been passed against minor's estate, and his aunt, on being refused a re-hearing, appeals, *held* that the Judge had authority to allow the aunt to represent the minor and to appeal from the decree, though she had not obtained a certificate under Act XL of 1858, *held*, also, that the case should be sent back for trial on the merits as between the plaintiff and the aunt as the representative of the minor. *SHEOBURRUT SINGH v. LALLJEE CHOWDHRY*, 13 W.R. 202.

(77)—*Act XL of 1858, Scope of—Filing of accounts by discharged guardian, Court, not competent to order.*—In this case, the lower appellate Court had ordered a discharged guardian of a minor to produce his accounts under s. 21 of Act XL of 1858. The objection urged by the guardian in his appeal that it was not competent to the Judge to order him to file accounts, was allowed by the High Court which *held* that s. 21 of Act XL of 1858 refers to the procedure as between discharged guardians and their successors and provides that the retiring manager shall, on a summary order by the Judge, hand over to the person appointed to succeed him a full and true account of his receipts and disbursements. The section, however, has no reference to cases like the present where the contest happens to be between the owner of the estate and a discharged guardian, the only remedy open to the former being to institute a regular suit. *DOOLUN SINGH v. TORUL NARAIN SINGH*, 4 W.R. Mis., 3.

(78)—*Suit where minor need not take active part—Duty of guardian.*—Where a minor need not take an active part in a suit, his guardian should not take any step prejudicial to his ward, when he finds he cannot do the minor any benefit, he should leave the matter to the Court. *THE COURT OF WARDS v. RAJ COOMAR DEO NUNDEN SINGH*, 16 W. R. 142.

(79)—*Minor's jote—Guardian's relinquishment.*—A guardian's relinquishment of a hereditary jote is binding on minor only when it is shown to have been made for the minor's benefit. *KEDARNATH MOOKERJEE v. MUTHOORANATH DUTT*, 10 W.R. 59=1 B.L.R. A.C., 17. (6 W.R. 67, R.)

(80)—*Certificated guardian—Investment of money—Government security—Mortgage.*—The District Judge's order directing the certificated guardian of a minor to invest a sum of money belonging to the estate of the minor in Government Securities, in preference to investing it



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in mortgage of landed property, yielding interest at 12 per cent. per annum, was approved by the High Court, **MUHAMMAD HUSAIN v. NAJJO, A.W.N. 1881, 37.**

(81)—*Appeal to Privy Council on behalf of a minor—Withdrawal of appeal—Costs.*—In a suit instituted by a guardian on behalf of a minor, an appeal was preferred to the Privy Council during the minority of the ward. The minor alleging himself to have become a major sought to withdraw the appeal. It appeared from the evidence let in by the ward that he had attained his majority. But the guardian objected to the withdrawal of the appeal on the ground that he had not attained his majority and insisted that the appeal should be kept pending till the minor should attain his majority. *Held*, the guardian had no right to insist upon the appeal being kept pending. *Held*, also, that the guardian might recover the costs incurred by him, from the estate of the minor. **RANEE BISTOCPRIA PUTMADAYE v. NUND DHUL, 15 W.R. 19, P.C.=6 B.L.R. 190.**

(82)—*Guardian and ward—Entrustment of minor for particular purpose—Authority of lawful guardian in respect of matter outside scope of entrustment.*—Where a person is entrusted with the care and custody of a minor for a temporary but indefinite period, the higher legal guardianship of the lawful guardian is not ousted in respect of matters outside the scope or purpose of the entrustment, and in such matters the minor is considered to be in the custody or possession of such lawful guardian. **REGINA v. AVASARALA JAGAN-NADHA ROW, 10 M.L.J. 405=24 M. 284.**

(83)—*Guardian and ward—Right of guardian to release portion of minor's mortgage security.*—As a general rule, a guardian is liable to his ward as a trustee is to his beneficiary, but, as regards the alienation of the ward's property, the powers of the guardian are strictly limited by law. The powers of a guardian are not co-extensive with those of a trustee. A guardian cannot alienate his ward's property except in cases of necessity or for an evident advantage to the ward. Suit for sale of the mortgaged properties. The guardians of the plaintiff had, during his minority, lent the first defendant a sum of money on the security of the plaintiff's properties. Subsequently, the guardians released a portion of the properties from liability to the mortgage on the ground that the remainder thereof was ample security for the loan. The property so released was subsequently mortgaged by the first defendant to the fourteenth defendant. The minor, on attaining majority, brought the present suit against all the properties mortgaged to his guardians, including the portion afterwards released by them and mortgaged to the fourteenth defendant. The latter contended that the lands mortgaged to him, having been released were not liable for the plaintiff's debt. *Held*, that the release granted by the guardians was in excess of their

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authority inasmuch as in law it was necessarily prejudicial to the interests of the plaintiff. Consequently, the plaintiff's right to proceed against the whole property mortgaged was unaffected by the release. **MUTHUSUBBIAH CHETTIAR v. RANGIA GOUNDAN, 7 M.L.J. 191.**

(84)—*Guardian and minor—Alienation by guardian of minor's property—Validity.*—A mortgage and sale, executed by the guardian of a minor, of the property of the minor, are void as against the minor except in so far as they can be shown to be for his benefit or executed under circumstances otherwise rendering them binding upon him. **KAMAKSHI NAYAKAN v. RAMASAMI NAYAKAN, 7 M.L.J. 131.**

(85)—*Contract respecting minor's estate made by his natural guardian not void but voidable—Contract between plaintiff and third party, on what grounds defendant can question validity of.*—A sale or mortgage of or other dealing with a minor's estate by a *de facto* and natural guardian is not a nullity; it is not void but only voidable and only the minor or his representatives can ratify it or avoid it; and the same is the case with a certificated guardian who deals with his ward's estate without the sanction of the Court. A volunteer cannot as plaintiff avoid a transaction which does not concern him, and a defendant can always resist a suit upon the ground that no right or title at all has passed to the plaintiff or that an assignment to the plaintiff was made to defraud the defendant or was illegal or void or opposed to public policy; but where an assignment is in law sufficient to pass title to the plaintiff and is not illegal or void or opposed to public policy or a fraud upon the defendant but is only voidable at the instance of a third party on the ground of undue influence, failure of consideration or the like, then the defendant cannot challenge the validity of the assignment unless a trial of the question of its validity is necessary for his protection, in which case the person who has the right to ratify or avoid the assignment should be made a party to the suit and the validity of the assignment tried out. **HAZARI v. LALLU, 7 O.C. 181.**

(86)—*Bond by guardian—Liability of minor—Necessaries—Bond to keep alive debt due for necessaries, when binds minor's estate—Limitation—Personal liability.*—The proposition that a guardian of a minor cannot bind his ward personally by a simple contract debt, by a covenant or by any promise to pay money or damages, is subject to the modification that the promise will not bind the minor, unless it has been made merely to keep alive a debt, for which the ward's property was liable. (26 M. 330, R.) Where the promise is to pay money, which has been expended for necessaries, the estate of the minor may be liable, not on the promise, but because the money has been supplied. (17 M. 306, R.) It is established law that a guardian cannot bind his ward's



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estate, except by a document purporting to bind it. When a third person enters into dealings with the guardian of a minor, and advances money for necessities for the minor or for the benefit of his estate, and takes a bond for the debt from the guardian, the responsibility rests on him to take care that the bond is so drawn as to render the estate of the minor in law liable for the debt. **BHAWAL SAHU v. BAIJ NATH PERTAP NARAIN SINGH, 12 C.W. N. 256=3 M.L.T. 156=35 C. 320. (20 B. 61, R.)**

(87)—*Minor—Guardian ad litem—Not properly represented—Decree by default—Sale to stranger, not binding on minor—Civ. Pro. Code, s. 443.*—One M, who was the certificated guardian of H, mortgaged, at his own, a house to A. A brought a suit for sale against M, M as the certificated guardian of H, made an application that H, might be made a defendant. That application was granted and H made a defendant under the guardianship of M. The suit was decreed, property sold and purchased by respondent. H then brought the suit for possession of the house on the ground that he was no party to the decree, not having been properly represented in that suit. *Held* that M was not a fit person to be appointed a guardian *ad litem* and as he did not effectively defend the interests of H and allowed a decree by default to be passed, H could not be deemed to have been properly represented in the previous suit. The provisions of s. 443 of the Civ. Pro. Code are imperative and a Court has no jurisdiction to pass a decree against, or to sell property of, persons, who are not parties to proceedings or properly represented on the record. **HANOMAN PERSHAD v. MUHAMMAD ISHAQ, 2 A.L.J. 615=A.W.N. 1905, 229=28 A. 137. (9 C.W.N. 201, P.C.=2 A.L.J. 7=32 I.A. 23=7 Bom. L.R. 1, Appl.; 30 C. 1021, D.) [R., 5 C.L.J. 424, 10 O.C. 321, 2 S.L.R. 55, F.B., 55 P.W.R. 1910=35 P.R. 1910=6 Ind. Cas. 663; D., 28 A. 416=3 A.L.J. 187=A.W.N. 1906, 73.]**

(88)—*Act XL of 1858—S. 18—Lease executed by guardian on behalf of minor—Suit by minors to set aside lease executed by their guardian—Negligence, what amounts to in the guardian of a minor—Compensation.*—The plaintiffs' mother, holding a certificate of guardianship under Act XL of 1858, executed a perpetual lease in favour of the defendants, who on the 2nd November, 1887, obtained a declaratory decree against the plaintiffs under the guardianship of their mother, upholding the lease. The case was decided under s. 152 of the Civ. Pro. Code, there being no contest between the parties. Subsequently the plaintiffs brought a suit against the defendants to have the lease set aside on the ground that it had been granted without the order of the Civil Court previously obtained, contrary to s. 18, Act XL of 1858. *Held*, that the guardian of the plaintiffs did not defend the case with due care which, if it had been shown, would have made

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the defence successful, and that the decree of the 2nd November, 1889, was not binding on the plaintiffs. It is not every kind of negligence nor any amount of negligence on the part of a guardian of a minor which would render proceedings, otherwise regular and proper liable to be opened up. There must be such negligence as leads to the loss of a suit, which, if it had been conducted with due care, must have been successful. *Held*, further, that in the absence of any evidence to show that the plaintiffs had acquiesced in the construction of a well by the defendant, the latter were not entitled to get any compensation. **GHULAM AKBAR KHAN v. MATHURA, 2 O.C. 233.**

(89)—*Acts of guardian when and how far binding on a minor—Minor's right of ratification on repudiation.*—A minor is bound by the Act of his guardian done *bona fide* and for his benefit in the management of his estate even though his name does not appear in the transaction. (20 B. 286, F.) It is only where the guardian's act was not necessary, proper or prudent that any question of ratification or repudiation can arise. A person cannot, on attaining majority, ratify a transfer made during his minority by his guardian, so as to affect the rights of an intermediate transferee for value. **SETH GHASIRAM v. MT. BINIA, 1 N. L.R. 66.**

(90)—*Agreement entered into in proceedings in suit subsequent to decree—Foreclosure, suit for—Compromise entered into by next friend or guardian for suit of minor, without leave of Court—Civ. Pro. Code, s. 462—Civ. Pro. Code, s. 258.*—In a suit for foreclosure of a mortgage, the appellant who was a minor at the time, and the respondent No. 3 who was his guardian for the suit were defendants. In September 1883, a foreclosure decree was passed in favour of the plaintiff. Before the date fixed by the decree for the payment of the mortgage-money, the respondent No. 3 and the plaintiff presented a petition to the Court, which passed the decree, in which they stated that the mortgagee had agreed that the mortgagors should hold certain land, part of the mortgaged property rent free, and that the mortgagors had agreed not to redeem the mortgage; and they prayed that an order absolute for foreclosure might be made at once. This petition purported to have been presented under s. 258, Civ. Pro. Code. The Court made an order, embodying the terms of the agreement, and declaring that the order had the force of a decree under s. 87, T.P. Act, and s. 375, Civ. Pro. Code. The mortgagee obtained possession of the mortgaged property. The appellant in 1897 brought a suit against the respondents, claiming to have the agreement above mentioned set aside, and to recover possession of the mortgaged property on the ground that the agreement was fraudulent, and had been made without the leave of the Court. *Held*, that a compromise entered into by the next friend or guardian for the suit of



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a minor, without the leave of the Court, is voidable at the instance of the minor on that ground alone, notwithstanding the decree made upon such compromise may have become final, and that no attempt is made to show that it was disadvantageous to him. *Held*, that the provisions of s. 462, Civ. Pro. Code, are applicable to agreements entered into in proceedings in a suit subsequent to the decree, even if the agreement adjusted the decree for foreclosure, within the meaning of s. 258, Civ. Pro. Code. **MAKUND SINGH v. REOTI**, 2 O.C. 45. [R., 6 O.C. 175.]

(91)—*Suit for account by minor against his agent—Advances made for minor's benefit—Guardian's power to bind minor—Principal and agent.*—Where a minor comes to Court to have an account taken as between himself and his agent, and it is found on taking that account that the agent has made certain advances to the guardian of the minor and that those advances had been applied for the benefit of the minor, it was held that the agent ought to be allowed those advances in taking the accounts. Where the plaintiff seeks relief from a Court administering equity, he must do equity himself. A guardian cannot bind his minor ward by a personal covenant. **SURENDBA NATH SARKAR v. ATUL CHANDRA ROY**, 34 C. 892=7 C.L.J. 87. (11 B. 551, F.)

(92)—*Mortgage by guardian for necessity—Guardian making himself personally liable—Right of guardian to retain possession of ward's property till the discharge of liability—Puisne mortgagee discharging a prior mortgage binding on ward, right of—Caretaker, acts of—How far binding.*—Where a guardian executes a mortgage of the minor's property for a debt due by the estate of the minor, and makes himself personally liable, he is entitled to insist upon the debt being discharged and his liability being put an end to before possession of the ward's estate is taken away from him. Where, to discharge a prior mortgage-decree binding on the ward's estate, the guardian executes a usufructuary mortgage after the ward's death, the usufructuary mortgagee is entitled to be reimbursed the amount paid by him in discharge of the mortgage decree, and has a charge upon the minor's property for that amount, even though the usufructuary mortgage may not be valid as against the ward or his heir. Consequently, he is entitled to insist, as against such ward or any one claiming under him, that he should not be rejected from the property usufructuarily, mortgaged to him, till the amount is paid. Even the act of a mere care-taker of property in charging the estate, if done *bona fide*, will be binding on the principal, and any one claiming the estate through such principal must, in equity, be held disentitled to recover the property without satisfying the charge. **ANANTHAYA KAMTHI v. LAXMINARAYANAPAYYA**, 15 M.L.J. 233.

(93)—*Bona fide compromise by guardian of an uncertain claim of the minor—Latter bound*

*Guardian—continued.***—3.—Duties and Powers of Guardians—*ctd.***

*by and estopped from repudiating, the compromise.*—Compromise was entered into in this case on behalf of the minor plaintiff by his grandmother and guardian, *bona fide*, in settlement of a real existing dispute in which the rights of both parties were uncertain and the compromise was in the interest of, and beneficial to, the minor who got under it half the property without the expense and uncertainty of pressing his claim further in Court. Both parties were bound by the compromise and the minor, therefore, could not turn round and repudiate it so far as it was in favour of the other party and so went against him. *Quære.*—Whether a person's status as an *illatom* son-in-law of another could be maintained at law when the latter had sons of his body at the time of the former's marriage? **MALLA REDDI v. ASWARATHA REDDI**, 15 M.L.J. 494. (7 M. H.C. 25, 4 M. 272. R.)

(94)—*Guardian ad litem, duty of—Decree, when to be set aside, for the negligence of the guardian—Test—Minor, to prove what.*—The guardians of infants are not bound to contest all claims against an infant's estate whether well or ill-founded. (14 M.I.A. 393, R.) If the omission by a guardian to plead a defence is fraudulent or amounts to gross misconduct, the decree may be avoided. (3 C.L.R. 17, R.) If there has been gross negligence on the part of a next friend in the conduct of a suit, the decree may be successfully impeached by the infant. (22 C. 8, R.) The test is, whether the inaction of the guardian amounted to neglect of duty or was in best interests of the infant. It is not every kind of negligence nor any amount of negligence which would render proceedings, otherwise regular and proper, liable to be opened up; it must be such negligence as leads to the loss of a right, which, if the suit had been conducted or resisted with due care must have been successfully asserted. (5 C.W.N. 58, R.; 6 C.L.R. 69, D.) It is not sufficient for the minor to allege that the suit was not defended by the guardian *ad litem*; it ought to be alleged and proved that an available good ground of defence was not put forward at the hearing by the omission of the guardian to appear at the trial. **PARMESWARI PERSHAD NARAYAN SINGH v. SHEO DAT RAI**, 6 C.L.J. 448. (12 C. 69, 2 C. 283, 25 W.R. 449, R.)

(95)—*Contract for sale by guardian of minor—Subsequent sale to third party—Sanction of District Judge—Sale, void or voidable—Specific performance.*—A certificated guardian of certain minors contracted to sell their property to the plaintiff for a consideration of Rs. 217, of which Rs. 30 was to be paid in cash and the balance of Rs. 187 was to redeem a mortgage upon the property executed by the late father of the minors in favour of the plaintiff. The guardian undertook to obtain the sanction of the District Judge to the transaction. She, afterwards, fraudulently conveyed the property by registered deed to her relative, the defendant No. 1 who was fully aware of



**Guardian—continued.****—3.—Duties and Powers of Guardians—*ctd.***

the previous contract with the plaintiff. *Held*, that the sale to the plaintiff was not *ipso facto* void but only voidable at the instance of any person affected thereby. That the plaintiff became entitled to obtain specific performance when, by finding that the sale to him was for the minor's benefit, the District Judge in effect sanctioned the sale. **MUSST. ETWARIA v. CHANDRA NATH MUKERJEE, 10 C.W.N. 763.**

(96)—*Contract of sale and purchase—Minor—Contract by guardian—Specific performance—Personal liability.—Woodroffe, J.—Specific performance may be granted of a contract entered into by a guardian on behalf of a minor, if the contract be one which, being within the guardian's powers, binds the minor. An agreement for sale and purchase entered into on behalf of a minor may be specifically enforced, notwithstanding the fact that it involves a personal liability to pay the price, if the agreement be carried out, and also damages in lieu of, or in addition to, specific performance, if the agreement be broken. MIR SARWARJAN v. FAKHRADDIN MAHOMED CHOWDRY, 11 C.W.N. 34=34 C. 163=1 M.L.T. 360=4 C.L.J. 431. (14 I.A. 89, R.)*

(97)—*Appointment of guardian—Minor Hindu co-parcener—Guardian of property whether can be appointed guardian of person—Status of the family—Suit by one co-parcener against another for possession, whether effects separation—Partition.—A guardian cannot be appointed to the estate of a minor co-parcener of a joint Hindu family, who has no separate property. (25 A. 407, P.C., R.) The status of the minor places no difficulty in the way of appointing a guardian of the person, but different considerations apply to the guardianship of property. (30 B. 152, R.) It is a fact that individual members of a joint Hindu family frequently hold property, in which the other members of the family have no share, and a suit by one against another, based on the allegation that an acquisition was for the joint family and not merely for the member in whose name it was recorded, does not effect a separation. (2 P.R. 1892, 4 C. 434, D.) So, a suit by a co-parcener against a minor co-parcener, to establish the fact that a mortgage transaction effected by the minor's father was on behalf of the joint family, does not effect a partition. **RAM KISHEN v. BELI RAM, 23 P.R. 1910=33 P.W.R. 1910=5 Ind. Cas. 887.***

(98)—*Mortgage by guardian, Validity of—Guardians and Wards Act (VIII of 1890), s. 31—Order, if to substantially comply with the provisions of the section—Order obtained on misrepresentation of fact and not by fraud—Mortgagee entitled to amount advanced.—A mortgage executed by a certificated guardian of a minor's property, in pursuance of a permission obtained on misrepresentation of fact and not by fraud, is a valid mortgage, even though the permission ought not to have been granted. A mortgagee is not bound to go behind the order of the Court permitting the mortgage, where no case of fraud exists.*

**Guardian—continued.****—3.—Duties and Powers of Guardians—*ctd.***

(12 A. 47, 11 C. 379, F.) An order granting permission to the guardian to transfer is sufficient, if it substantially, though not in form, complies with the provisions of s. 31 of the Guardians and Wards Act. Thus an order not reciting the necessity for which the loan was required is valid, if the petition on which the order was granted contained the requirements provided in s. 31 of the said Act. A mortgagee is not entitled to recover any larger sum than what he has actually advanced. **MAHARAJA SIR RAMESWAR SINGH BAHADUR v. DHUNPAT SINGH, 11 C.L.J. 197=5 Ind. Cas. 334.**

(99)—*Mortgage—Minor—Loan by a guardian—Lender's rights against property—Due enquiries.—When a guardian purports to mortgage the minor's property on behalf of his ward, the lender is bound to enquire into the necessities of the loan and to satisfy himself as well as he can with reference to the parties with whom he is dealing, that the guardian is acting in the particular instance for the benefit of the minor. If he does enquire and acts honestly, the real existence of an alleged and reasonably credited necessity is not a condition precedent to the validity of the charge, nor is he bound to see to the application of the money. It is only, however, when there has been at the time of the loan either real necessity for it or due enquiry as to such necessity that the lender can obtain a charge over the minor's property. **DALIBAI v. GOPIBAI, 4 Bom. L.R. 105=26 B. 433.***

(100)—*Investment of property—Minor's property—Change of investment—Court's discretion in sanctioning the change—Guardian's duty to preserve and not to add to minor's property.—Guardians are in a fiduciary position and the Court should ordinarily be guided by the rules embodied in the Trusts Act, 1882, in sanctioning changes in the investment of the minor's property. A trustee is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. Business men of ordinary prudence may and frequently do select investments which are more or less of a speculative character but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust and avoid all investments which are attended with hazard. The duty of guardians is primarily to preserve and not to add to the property of the minor. *In re CASSUMALI, 8 Bom. L.R. 383=30 B. 591.**

(101)—*Adoptive mother—Adopted son—Age—Competency.—A woman can become the guardian of the person of her adopted minor son though she may be only 18 years of age. **RANGUBAI v. GOPAL, 5 Bom. L.R. 542.***

(102)—*'Ad litem'—Gross negligence.—To withdraw from an uncertain defence which may or may not have been sustainable, is not in itself such gross negligence as in the eyes of the law to be tantamount in its consequences to fraud on the part of the guardian *ad litem*. The*



**Guardian—continued.****—3.—Duties and Powers of Guardians—*ctd.***

mere withdrawal by a guardian *ad litem* from a suit even though there might be a good case, is not in itself gross negligence, which would prevent the bar of *res judicata*. **VENKATESH v. BHAVANISHANKAR**, 5 Bom. L.R. 174.

(103)—*Duties and powers of guardian—Appointment of guardian by Court—Lending of money by guardian in course of carrying on minor's business—Liability of guardian for debts proving bad—Investment in new company—Right of minor to claim return of money so invested.*—Where a person to whom letters of administration was granted under Act XL of 1858 in respect of a minor's estate had to carry on business carried on by the minor's father, which involved lending of money and incurring liabilities, did business honestly to the best of his ability with proper care and prudence he was not liable for some debts proving bad. But where he invested money of the minor in a company which was only just started and the success of which was a mere matter of speculation he acted beyond the scope of his authority and was bound to return the money so invested and take himself the shares in the company. **BANSIDHER v. GANPATLAL**, 3 C. P.L.R. 95.

(104)—*Duties and powers of guardian—Sale by guardian of minor's property to discharge father's debt—Sale valid if beneficial to minor's interest.*—The guardian of a minor may sell away the ancestral property of the minor to discharge a mortgage debt of the minor's father, if the sale is a prudent transaction and for the benefit of the minor. **MADHOSING v. MAHAMAD IBRAHIM**, 1 C.P.L.R. 72.

(105)—*Settlement by elder brother and guardian—Effect upon minor.*—In this case plaintiff sought to set aside a settlement, which was entered into on his behalf, when he was a minor, by his elder brother and guardian. It was in the nature of a family settlement entered into for the purpose of putting an end to family disputes. It was found that the transaction was honest, fair and prudent, but that, before making the settlement, the guardian made no enquiry with regard to the nature of the debts. *Held*, the settlement was binding on the minor. **NATESA IYER v. RAMA IYER**, 9 M.L.T. 498.

(106)—*Mortgage executed by guardian—Legal necessity—Minor's benefit—Recitals in a deed, no evidence of contents—Estoppel—Admission of mortgage-debt by minor after becoming major—Ratification—Whether decree can be based on admissions.*—A mortgage-deed was executed by one B on his own behalf and as guardian of a minor. There was no evidence beyond the recital in the mortgage-deed that it was executed for legal necessity. The mortgagee also made no enquiry as to the necessity of the loan. The minor on attaining majority admitted in two subsequent documents that the debts due under the previous mortgage were due from him and that they had been re-paid. *Held*, that mere recitals in a deed were not sufficient

**Guardian—continued.****—3.—Duties and Powers of Guardians—*ctd.***

proof of the facts contained therein. *Held*, also that admissions contained in subsequent documents could not be treated as estoppel or as ratification of the transaction, but that they could be treated as statements that the money had been legally borrowed for the minor's benefit and that he was legally bound to re-pay it, and that, on the basis of such an admission, a decree could be passed against him. **SHEO NARAIN SINGH v. MAHABIR PRASAD**, 9 Ind. Cas. 56.

(107)—*Uncertified guardian—Powers—Bona fide acts—Avoidance—Ground.*—A minor on his attaining majority cannot impeach a *bona fide* transaction made by his *de facto* guardian for the benefit of his estate and in his interest, on the ground that such guardian was not one legally constituted under Act XL of 1858. **MASTU v. NAND LAL**, 73 P.R. 1890. [Cons., 28 P.R. 1909=182 P.L.R. 1908=170 P.W.R. 1908; R., 52 P.R. 1904=85 P.L.R. 1904.]

(108)—*Sale by certified guardian—Permission of Court—Nature of such.*—A sale made by a certified guardian with the permission of the District Judge cannot be impeached by the minor on the ground that the permission so given did not comply with the provisions of s. 18, Act XL of 1858. The sale will be held valid if it is shown that it was done in good faith for the benefit of the minor and for necessary purposes. **CHAUTH MAL v. GODHU**, 56 P.R. 1890. [R., 9 P.R. 1892.]

(109)—*Lease to guardian—Management of estate—Introduction of stranger.*—A lease to a guardian of his ward's land is most objectionable. An order of a Judge the effect of which would be to introduce a stranger in the management of an ancestral holding will not be justified unless it can be shown that the members of the minor's own family are unfit to be his guardian. **KISHEN SINGH v. RAHAB SINGH**, 78 P.R. 1892.

(110)—*De facto guardian—Balance struck by him—Minor when bound.*—A balance struck by a *de facto* guardian on a minor's behalf will not bind the minor unless it is shown that the transaction was for the minor's benefit and that it was done with great care and caution. **HIRA SINGH v. CHETU**, 97 P.R. 1889.

(111)—*Guardian and minor—Power of guardian to enter into a compromise on behalf of the minor—Act XL of 1858—Minor's Act, s. 18.*—A certificated guardian has no power to bind his minor ward by a compromise which involves an assignment of immoveable property belonging to the minor without having first obtained the sanction of the Civil Court to the compromise; nor does the fact that the guardian has subsequently joined the minor as a party in suits in which the compromise was practically adopted estop the minor from questioning the validity of the compromise. **BRIJMOHAN LAL v. GHASI RAM**, A.W.N. 1891, 46.



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(112)—*Appeal by guardian—Practice.*—No appeal is allowable by a guardian to protect himself against a decree by making a minor's property liable under it. *H. G. FRENCH v. BARANASHEE BANERJEE*, 8 W.R. 29.

(113)—In a suit to set aside sales by a minor's guardians, on the ground that they were not justified by any legal necessity the burden of proof is on the defendant to prove the legal necessity. *LOOLOO SINGH v. RAJENDUR, LAHA*, 8 W.R. 364.

(114)—*Sale by guardian—Suit for setting aside sale—Fraud—Purchaser not acting bona fide.*—The guardian of three minors sold a portion of their ancestral lands and one of them, after attaining majority, instituted a suit on behalf of himself and of his other brothers to cancel the sale. The lower Court found that, although the estate of the minors did not seem to have been substantially injured by the sale (the greater portion of the purchase-money having been re-invested in land by the guardian), still the sale was not warranted by law, being made without necessity, and the sale was thus set aside. The purchaser appealed on the ground that he acted *bona fide*, and that there was no finding of the lower Court that he acted otherwise. *Held*, that the finding of the lower Court, although it did not amount to finding of fraud or collusion on the part of the purchaser—was substantially a declaration that he did not act *bona fide*, that is to say, that if in fact he believed that there was a legal necessity for the sale which the guardian was making, he had not exercised due care and attention in arriving at the belief. *SHEO PERSHAD RAM v. THAKOOR PERSHAD*, 5 W. R. 103.

(115)—*Compromise by guardian on behalf of minor—Advantage to minor and good faith in guardian essential.*—A compromise had been effected between the guardian of the plaintiff, who was a daughter's son, and therefore, the heir expectant of his grand-father, and the widow of that grand-father, by which the minor was to receive immediate possession of half of the property on the condition of his guardian on his part surrendering all claim to the reversion of the other half which the grand mother settled on the defendant, who was the son of her daughter's daughter and therefore no heir at all under the Hindu Law. The High Court held that the arrangement could not be sustained unless it be shown that the transaction was at the time one reasonably beneficial to the minor, and refuse to sanction it since there was neither necessity nor advantage in such an arrangement. The acts of the guardian as regards minors must show the strictest good faith and must be based on considerations of actual necessity and advantage not on calculations of possible benefits. *BODH MUL v. GOUREE SUNKAR*, 6 W.R. 16. [R., 10 B.H.C. 311.]

(116)—*Compromise of suit by guardian ad litem—Suit by minor to set aside decree—Plea*

**Guardian—continued.****—3.—Duties and Powers of Guardians—*ctd.***

*of fraud and collusion—Maintainability of suit.*—A decree was passed against the plaintiff (a minor) in a compromise entered into by his guardian *ad litem* to which the consent of the Court had been duly obtained under s. 562 of the Civ. Pro. Code, 1882. The present suit was instituted by the plaintiff to set aside that decree, on the allegation that the guardian *ad litem* had entered into the compromise *mala fide* and by reason of collusion, fraud, and improper pecuniary inducement. *Held*, that there was no objection to the maintainability of the suit, on the allegations contained in the plaint. *BEHARI LAL v. MUMTAZ KHAN*, A.W.N. 1884, 316.

(117)—*Mother's act as guardian.*—A mother can bind her sons, acting in good faith, as their guardian. *MAKBUL ALI v. SRIMATI MASNAD BIBI*, 3 B.L.R. A.C., 54=11 W. R. 396.

(118)—*Act VIII of 1890 (Guardians and Wards Act), ss. 29 and 30—Guardian and minor—Mortgage by guardian of minor's property—Previous permission of the Court of Wards not obtained—Effect of mortgages.*—A mortgage, purporting to bind the estate of a minor, was executed on behalf of the minor by his mother who was not only the natural guardian of the minor, but a certificated guardian under the provisions of the Guardians and Wards Act. The guardian, however, had not obtained the permission required by s. 29 of the above mentioned Act. *Held*, that the mortgage was not void, but if the minor had in fact benefited by the money borrowed, to that extent the minor's estate ought to be held liable before he was entitled to be relieved against the mortgage. *SAH TEJPAL v. GANGA*, A.W.N. 1902, 192. (9 A. 340, 22 M. 289, F.; 18 A. 373, D.)

(119)—*Guardian and infant—Alienation by guardian—Delay in repudiating a guardian's act—Suit by minor—Limitation—Notice.*—Mere silence for a period short of that prescribed by the law of limitation cannot by itself constitute a valid ground for rejecting a person's claim to set aside an alienation improperly made by his guardian, during his minority, without valid necessity. A person who has arrived at majority is not required by law to give any notice, express or implied, to the person who holds his property under such an alienation, or to perform any preliminary acts before he can bring a suit to set it aside. *RAJ-NARAIN DEB CHOWDHRY v. KASSEE CHUNDER CHOWDHRY*, 10 B.L.R. 324=18 W.R. 404.

(120)—*Minors—Duty of guardians—Compromise—Burden of proof—Fraud.*—It is undoubtedly the duty of guardians scrupulously to regard the interests of minors in dealing with their estates, and the Court will, when necessary, enforce the performance of this duty. But the interests of infants would seriously suffer if a notion were to prevail that guardians



**Guardian—continued.****—3.—Duties and Powers of Guardians—*ctd.***

were bound, for their own security, to contest all claims against and infant's estate, whether well or ill-founded; and such a notion might prevail if the compromise of a claim of debt confirmed by a decree of a Court were to be set aside after 16 years without distinct proof of fraud. In this case, the burden of proving his allegations that the suit against him while a minor was fictitious, and the compromise of it by his guardian fraudulent and collusive, lay upon the plaintiff, and an element in that proof, without which his case amounted to nothing, was the non-existence of a debt. But as the lower Courts fell into an error in point of law in assuming that the burden of proof of the debt lay upon the defendant, the Privy Council reversed their decision, and dismissed the suit with costs. *BABOO LEKRAJ ROY v. BABOO MAHTABCHAND*, 10 B.L.R. 35, P.C. = 17 W.R. 117 = 14 M.I.A. 393 = 2 Suther. 536 = 3 Sar. 43. [R., 6 C.L.J. 448.]

(121)—*Guardian and minor—Guardian appointed under Act XX of 1864 (Minors Act)—Mortgage by guardian without Court's sanction—Validity—Act VIII of 1890 (Guardian and Wards Act), ss. 29, 30—Mortgage by guardian with sanction under, s. 305, Civ. Pro. Code, 1882, of subordinate Judge—Sufficiency of sanction—Validity of mortgage—Mortgage by guardian—Parties to suit—Transfer of Property Act, 1882, s. 85.*—A guardian of the person and property of a minor, appointed under the Minors Act (XX of 1864) is not competent under s. 29 of Act VIII of 1890, to mortgage the property belonging to his ward without the permission of the Court which appointed him. Such a mortgage is absolutely void under Act XX of 1864 and is voidable under s. 30 of Act VIII of 1890 at the instance of any other person (*i.e.*, any person other than the guardian-mortgagor) affected thereby. [R., 17 C.P.L.R. 13, 10 O.C. 321.] Where the guardian of a minor appointed under Act XX of 1864 (being a judgment-debtor) mortgaged the property belonging to his ward with the sanction of a subordinate Judge under s. 305 of the Civ. Pro. Code, 1882, *held* that the sanction was insufficient to validate the mortgage. Under s. 29 read with s. 4 (5) of the Guardian and Wards Act (VIII of 1890), the Court whose sanction is required for such a transaction is the Court which appointed the guardian in pursuance of an application under the Act (*viz.*, the District Court). The suit property belonged to T, who mortgaged it with possession to first defendant in 1884. T died leaving behind him his son V (a minor) to whom W was appointed guardian by the District Court under the Minors Act (XX of 1864). In 1890, W mortgaged the same property to the plaintiff with sanction of Court obtained under s. 305 of the Civ. Pro. Code, 1882. The plaintiff, as puisne mortgagee, filed the present suit in 1895 for redemption of the earlier mortgage of 1884. *Held*, that the original mortgagee (first defendant) was not affected by the plaintiff's mortgage, because he had a right to his money

**Guardian—continued.****—8.—Duties and Powers of Guardians—*ctd.***

only (as prior encumbrancer), but that the person really affected by the mortgage was V (the owner of the equity of redemption) who was a necessary party to the suit under s. 85 of the Transfer of Property Act, N.B.—The case was accordingly remanded for V being added as a party and for decision on the merits. *DATTARAM v. GANGARAM*, 22 B. 287. [*Expl.*, 7 O.C. 181.]

(122)—*Act XL of 1858, s. 18—Sale by guardian without sanction of Court—Guardian jointly interested in minor's property—Recall of certificate.*—Specially good cause must be made out before removing from the office of guardian and manager of minor's estate, a person who is himself jointly interested with the minor in the management of the property. In this case, a certificate of guardianship had been granted to a certain person in respect of the property of his minor half brother. The certificate was recalled by the Judge on the ground that the guardian had, without the sanction of the Court; executed a bond pledging certain property of the minor. *Held*, that though the guardian, in executing the bond, violated the provisions of s. 18, Act XL of 1858, in so far as that the bond would be invalid as being without the Court's sanction, it did not follow that the guardian must therefore be removed from his office. It should have been made clear, that the guardian, in so executing the bond, had acted in bad faith, or had injured, or was likely, or intended, to injure the interests of the minor. It did not appear even that he knowingly contravened the terms of that section, and, at any rate, it appeared that the bond in question was executed four or five years ago, and that it had been superseded by a patni settlement entered into by the guardian with full, sanction of the Civil Court. *Held*, therefore, that the Judge had no sufficient ground for setting aside the certificate. *In the matter of the petition of BUSUNTO COOMAR GHOSE*, 15 B.L.R. 351, Note = 13 W.R. 300. [R., 15 B.L.R. 350 = 24 W.R. 46.]

(123)—*Act XL of 1858—Mortgage by guardian without Court's sanction.*—In this case a Division Bench declined to disturb a mortgage made by the guardian appointed by Act XL of 1858, as the mortgage was after a suit, to which the minor was a party, had been brought on the mortgage, and a decree had been passed in favour of the mortgagee. *ALFOOTOONISSA v. GOLUCK CHUNDER SEN*, 15 B.L.R. 353, Note. [R., 2 C. 283.]

(124)—*Act XL of 1858—Sale by guardian—Sanction of Court not obtained.*—Where the elder brother natural guardian of a minor, who was also appointed guardian under Act XL of 1858, sold the minor's immoveable property without the sanction required by s. 18 of the Act, *held* that the sale was invalid, though it was necessitated by the condition of the estate and though a fair price was given. *SHUBRUT CHUNDER v. RAJKISSEN MOOKERJEE*, 15 B.



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L.R. 350=24 W.R. 46. [*F.*, 4 C. 33; 9 A. 340; R., 2 C. 283, 15 C. 627, 20 B. 61, 22 M. 289, 9 C.W.N. 923, 3 C.L.J. 260]

(125)—*Act XL of 1858—Power of guardian to mortgage without sanction of Court—Mofussil—Mortgage of property in Calcutta.*—When a testamentary guardian obtains a certificate under Act XL of 1858, he puts himself to a certain extent under the control of the Civil Court, and cannot mortgage or sell without its sanction. A guardian who has obtained a certificate under Act XL of 1858 is competent to mortgage or sell property in Calcutta, without the sanction of the Court. In the High Court at Calcutta, which alone has jurisdiction over landed property in Calcutta, the relations between incapacitated persons and their guardians whether testamentary or otherwise, have always been treated from a different point of view to that taken in the mofussil. (The notion that a testamentary guardian could not act on behalf of his ward without the sanction of the Court has never prevailed in Calcutta. *GOPAL NARAIN MOZOOMDAR v. MUDDOMUTTY GUPTA*, 14 B.L.R. 21.

(126)—*Power of guardian to mortgage estate.*—The manager of a minor's property can mortgage the estate to meet pressing demands against it, without the intervention of the Court. *ALLA DITTA v. HIMMAT*, 52 P.R. 1872.

Right of guardianship—Hindu Law—Competition between outcasted mother and paternal grandfather in caste—See ACT XXI OF 1850, A.W.N. 1905, 205=2 A.L.J. 663=28 A. 233.

Power of lunatic's—to contract without permission from Court—See ACT XXXV OF 1858, 3 A.L.J. 686=A.W.N. 1906, 298.

Guardian not competent to enter into contract binding ward personally—See BOM. ACT, VI OF 1862, s. 12, 11 B. 551, P.C.

Authority of—to agree to arbitration on behalf of a minor—See ARBITRATION—REFERENCE TO ARBITRATION, A.W.N. 1905, 171=2 A.L.J. 493=28 A. 25.

Minor if can enter into submission to arbitration—Guardian's power to submit on behalf of ward—See AWARD, 14 C.L.J. 188.

See BETROTHAL, 21 P.R. 1868, 59 P.R. 1866.

Guardian and ward—Alienation by guardian of minor's property—Suit to set aside alienation by minor on attaining majority—Burden of proof—See CIV. PRO. CODE, 1908, O. II, rr. 4, 5; 5 M.L.J. 53.

Compromise by guardian or next friend—See COMPROMISE—COMPROMISE OF SUITS IN CIV. PRO. CODE, 17 A. 531=A.W.N. 1895, 126.

Sale by guardian to his minor ward—Validity—See CONTRACT ACT, 1872, ss. 10, 11, 9 A. L.J. 670.

**Guardian—continued.****—3.—Duties and Powers of Guardians—*ctd.***

Guardian *ad litem* of minor defendant when liable for costs of suit—Gross misconduct of guardians—See COSTS—SPECIAL CASES, 8 B. 391.

See DECLARATORY DECREE, SUIT FOR—WHEN DECLARATORY SUITS LIE, 42 P.R. 1876.

See HINDU LAW—ALIENATION, 18 W.R. 81, Foot-note=6 M.I.A. 393.

Bills of exchange—Guardian of Hindu—Minor, sole owner of business—Power to appoint agent—Guardian's power to give authority to draw bills to such agent—Extent—See HINDU LAW—JOINT-FAMILY, 21 M.L.J. 620=M. W.N. 1911, 385.

The *Karta* of a joint Hindu family, who is also the certificated guardian of a minor member of it, can make a mortgage of the joint family property so as to bind his minor ward as well—See HINDU LAW—JOINT FAMILY, 3 C. L.J. 12.

Joint Hindu family—Powers of manager—Creditor lending money to manager, duty of—See HINDU LAW—JOINT FAMILY, 194 P.L.R. 1905.

See HINDU LAW—JOINT FAMILY, 20 B. 767.

Right to question partition effected during minority of co-parcener—Validity—Fraud, undue advantage or gross inequality in distribution of property to be proved—See HINDU LAW—PARTITION, 2 M.H.C. 182.

See HINDU LAW—PARTITION, 3 M.H.C. 94, 1 M.H.C. 105.

Sale by plaintiff's mother as guardian during his minority—Suit to set aside sale—Limitation—See LIMITATION ACT, 1908, arts. 44, 144, 11 M.L.T. 198=M.W.N. 1912, 383.

Power of widow to alienate estate—Rights of attaching creditor—Widow with minor children—Guardianship of property—See MAHOMEDAN LAW—ALIENATION, 2 L.B.R. 144.

Order absolute for sale—Guardian dead—Effect of non-service of notice—See TRANSFER OF PROPERTY, ACT, 1882, ss. 88, 89, 2 A.L.J. 610=A.W.N. 1905, 241=28 A. 193.

**—4.—Ratification of Act of Guardians.**

(1)—*Possession—Right to sell—Minority—Sale—Acquiescence.*—Persons having a right of possession may dispose of property, though it is not actually in their possession. The conveyance of property while its owner is a minor is not necessarily inoperative; the sale may be valid if effected by the guardian and acquiesced in by the minor after he came of age. *KUMUROODDEEN SHAIKH v. SHAIKH BHADDOO*, 11 W.R. 134. [*F.*, 22 W.R. 99, 25 W.R. 223.]

(2)—*Major conniving at guardian's misrepresentation of his true age—Mortgage—Possession—Repudiation—Hindu Law—Debts—Necessity.*



**Guardian—continued.****— 4.—Ratification of Act of Guardians.—*ctd.***

A party of full age allowing his guardian to give out that he is a minor and as such to mortgage his ancestral property, and permitting mortgagee to hold possession for 5 years, cannot afterwards repudiate the arrangements. A necessity for contracting a loan is clearly made out (and a justification to a money lender) by the existence of a decree which may at any time be executed against ancestral property. **PURMESSUR OJHA v. MUSSAMUT GOOLBEE, 11 W.R. 446.**

(3)—*Sale by guardian—Ratification.*—Where a plaintiff, after attaining his majority, conducts a suit in his mother's defence, in which he signs a written statement, showing that the purchaser from her of property sold during his minority was entitled to what he claimed, he must be considered to acquiesce in and ratify the sale. **KELUEL KRISTO DOSS v. RAM COMOAR SHAH, 9 W.R. 571.**

(4)—*Guardian to abstain arrangement beneficial to himself—Ratification.*—A guardian must abstain from any arrangement beneficial to himself and detrimental to the minor's estate; and if he has failed to do so, he must, immediately after the minor comes of age, obtain a distinct formal ratification. **PROSUNNO COOMAR GHUTTUCK v. WOOMA CHURN MOOKERJEE, 20 W.R. 274.**

(5)—*Minor receiving rent on coming of age—Effect.*—A minor, who on coming of age, receives rent on a lease granted by his guardian, cannot afterwards repudiate it. **RAM CHUNDER SIRCAR v. PRAN GOVIND BOISHNUB, 25 W. R. 71.**

(6)—*Farm lease of minor's estate granted by guardian bona fide, when Court could set aside.*—This was a suit to set aside an ijara lease, on the allegation that it was granted by the guardian of the plaintiffs while the plaintiffs were minors, and that the plaintiffs having attained majority, it had no longer any legal effect. The lower Courts having upheld the ijara, plaintiff contended on special appeal that it must be set aside. The High Court dismissed the appeal holding that the *bona fide* act of the guardian for the benefit of the estate of the minors, in giving out that estate in farm for a certain number of years, was not one which the Court could lightly set aside. There were sufficient ground for upholding the act of the guardian in having granted the farm and the money raised upon it was found to have been taken for the minor's use. **HURO MOHUN MOOKERJEE v. KALEENATH MUKERJEE, 2 W.R. 270.**

(7)—*Liability of minor for bona fide acts of guardian.*—A minor is bound by all acts of his guardian done *bona fide*, the more particularly if he, after having come of age, gave an acknowledgment to the guardian, admitting himself to be liable for all debts of his ancestors and for the debts incurred by the guardian, except those which were specified therein. **HURO CHUNDER CHOWDHRY v. GUNGSEE MOHUN DAS, 1 W. R. Mis., 15.**

**Guardian—continued.****— 4.—Ratification of Act of Guardians.—*ctd.***

(8)—*What transactions entered into by guardians will be recognised by Courts.*—In the case of transactions entered into by guardians on behalf of their wards, the Courts will recognise only such as secure to the wards some tangible advantage or prevent some clear injury. **DHARMJI v. GURRAR, 10 B.H.C. 311.**

(9)—*Butwara proceedings conducted with assent of guardians—Effect.*—Butwara proceedings conducted with the assent of guardians do not bind a minor, unless it is found that the guardians acted *bona fide* and with a due regard to the interests of the minor. **BABOO HAREE PERSHAD SHA v. MUDDUN MOHUN THAKOOR, 17 W.R. 217.**

(10)—*Guardian not seeking to set aside mokurruree case.*—The fact of a minor's guardian not seeking to set aside a mokurraree pottah is not sufficient to defeat his title or make the terms of the pottah binding on him. **SREEMUTTY APORAJITA DEBIA v. PAN-CHCOWREE KYBURTO DOSS, 20 W.R. 236.**

See RES JUDICATA--PARTIES, 38 P.R. 1897.

**— 5.—Miscellaneous.**

(1) — *Disqualified proprietor, suit by and against—Act XIX of 1873 (N.W.P. Land Revenue Act), s. 205—Act VIII of 1879, s. 23.*—Under s. 205 of Act XIX of 1873, as amended by s. 23 of Act VIII of 1879, disqualified proprietors, whose property is in charge of the Court of Wards, must sue and be sued in the Civil Courts, by and in the name of their guardians, where guardians have been appointed, or by and in the name of the Collector of the District in which the suit is brought, where guardians have not been appointed. And it makes no difference that the suit may have for its object to set aside acts done by the ward before the date when the property came under the charge of the Court of Wards. **SHEO DIAL CHAUBEY v. THE COLLECTOR OF GORAKHPUR, 5 A. 264 = A.W.N. 1883, 17.**

(2)—*Suit against disqualified proprietor—Impleading of Collector as defendant—Appointment of guardian ad litem—Act VIII of 1879, s. 23—Act XIX of 1873, s. 205—Ch. VI—Power of disqualified proprietor to contract debts.*—Although, in a suit against a disqualified proprietor, whose estate is under the superintendence of the Court of Wards, the Collector is not directly added as the representative of the defendant in the manner required by s. 23 of Act VIII of 1879, amending Act XIX of 1873, s. 205, still, if he is impleaded as a defendant on the ground, "that the property of the defendant had come under the superintendence of the Court of Wards" before the execution of the bond, on which the proprietor was sued, this may be held to be a sufficient description of his position and character in the litigation, namely, as representative *ad litem* of the defendant, and the Collector would, therefore, be entitled to raise, on her account, the question of her legal capacity to contract



**Guardian—continued.****—5.—Miscellaneous—continued.**

simple money debts. The mere disqualification of a person to manage his estate does not carry with it a general and complete disqualification to enter into any contracts at all. **THE COLLECTOR OF BENARES v. SHEO PRASAD**, 5 A. 487 = A.W.N. 1883, 63.

(3)—*Guardian and minor—Muhammadan Law—Suit by minor to set aside sale by her father of property in which she was a sharer.*—Where a Muhammadan sold immoveable property in which his minor daughter was entitled to a three anna share, and it was found that the sale was for the benefit of the father alone and that the minor was in no way benefited by it: *Held*, that the daughter on attaining majority was entitled to have the sale, so far as it affected her interest in the property, set aside. **BISHNATH SINGH v. ASHRAF-UN-NISSA**, A. W.N. 1894, 89. (16 C. 627, R.; 9 A. 340, D.)

(4)—*Suit by minor plaintiff.*—Where the Judge, who is competent to try a suit by a minor plaintiff for recovery of property, allows the minor to be represented by his sister, considering that the father had neglected his interests in respect of the property in suit, the suit was held maintainable, though the sister had not been appointed guardian *ad litem* by order of Court. **LUCHMIPUT SINGH v. AMIR ALUM**, 9 C. 176 = 12 C.L.R. 22.

(5)—*Act XL of 1858, s. 3—Certificate of guardianship—When it takes effect*—A certificate of guardianship, issued under s. 3 of Act XL of 1858, takes effect from the date of issue, and not from the date of the order directing its issue. **NOWBAT ROY v. LALA KEDAR NATH**, 13 C. 219. (9 C. 901, 12 C. 542, F.; 8 C. 967, *Disappr.*) [R., 13 B. 285.]

(6)—*Suit on behalf of minor—Limitation.*—The law of limitation applicable to a suit by a guardian on behalf of a minor is only that applicable to the minor. **KHODABUX v. BUD-REE NARAIN SINGH**, 7 C. 137 = 8 C.L.R. 306.

(7)—*Suit by guardian—Spurious pattahs—Act VIII of 1859, s. 15.*—Suit by a guardian for a declaratory decree that certain pattahs put forth by defendants to protect themselves from enhancement are spurious and likely to injure the minor's interests is premature, and cannot lie under s. 15, Act VIII of 1859. **OOMAR SULIMA BIBEE v. LUCKEE PREA DABEE**, 10 W.R. 47 = 7 B.L.R. 617, Note.

(8)—*Contract—Specific performance—Contract to sell by guardian with permission of Judge—Subsequent sale with permission for higher prices.*—A Court will not specifically enforce a contract, made by the guardian of a minor, if it is shown that it was made to the detriment of the minor. Where, therefore, a guardian contracted to sell to A, the minor's property for Rs. 725, with the permission of the Judge, and subsequently sold it to B, for Rs. 825, with the renewed sanction of the Judge, who however, gave notice of the higher bid to A, who

**Guardian—continued.****—5.—Miscellaneous—continued.**

declined to pay the higher figure, *held* that the first contract could not be specially enforced. **CHITTAR MAL v. JAGANNATH PERSAD**, 4 A. L.J. 24 = A.W.N. 1907, 25 = 29 A. 213.

(9)—*Cessation of guardian's powers when minor comes of age—Court's jurisdiction to order guardian to spend minor's property after such cessation—Appeal—Revision*—Under s. 4 (2) (c) of Act VIII of 1890, the powers of a guardian cease from the date on which the minor comes of age, and after that period, the Court has no jurisdiction to make an order, allowing the guardian to spend the property of the ward, for the marriage of the ward's sister, however proper the expense might be in the interests of the girl. No appeal lies against such an order, but the Court may treat the appeal as a revision petition under s. 622, Civ. Pro. Code. **SEETHARAMA BHAGAVATHAR v. BALARAMA BHAGAVATHAR**, 17 M.L.J. 199.

(10)—*Guardian, purchases by, of property at auction—Sale in execution of decree against minor—Trustee purchasing trust property at auction sale without permission of Court—Indian Trusts Act (II of 1882), ss. 53 and 88.*—The plaintiff sued the defendant for possession of certain land on the allegation that he had purchased it at an auction-sale in execution of a decree against the defendant. The sale was admitted but it was contended that the plaintiff was the guardian of the defendant at the time of the sale and that the sale was invalid by reason of the provisions of s. 53 and s. 88 of the Trusts Act (II of 1882). *Held*, that if the plaintiff as guardian of the property of the defendant was a trustee, on the property in suit being attached in execution of a decree, he ceased to hold it in trust and it ceased to be trust property in his hands. *Held*, therefore, that there was nothing in s. 53 of the Trusts Act to bar the purchase of the property by the plaintiff and that under s. 88 of that Act it could not be held that he held it after the purchase for the benefit of the minor. **MAHARAJ SINGH v. MAULVI WALI ULLAH**, 6 O.C. 252.

(11)—*Promissory note passed by guardian but not signed as such—Liability of ward on such promissory note—Decree should be against guardian in his private capacity.*—In a suit on a promissory note signed by a guardian, of a minor, but not as such guardian the Court has no right to go behind the face of the *rukka*, to ascertain whether the money obtained on it was used for the benefit of the minor. The decree should be passed only against the executant of the note in his private capacity, and not against the minor. **MUSSAMMAT NANHE v. DAULAT RAM**, 2 Ind. Cas. 403.

(12)—*Mortgage—Minor—Guardian—Legal necessity—Enquiry—Application of money.*—It is necessary for the mortgagee from the guardian of a minor to prove that there was legal necessity, which he can show by proof of actual



**Guardian—continued.****—5.—Miscellaneous—continued.**

pressure on the estate, of danger to be averted or of the benefit to be conferred upon it by the loan. The lender is bound to enquire into the necessities of the loan, and to satisfy himself, as well as he can, that the guardian is acting for the benefit of the estate. If he does so and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and he is not, under any circumstances, bound to see to the application of the money. **RAJANI KANTA CHATTOPADHYA v. ABINASH CHANDRA RAI**, 2 Ind. Cas. 366. (6 M.L.A. 339, 18 W.R. 81, F.)

(13)—*Guardian—Power of District Judge to order prosecution of—Appeal.*—Upon an appeal against an order passed by the District Judge, directing prosecution of a person who was appointed guardian of a minor and required to furnish security. *Held*, that the order was not appealable. *Held*, further, that the District Judge had no jurisdiction to pass the order, which must be reversed and set aside as *ultra vires*. **SITAL DAS v. JESI BAI**, 88 P.L.R. 1910 = 8 Ind. Cas. 248.

(14)—*Omission to appoint guardians of minors in previous execution proceedings—Subsequent execution application, if barred.*—Where it appears that certain defendants practically acted as guardians of certain minor defendants in the suit and in execution proceedings, the omission to formally appoint them as guardians *ad litem* in execution proceedings is a mere error of form and not fatal to the execution proceedings; and so, such an omission in previous execution petitions preferred within three years does not bar the subsequent application for execution. **TIMMAPPA SHETTI v. SHESHA SHETTI**, 3 M.L.J. 264.

(15)—*Suit against guardian of a minor instead of against a minor under guardianship—Power to rectify error—Suit on foreign judgment.*—An error by making the guardian of the real defendant (minor) the defendant, instead of making the minor the defendant under the guardianship of such guardian, may be rectified by striking out the name of the guardian and entering the name of the minor as defendant. But, this would not save limitation if the time limited for the suit had expired by that time. A suit on a foreign judgment will not lie in a Small Cause Court. **UDE RAM v. MUSSAMMAT DAYAN**, 37 P.R. 1889.

(16)—*Institution of suit by guardian.*—Though a guardian cannot institute a suit in respect of property of which he claims charge without a certificate, the want of one does not make every act of his null. **MUSSAMMUT SHOOGHURY KOOR v. BOSHISHT NARAIN SINGH**, 8 W.R. 331.

(17)—*Act XL of 1858—Certificate—Specification of property.*—A District Judge can neither specify the property in respect of which a certificate is granted under Act XL of 1858

**Guardian—continued.****—5.—Miscellaneous—continued.**

nor make any binding declaration as to the amount or description of the minor's property. **MUSSAMMAT RAMBHAJJI v. HARNARAIN**, 15 P.R. 1889.

(18)—*Application for guardianship—Summary rejection—Propriety of.*—A District Judge cannot summarily dispose of an application for the appointment of a guardian over a minor's property without enquiring whether there is any near relative of the minor, willing and fit to be entrusted with the charge of the minor's property, if not whether it is not necessary to provide for the charge of such property, to ensure the interests of the minor. **CHARINJIT SINGH v. RAM SINGH**, 202 P.R. 1889.

See U.P. ACT III OF 1901, s. 233 (k), 7 A.L.J. 1169 = 8 Ind. Cas. 822.

Non-production of account books by minor defendant—Discretion of Court—See CIV. PRO. CODE, 1908, O. XI, r. 21, A.W.N. 1896, 156.

Guardian *ad litem* if may waive issue of fresh proclamation for adjourned sale—See CIV. PRO. CODE, 1908, O. XXI, r. 69, 14 C.W.N. 1019 = 6 Ind. Cas. 813.

See COMPROMISE—COMPROMISE OF SUITS IN CIV. PRO. CODE, 3 M. 103.

See COMPROMISE—MISCELLANEOUS, 9 C. 810 = 12 C.L.R. 455.

Agreement to get the guardians of two minors to execute a deed of sale and to exchange land belonging to another minor, and also to pay damages on failure to do so—Minors whether bound by such agreement—Liability to damages—See CONTRACT—MISCELLANEOUS, 5 M.L.T. 221.

See DISTRICT JUDGE, JURISDICTION OF, 6 M. 187.

Mutation of names in favour of guardian—Adverse possession—See EVIDENCE ACT, 1872, s. 32 (5), 8 Ind. Cas. 728.

Guardian—Power to revive a barred debt—See HINDU LAW—ALIENATION, 7 M.L.T. 383 = 6 Ind. Cas. 760 = 20 M.L.J. 567.

See HINDU LAW—JOINT FAMILY, 8 B. 395.

See LETTERS OF ADMINISTRATION, 4 C. 87.

See LIMITATION ACT, 1908, s. 3, 4 A. 37 = A.W.N. 1881, 129.

Suit by minor's vendee to set aside sale by guardian—Limitation—See LIMITATION ACT, 1908, art. 44, 5 N.L.R. 50 = 2 Ind. Cas. 229.

Suit for money advanced to minor—Registration of bond executed by guardian—Necessaries supplied to minor—See LIMITATION ACT, 1908, arts. 57, 61, 10 C.C. 38.

Suit by minor to recover property transferred by guardian—Practice—Procedure—Limitation—See LIMITATION ACT, 1908, arts. 91, 141, 7 A.L.J. 337 = 5 Ind. Cas. 585 = 32 A. 392.



**Guardian—concluded.****—5.—Miscellaneous—concluded.**

Nature of guardian's possession—See LIMITATION ACT, 1908, arts. 142, 144, 12 Bom. L.R. 956=8 Ind. Cas. 639.

Question whether sale by guardian was for benefit of minor, whether a question of fact or of law—See MAHOMEDAN LAW—ALIENATION, 4 C.L.J. 485=11 C.W.N. 71=34 C. 36.

Status of a Mahomedan mother as guardian of the property of her minor children—See MAHOMEDAN LAW—ALIENATION, 4 C.L.J. 578=11 C.W.N. 163=34 C. 65.

Mortgage of minor's property by natural and *de facto* guardian—Minor's liability—Liability to pay interest—See MORTGAGE—GENERAL, 5 C.L.J. 542.

Death of guardian, if affects minor's age of majority—See NECESSARIES, 13 C.W.N. 643=36 C. 768=1 Ind. Cas. 724.

Hindu Law—Mother in possession on behalf of minor son—Possession of mother, nature of—See POSSESSION—ADVERSE POSSESSION, 17 M.L.J. 14=30 M. 145.

See PRE-EMPTION—MISCELLANEOUS, 203 P.L.R. 1910=8 Ind. Cas. 777.

Mortgage by guardian—Proof of mortgagee's belief in the existence of a reasonably credited necessity—See PROBATE AND ADMINISTRATION ACT, 1881, s. 113, 2 M.L.T. 343.

Surrender by a guardian of the absolute occupancy holding of a minor, when binding on minor—See RIGHT OF OCCUPANCY—LOSS OF RIGHT, 6 N.L.R. 6.

Contract for sale by guardian—Registration—See SPECIFIC PERFORMANCE, 7 A.L.J. 887=7 Ind. Cas. 408.

Specific performance—Contract by mother as guardian of minor—Enforceability—See SPECIFIC RELIEF ACT, 1877, s. 28, 18 M. 415=5 M.L.J. 164.

Certified guardian—Discharge of debt due to a minor given by his brother without concurrence of certified guardian—Effect—See TORT, 6 C.L.J. 383.

Sale by *de facto* guardian of Mahomedan minor—Effect on the minor—See TRANSFER OF PROPERTY ACT, 1882, s. 51, 1 M.L.T. 433=17 M.L.J. 9=30 M. 197.

**Guardian ad litem.**

See CIV. PRO. CODE, 1908, O. XXXII.

See GUARDIAN.

See LUNATIC.

See MINORS—SUITS BY AND AGAINST MINORS.

(1)—S. 462, Civ. Pro. Code, 1882—Guardian ad litem—Compromise without sanction of Court—Validity—Guardian ad litem, father of minor, and a party to suit—Bona fide compromise of disputed claim on behalf of the family,

**Guardian ad litem—continued.**

without permission of Court—Its validity.—Under s. 462, Civ. Pro. Code, the next friend or the guardian for the suit is not competent to enter into a compromise, without the sanction of the Court, on behalf of the minor. But a *bona fide* compromise of a disputed claim, entered into by the father of the family who is himself a party to the suit, and who is also appointed as guardian *ad litem*, is binding on the minor, though it is made without the sanction of the Court. The father is not precluded by s. 462 from entering into such a compromise. T. R. GANESA ROW v. T. V. TULJA RAM ROW, 6 M.L.T. 325.

(2)—Who cannot be served—Court's duty—Procedure.—Where a guardian *ad litem* is absent from the country and so cannot be served with a notice, he is useless, and the Court should proceed to appoint another guardian. If a Court-sale takes place with such a guardian for the minor, the minor should be considered to have been unrepresented when the sale took place. The sale should, consequently, be set aside. ABSA BEENI v. MAIDINSA ROWTHER, 17 M.L.J. 179. (32 C. 296, R.)

(3)—Costs—Guardian ad litem of a lunatic—Guardian filing an unnecessary appeal—Personal liability of the guardian to pay—Costs.—The guardian *ad litem* appointed by the Court usually gets his costs out of the estate of the defendants whom he represents, if he does not recover them from the plaintiff; but when the guardian *ad litem* takes upon himself to appeal against a decree passed against the lunatic, whom he represents, he must personally pay the costs incurred. SHAPURJI HORMASHJI HAREVER v. MONOSSEH JACOB MONOSSEH, 11 Bom. L.R. 1011=84 B. 374=4 Ind. Cas. 107.

(4)—Guardian named in plaint as guardian ad litem for minor defendant omitting to defend the suit—Decree *ex parte*—Appeal by third party on behalf of the minor.—In a suit in which the defendant was a minor, a guardian *ad litem* was named in the plaint and was accepted by the Court, which served him with notice of the suit. The said guardian *ad litem* did not defend the suit, and a decree was passed *ex parte* in favour of the plaintiff. Against this decree an appeal was preferred by one Sadho Lal purporting to act as guardian *ad litem* of the minor. Held that such appeal could not be maintained without an order of the Court removing the guardian *ad litem* appearing on the record. BAWAN DAS v. BISHNATH, A.W.N. 1899, 203. (22 M. 187, F.)

(5)—Duration of office of guardian ad litem appointed by the Court—Guardian and minor—Appeal by mother of minor who had declined the office of guardian in the Court *below*.—The mother of a minor defendant having declined to act as his guardian *ad litem* on the ground that his property was under the Court of Wards, the Collector as representing the Court of Wards was appointed guardian. The minor's mother was impleaded as a co-defendant and a decree was passed against her and the minor.



**Guardian ad litem—continued.**

The Collector, on behalf of the minor, accepted the decree and did not appeal. *Held* on these facts that it was not competent to the mother to assume the office of guardian *ad litem* and to appeal on behalf of the minor. **CHEDI PANDE v. LACHMI NARAIN, A.W.N. 1893, 161.**

(6)—*Guardian ad litem, appointment of, of an infant, without consent of guardian, if legal—Infant, decree against, represented by guardian appointed without consent, if binding and operative—Code of Civil Procedure (Act XIV of 1882), s. 457. and (Act V of 1908), C. 32, r. 4*

(3)—*Appointment. Effect of such.*—No person can be appointed to act as guardian *ad litem* of an infant without his consent. (5 B. 306, R.) Where the mother of an infant defendant was proposed by the plaintiff as guardian *ad litem* of her infant son, and she never consented to act as such, it was not competent to the Court to appoint her as guardian *ad litem* of her infant son. When a married woman has been appointed guardian *ad litem* for an infant defendant, he must be taken not to have been represented for the purpose of the suit. In such cases, he is in the same position as if he was not made a party to the suit at all. 6 C. L.J. 36, 10 C.L.J. 318, 13 C.W.N. 1182, R. & F.) The appointment of a married woman as guardian *ad litem* for an infant defendant in contravention of the provisions of the statute (Act XIV of 1882), s. 457, is not merely an irregularity, but renders the proceedings a nullity so far as the infant is concerned. (1 C.L.J. 584, 32 C. 296, R.) **NARSINGH NARAIN v. SHEIKH JAHU MISTRY, 15 C.L.J. 3=16 C.W.N. 286.**

Not appointed — *Ex parte* decree against minors—Application to set aside decree—See CIV. PRO. CODE, 1808, O. IX, r. 13. O. XXXII rr. 3 (1), 4 (2), 24 A. 333, F.B.=A.W.N. 1902, 76.

Compromise by — in suit against minor, sanction of Court necessary for—See COMPROMISE—GENERAL, 21 M. 69=7 M.L.J. 319.

See COMPROMISE—COMPROMISE OF SUITS IN CIV. PRO. CODE, 3 M. 103.

Compromise entered into on behalf of minor by his guardian *ad litem*, suit to set aside—Compromise on behalf of minor made without leave of Court voidable at the instance of minor—Minor, grounds on which compromise made on his behalf can be set aside in whole or part at the instance of—See COMPROMISE—SETTING ASIDE COMPROMISE, 6 O.C. 175.

Guardian *ad litem*—Advance by plaintiff for costs of minor defendants under order of Court—Right to recover amount advanced—See COTS—SPECIAL CASES, 22 M. 314.

Guardian *ad litem* — Party for purpose of discovery—Interrogatories if same applies to—See DISCOVERY, 10 B. 167.

Execution of decree—Against minor when no—appointed in the suit—See EXECUTION OF DECREE—MISCELLANEOUS, 7 O.C. 199.

**Guardian ad litem—concluded.**

Appointment of, without consent—Effect—Mortgage by father—Father if can be appointed guardian *ad litem* of minor son—See EX PARTE DECREE, 15 C.L.J. 446.

Power of High Court as an appellate Court. to make an interlocutory order appointing a—See GUARDIANS AND WARDS ACT, 1890, ss. 4, 7, 12, 47, cl. (a), 3 C.L.J. 29.

See RES JUDICATA — PARTIES, 4 P.L.R. 1901.

Transfer of suit—Application for transfer by next friend of minor in the absence of—See TRANSFER OF CIVIL CASES, 16 C. 771.

Guardians and Wards Act (VIII of 1890).

[REP. IN PT. (AS TO BURMA)—ACT. XIII OF 1893, S. 18 ; ACT VI OF 1900, s. 48 ; REP. IN PT. (IN THE CENTRAL PROVINCES AND SAMBALPUR DISTRICT), ACT XXIV OF 1899, S. 53 ; REP., ACT V OF 1908 ; DECLARED IN FORCE—IN THE SONTHAL PARGANNAS, REG. III OF 1872, S. 3 ; AS AMENDED BY REG. III OF 1899, S. 3 ; IN THE ANGUL DISTRICT, REG. I OF 1894, S. 3 ; IN UPPER BURMA (EXCEPT THE SHAN STATES), ACT XIII OF 1898, S. 4.]

See CIV. PRO. CODE, 1908, O. XXXII.

See CUSTODY OF CHILDREN.

See GUARDIAN.

See HINDU LAW—GUARDIANSHIP.

See MAHOMEDAN LAW—GUARDIANSHIP.

See MINOR.

(1)—*Difference between the Guardians and Wards Act, 1890 and Act XL of 1858.*—The only difference between the two Acts, is, that Act XL of 1858, is imperative whilst Act VIII of 1890, is permissive. Under the Old Act, no person was entitled to institute or defend any suit connected with the estate of a minor unless he had obtained a certificate or unless the estate was of small value. Under the present Act, the Court has the power of appointing a next friend or guardian for any suit for or against a minor, but it is not necessary that the person so appointed should be a guardian under the Act. **SHAM KUAR v. MOHANUNDA SAHOZ, 19 C. 301.**

(2)—*Guardianship, Certificate of—Appointment of guardian under Will—Probate, Necessity of.*—It is not incumbent on a person who has been appointed guardian of a minor under a Will, to take out probate as a condition precedent to his obtaining a certificate of guardianship under Act VIII of 1890. **PATHAN ALIKHAN BADLUKHAN v. BAI PANIBAI, 19 B. 832.**

(3)—*Minor-Co-parcener in joint Hindu family governed by Mitakshara Law — Guardianship—Hindu Law.*—Under Act VIII of 1890 a guardian cannot be appointed to the property of a minor forming one of the members of an undivided Hindu family governed by the *Mitakshara* law, and possessed of no separate property.



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A guardian of the person of such a minor may be appointed under the Act. **VIRUPAKSHAPPA v. NILGANGAVA**, 19 B. 309, F.B. [F., 20 B. 659; *Appl.*, 32 B. 259 = 10 Bom. L.R. 279; R.; 17 A. 529; D., 21 M. 402.]

(4)—*Benefit of minor—Guardian, Appointment of—Power of High Court.*—The High Court has the power to appoint a guardian for an infant or his estate, irrespective of the Guardians and Wards Act. When it appears to the Court that, by the appointment of the father of the infant sons as guardian for the purpose of raising money by mortgage of property, better terms are likely to be secured from the mortgagee, the Court will appoint the father alone guardian of his infant sons. **JAIRAM LUXMON AND OTHERS, PETITIONERS**, 16 B. 634. [R., 19 B. 96, 10 P.R. 1904.]

(5)—*Application for regulating maintenance—District Judge.*—Where an application was made by a guardian to the District Court for regulating the amounts of maintenance already allowed, the District Judge refused the application remarking: "I am of opinion that the estate is being administered wisely and well, I see no reason for reducing the maintenance allowed to the minor's mother or for increasing the allowance made to the minor himself for maintenance." *Held*, that the order passed by the District Judge was not a judicial order regulating the conduct or proceedings of a guardian of the estate which the High Court could deal on appeal. **CHUDASAMA HARBHAMJI v. TALUKDARI SETTLEMENT OFFICER**, 2 Bom. L.R. 817.

(6)—*Suit by father to recover custody of his children.*—It is open to a father to institute a regular suit for recovering the custody of his children. The Guardians and Wards Act nowhere lays down that his only remedy is an application under the Act. **SHARIFA v. MUNEKHAN**, 3 Bom. L.R. 167 = 25 B. 574.

(7)—*Regular suit for custody of minor—Jurisdiction of principal Civil Court of original jurisdiction.*—Act IX of 1861 did not take away the right to bring a regular civil suit for the custody of a minor. But Act XL of 1858 (Bengal) had the effect of limiting the jurisdiction in such cases to the principal Civil Court of original jurisdiction in the district. Consequently a suit for the custody of a minor had to be brought in that Court. **RANCHANDRA v. MT. MUNNA**, 1 C.P.L.R. 135.

(8)—*Agreement inter partes—Guardian—Ward—Court—Jurisdiction.*—Having regard to the scheme of the Guardians and Wards Act and the protection intended to be thereby provided for minors, the powers and jurisdiction of the Court, vested in it for the purpose of carrying the Act into effect, cannot be ousted by any agreement *inter partes*. **RUKSHMANI v. MOHANLAL**, 4 Bom. L.R. 963.

(9)—*Guardian of alleged married girls.*—On an application for the appointment of guardian

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of two minor girls alleged to be married and living with their husbands, facts denied by the applicant, the Court ordered the petition to be dismissed with leave to the applicant to apply again when she should have, in a regular suit or other proceeding in a competent Court, established either that the minors have not been married to their alleged husbands or that the marriages are invalid. **MUSSAMMAT FAKHRAN v. MUSSAMMAT JAGGAN**, P.L.R. 1900, p. 317.

(10)—*Property in possession of trustee—Minor beneficiary—Appointment of guardian of property of minor—Jurisdiction of Court.*—Where the estate of a minor is in the actual possession of trustees on behalf of the minor, and the minor has no interest in the property beyond that of a beneficiary until he comes of age, the Court has no jurisdiction to appoint a guardian of the property of the minor. **ASHRAFI KUAR v. JAI NARAIN**, 6 Ind. Cas. 862.

(11)—*Santhal Perganas—Same officer acting as District Judge and Deputy Commissioner at the same time—District Judge's power to appoint Deputy Commissioner as guardian.*—There is nothing in the Act to support the conclusion that the Deputy Commissioner, being in the possession of the Collector in the Santhal Perganas, is incompetent to apply as such for the appointment of a guardian to a minor under the provisions of the Act, even though the application would be to himself in his capacity of District Judge, nor is there anything to support the view that the District Judge is precluded from appointing the Deputy Commissioner as guardian of a minor, even though he himself may hold the latter office. In his two offices as District Judge and Deputy Commissioner, he has two distinct *personæ* in the eye of law, and, in the latter capacity, when appointed as guardian, he is subject to the control of an authority different from himself as District Judge. The sections in Ch. III of the Act apply to persons other than the Collector appointed as guardian. **KESHOBATI KUMARI v. SATYA NARAIN SINGH**, 34 C. 569.

(12)—*Guardian appointed by Will may be declared guardian by Court.*—There is nothing in Act VIII of 1890 to prevent the Court from making a declaration that a person appointed by Will is the guardian of a minor. **MARIA SUSAI v. MICHAEL MUDALI**, 3 M.L.J. 182.

(13)—*Sale by a certificated guardian—Court's sanction.*—An unascertained alienation by a certificated guardian in excess of the powers contained in s. 18, of Act XL of 1858, is void. **MAHOMED ARIEF v. SARASWATI DEBYA**, 18 C. 259. [*Doubted*, 24 C. 265 = 1 C.W.N. 453.]

(14)—*Procedure under the Act—Failure to give security—Removal of guardian—Legality of.*—The provisions of the Civ. Pro. Code will apply to the procedure under Act VIII of 1890 unless the contrary is expressly declared therein. The failure of a guardian to furnish security is



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not a proper ground for his removal unless a distinct order fixing the security amount and the time within which it is to be filed is passed and disobeyed. **MUHAMMAD ARJUN v. MUHAMMADJI**, 7 P.R. 1898.

(15)—*Orders apparently under, made without jurisdiction—Proceedings not had bona fide, orders in—Consent obtained by judicial pressure—Judge, no arbitrator.*—One D died leaving a minor unmarried daughter by a pre-deceased wife and three widows. One R with a view to secure the marriage of his son with the girl (so that ultimately the property left by D might pass into the hands of the representatives of his own family) got the maternal grandfather of the girl, who was his servant, to apply for the appointment of himself as the guardian of the property and person of the minor, but no part of D's property had yet vested in her, the widows being according to Hindu law D's heirs. The widows objected to the application, but the District Judge having, owing to a misconception, passed orders directing that, unless the widows placed their properties in charge of R, he would remove the girl whom they dearly loved from their custody to that of the maternal grandfather, they were induced to grant a lease of the properties to R, after which they were made to present an application for the appointment of themselves as guardians of the person of the girl and they were formally appointed as guardians. *Held*, that no guardian was needed for the protection of the person of the girl and she had no property of which a possible guardian could take charge. The application of the widows for appointment as guardians of her person was not voluntary, and the application of the maternal grandfather was not made *bona fide*, and the orders passed by the Judge were without jurisdiction. "Orders passed in proceedings so instituted and conducted, even if they were nominally in conformity with statutory provisions, could hardly be regarded as invested with the efficacy of legal order made in *bona fide* judicial proceedings." *Held* also that the Judge could not be deemed in this case to have acted as an arbitrator chosen by the parties voluntarily, the ladies having in fact acted under judicial pressure of the highest degree to which they were not in a position to offer effectual and successful resistance, and consequently the decision in *Ledgard v. Bull* (9 A. 191=13 I.A. 134) did not apply. **SAHADRA KOER v. RAMADIN CHOWDRY**, 16 C.W.N. 444.

(16)—*See BOM. ACT XIV OF 1869, s. 16*, 16 B. 277.

(17)—Application for certificate of guardianship by the mother of an unmarried female minor—Second marriage of the mother, a Mahomedan, no valid objection—*See AWARD*, A.W.N. 1906, 64=3 A.L.J. 168=28 A. 408.

(18)—*See BURDEN OF PROOF—HINDU LAW*, 5 C. 363=5 C.L.R. 374.

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(19)—*Jurisdiction of Court—Suit of which it is not possible to estimate the value—Lower Burma Courts Act, s. 25—Civ. Pro. Code, s. 11—See JURISDICTION—QUESTION OF JURISDICTION*, 2 L.E.R. 140.

(20)—*See MAHOMEDAN LAW—DIVORCE*, U.B.R. 1892—1896, Vol. II, 536.

(21)—*See MAJORITY, AGE OF*, 3 A. 598.

(22)—*See RES JUDICATA—ADJUDICATIONS*, 16 M. 380=3 M.L.J. 121.

(23)—*S. 1, cl. (2)—Agency Tract—Ex parte order of Agent appointing guardian of infant—Appeal to High Court.*—An appeal lies to the High Court from an *ex parte* order made by the Agent to the Governor in Council at Vizagapatam appointing a guardian to the person and property of an infant, notwithstanding that there was no notification under s. 5 of Act XIV of 1874, extending the operation of the Guardian and Wards Act to that district, inasmuch as the Act extends to the whole of British India. **CHAKRAPANI v. VARAHALAMMA**, 18 M. 227. [Not F., 31 M. 362=18 M.L.J. 252=3 M.L.T. 264.]

(24)—*Ss. 3 and 7—Applicability to Wills—Appointment of heir as guardian.*—S. 7 is inapplicable to nuncupative Wills. The heir of a minor may be appointed as the guardian of the minor's property though not of his person as such heir is interested in the proper management of the minor's property to which he hopes to succeed. **AMIN CHAND v. CHAGGUMAL**, 54 P.R. 1898.

(25)—*Ss. 3, 9, 10—Letters Patent, s. 12—Jurisdiction of High Court in regard to appointment of guardians for infants—Welfare of minor to be preferred to wishes of natural guardian.*—S. 9 of the Guardians and Wards Act, conferring, on District Courts, jurisdiction for entertainment and disposal of applications for the appointment of guardians for infants, has not taken away the jurisdiction already possessed by the N.W.P. High Court in reference to the same matter. That such jurisdiction existed in the High Court prior to the passing of the Act was decided in 2 N.W.P. 79, the jurisdiction which existed in the High Court of Fort William in Bengal having been specifically conferred on the N.W.P. High Court by s. 12 of the Letters Patent, s. 3 of the Guardians and Wards Act has preserved such jurisdiction. In making an appointment of a guardian, the Court is not so much concerned with the feelings of the parents and natural guardians of an infant, as with the welfare of the latter. If an infant is capable of forming an opinion, as to what is best for him or her, the Court will have regard to the wishes of the infant in the matter. Case in which the High Court refused to hand over the custody of an infant to her parents and natural guardians, seeing that, for fourteen years, the infant was under the custody and guardianship of the respondent, and seeing, also, that the infant herself was satisfied to live under the protection of the latter. **ELLEN RAMM v. CHARLES SPENCER**, 2 A.L.J. 81.



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(26)—Ss. 3, 16 and 29—Minor cannot be minor in one District and major in another—Appointment of guardian of person and property of minor by a certain Court effect of—Guardian of minor's property in all Districts—Suit by minor on attaining majority for cancellation of sale-deed executed by guardian.—An application for the appointment of guardian of the property and person of a certain minor was made to the District Judge of Cuttack by the mother of the minor, a resident of Puri in that District, which was granted accordingly. Certain property belonging to the minor, situated in the District of Moradabad, was sold by the guardian without obtaining the permission of the Court. A co-sharer in that village brought a suit for pre-emption and impleaded the plaintiff, treating him as a major, although, at the time, he was under 21 years of age and obtained a decree in his favour. The minor, on attaining majority, brought the present suit for a declaration that the sale was not binding upon him and ought to be cancelled, and for recovery of the property. The contention of the defendants was two-fold: that the plaintiff attained majority at the age of 18 years, so far as regarded any property which was situate outside the jurisdiction of the District Judge of Cuttack and, therefore, he was of age at the time of the institution of the pre-emption suit and the decree in that suit was binding upon him, that the plaintiff's mother was not the certificated guardian, in the District of Moradabad inasmuch as a certified copy of the order, appointing her as guardian, was not produced before the Court at Moradabad, but remained the natural guardian of the plaintiff regarding the property there and could deal with it as such. *Held*, that, where a person has been appointed under the Act as guardian of the property and person of a minor, he becomes the guardian of the property of the minor, in whichever district or districts the property may be situated. The effect of the appointment is that he becomes the certificated guardian for all purposes until he is discharged and cannot lay aside his status as such and pose as a natural guardian. S. 16 of the Act contemplates that the Court, before which proceedings might be taken by any certificated guardian should, when apprised of the fact of the appointment of the guardian, recognise and accept the guardian as duly appointed, and give effect to the order of appointment. The section is directory and does not in any way affect or prejudice the status of a certificated guardian when appointed generally over the property of a minor. Under s. 3, a minor, of whose person or property a guardian has been appointed by any Court of justice, shall be deemed to have attained his majority when he has completed his age of 21 years, and not before. Such a minor cannot be major in one district and a minor in another. In a suit by a minor, on attaining majority, to avoid a sale made by his certificated guardian, he must make restitution of any benefits which he may

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have received from such sale before he obtains relief. **RAM CHANDAR v. CHHEDA LAL**, A.W.N. 1905, 122=2 A.L.J. 460.

(27)—Ss. 4, 7, 12, 47, cl. (a)—Guardian of an infant, order appointing—Guardian ad litem, power to appoint—"Court," meaning of—Appeal against order—Appellate Court, power of, to direct stay of order appealed against—Appellate Court, power of, to make ad interim order appointing guardian—Civ. Pro. Code, ss. 545, 582—Procedure, if to be regulated only by the Code—Onus of proof—Status quo, maintenance of—Injury to infant—Inherent power of Court—High Court.—Per Woodroffe, J.—Civil Courts, in this country, have, in matters of procedure, powers beyond those, which are expressly given by the Code of Civil Procedure, which binds the Courts only so far as it goes. The Code does not affect powers previously possessed unless it expressly takes them away. It does not affect the power and duty of the Courts to act according to equity and good conscience in cases for which no express provision is made. The Court has an inherent power to do that justice for the administration of which alone it exists. *Per Curiam*:—An appellate Court, having seizin of an appeal, has power to make an order staying proceedings in a lower Court pending the hearing of the appeal to that Court. The owner to stay proceedings is ancillary to the power of the appellate Court as the appellate authority to reverse the order of the inferior Court. (5 C.W.N. 781, 31 C. 722, R.) The High Court, has power, pending an appeal before it, against an order appointing a guardian of an infant under the Guardians and Wards Act, to stay proceedings in the lower Court for the carrying out of the order appealed against. The High Court as an appellate Court, has the power to make an interlocutory order appointing an *ad interim* guardian. *Per Mookerjee, J.*—The appellate Court, when it hears the appeal, is competent to make, in substitution for the order passed by the inferior Court, such an order as, in its opinion, ought to have been passed by that Court; and as ancillary to the power which the appellate Court thus possesses of appointing a proper person as guardian, it possesses also the power to appoint a temporary guardian during the pendency of the appeal. The Court, in an appeal from the final order, has in this respect the same power which has been expressly conferred upon the Court of first instance. (28 C. 734, R.) Such power may be exercised, even though no statutory provision has been made for it. When a party has got an order in his favour from the lower Court, he is entitled to rely on that order and thus to throw the onus upon the party appealing against the order, of satisfying the superior Court as to why that order should not be immediately carried into effect, and why a temporary guardian should be appointed and, if a satisfactory case is made out by him, the High Court will interfere and order that the *status quo* should not be disturbed during the



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pendency of the appeal. *Quere*:—Whether s. 545, Civ. Pro. Code, applies to an application for the stay of proceedings in the lower Court under an order appointing a guardian of an infant? **PANCHANAN SINGHA ROY v. DWARKA NATH ROY**, 3 C.L.J. 29. (28 C. 734, R.) [F., 33 C. 927=3 C.L.J. 67, 11 C.L.J. 285. 33 C. 1094=10 C.W.N. 719=4 C.L.J. 306; R., 36 C. 193=5 C.L.J. 611=1 Ind. Cas. 913, 14 C.W.N. 586=11 C.L.J. 435, 11 C.W.N. 1030=6 C.L.J. 298=34 C. 1037.]

(28)—S. 6—See TRUSTS ACT, 1882, ss. 3, 6, 46, 78, U.B.R. 1892—1896, Vol. II, 645.

(29)—S. 7—*Testamentary guardian, removal of, when his interests are adverse to the minor.*—A person, who is to succeed to the property of a minor on his death has an interest adverse to the minor; and, if he is not a blood relation of the minor, he is not fit to be a guardian of the minor's person, although appointed by the latter's deceased father's will to be guardian of both the person and property of the minor; but if the will is otherwise valid, its provision must be given effect to as regards the property of the minor. **SAMI ROW v. ELIVATHA ROW GAYABAVADU**, 16 M.L.J. 357.

(30 & 31)—S. 7—*Minor—Member of a joint undivided Hindu family—Appointment of guardian of property—Power of Court.*—Where a minor is a member of a joint Hindu family and the property is joint and undivided, *held*, that it was not competent to a Court to appoint any person guardian of the minor's interest in that property. **KURI MAL v. BHANA MAL**, 46 P.R. 1909=39 P.L.R. 1909=56 P.W.R. 1909=1 Ind. Cas. 745. (14 A. 407, P.O., F.)

(32)—S. 7—See NOS. 24, 27, *supra* and NO. 117, *infra*.

(33)—Ss. 7, 8, 10, 11 & 13—*Appointment of guardian.*—The act does not authorise the appointment as guardian of a person not claiming by his own application nor proposed in accordance with the terms of the Act. **BADR BAKSH v. GUNGBAZ KHAN**, 135 P.R. 1893.

(34)—Ss. 7, 8 and 17—*Appointment of guardian—Welfare of minor—Waiver of right.*—The paramount consideration for the Court in an application for the appointment of a guardian is the *welfare* of the minor consistently with the law to which he is subject. Even a father loses his right to the guardianship of his minor sons if he had allowed them to remain under the protection of others for a long series of years and to undergo a course of education opposed to that which he may now seek to impose upon them. **BARKHURDAR KHAN v. MUSSAMMAT GHULAM FATIMA**, 34 P.R. 1894.

(35)—Ss. 7, 10, sub-sec. 1, cl. (k)—*Key-note of Act—Welfare of minor—Application to be bona fide—Cause for making application to be disclosed—If not disclosed application summarily liable to be dismissed.*—The key-note of the Guardians and Wards Act lies in the introductory words of s. 7: the proceedings are to be

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taken for the benefit of the minor and the minor alone. If an application has been made for an ulterior purpose, such application ought not to be entertained. Ordinarily a Court must decide upon the evidence whether the appointment of the guardian is or is not for the welfare of the minor concerned. But there may be exceptional cases in which the Court may find upon undisputed facts that the application is not *bona fide*. An application presented under the Act ought not to be registered as a matter of course and without examination, before the Judge is satisfied that there is a ground for proceeding on the basis thereof. One of the material facts to be taken into consideration by the Judge is the cause or causes which have led to the making of the application. And a Judge acts within his powers if he rejects an application on the ground that it did not disclose the cause or causes which led to the making of the application as required by s. 10, sub-sec. 1, cl. (k) of the Act. Where the petitioner had retained the ornaments of his minor wife and driven her to a suit for their recovery and had taken a second wife and then applied to be appointed the guardian of her person and property, but in the application did not disclose any cause which led him to the making of the application. *Held*, that the Judge was right in summarily dismissing the application. **SARAT CHANDRA NANDAN v. GIRINDRA CHANDRA GUIN**, 7 Ind. Cas. 702.

(36)—Ss. 7, 17, 21—*Appointment of guardian—Matters to be considered in making order for—Welfare of minor—Minor husband and minor wife—Husband not to be allowed to obtain custody of his wife by being appointed guardian where he cannot obtain such custody by civil suit.*—In considering whether an order should be made appointing a guardian for a minor, the welfare of the minor is the paramount consideration in the case. Where a Court is satisfied that it is for the welfare of the minor that a guardian should be appointed, an order of appointment should be made. If the Court is not so satisfied, the order *cannot* be made. To appoint a guardian against the will of the minor, who is old enough to express an intelligent opinion, would not be for the welfare of the minor, R.C., a minor, was married to a girl S, also a minor. The parties were Hindus, but S, became a convert to Muhammadanism and refused to live with her husband R.C. R.C. applied under the Guardians and Wards Act to be appointed his wife's guardian. *Held*, that such appointment would not be for the welfare of the girl, as, though it is for the welfare of a married woman that she should live with her husband, and though it is not for the welfare of a grown-up girl that she should lead a life of celibacy, to compel her to live with her husband against her will and under his guardianship would only conduce to her unhappiness, and such a life is about the worst form of bondage known in the world; for these reasons and also as the girl was nearly approaching her majority,



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*held*, no guardian should be appointed. (49 P.R. 1907, D.) *Held*, further, that as, on the facts of the case, the husband was quite unable to obtain custody of his wife by a civil suit, he ought not be allowed to obtain that custody by means of an application to be appointed her guardian. BHAGWANA alias SHAH MUHAMMED v. RAM CHAND, 231 P.L.R. 1911 = 11 Ind. Cas. 478 = 196 P.W.R. 1911.

(37)—Ss. 7, 34—*Indian Majority Act (IX of 1875), s. 3—Attainment of majority by infant of whose person and property a guardian has been appointed—Order appointing guardian on his furnishing security, if complete before security is given.*—So far as the infant is concerned, he is put in the position of a ward as soon as the Court has made up its mind as to the matters set out in cls. (a) and (b) of s. 7 to the Guardians and Wards Act; and the proviso that the guardians should give security is merely an additional precaution to protect the interest of the infant. The effect of the order requiring security is to suspend the acts of the guardian till he gives security. But, as soon as an order is made, under s. 7, the infant becomes a minor and remains a ward irrespective of any act of the guardian until he attains the age of 21 years. GOPAL CHANDER BOSE v. GONESH CHUNDER SRIMANI, 4 C.L.J. 112. (17 C. 347, R.) [R., 36 C. 768 = 13 C.W.N. 643.]

(38)—Ss. 7, 39—*Appointment of guardians—Declaration and removal of guardians.*—S. 7, Guardians and Wards Act, 1890, makes a distinction between appointing a guardian and declaring a person to be one. A guardian is declared when, for instance, he has been appointed under some independent instrument such as a will. By the declaration, the Court merely gives effect to the appointment. In the case of a guardian so declared, the Court may hold him incompetent and remove him from the guardianship on any of the grounds specified in s. 39 of the Act. MANUBAI YAMUNABAI v. SAKHUBAI KESHAV RAMACHANDRA, 11 Bom. L.R. 348 = 2 Ind. Cas. 484.

(39)—S. 7 and 39—*Minor girl—Her father and maternal grandmother—Guardian of person.*—*Held*, that a person, who is not a lawful guardian himself under the minor's personal law, cannot appoint a guardian for the minor's person. According to Mahomedan Law, maternal grandmother's right to the guardianship, of the person of a minor girl is in preference to the father; therefore, the latter cannot appoint by a will guardian for the person of his minor daughter. BAHADUR ALI v. MUSSAMMAT BIWI, 66 P.W.R. 1910 = 48 P. R. 1910 = 6 Ind. Cas. 734 = 52 P.L.R. 1910.

(40)—Ss. 7, 47, 48—*An order by a District Judge under s. 7, if open to review.*—An order made by a District Court, under s. 7 of the Act refusing to appoint a guardian, is, under s. 47 (a), open to appeal to the High Court; but s. 48 provides—"save as provided

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by s. 47 of the Act and by s. 622 of the Code of Civil Procedure, an order under the Act shall be *final* and shall not be liable to be contested by suit "or otherwise." *Held*, therefore, that, under the wording in the above sections, the Legislature could not have intended that s. 623 of the Code should be applicable to such a case, since the words "or otherwise" necessarily precluded to notion that such orders were liable to be contested on review. FARID v. MITHO, 143 P.R. 1906 = 12 P.W.R. 1907 = 103 P.L.R. 1907.

(41)—Ss. 7, 52—*Order of District Court acknowledging a person as guardian of a minor—"Declaration"—Age of majority.*—The order of the District Court acknowledging a person as the guardian of minor is a declaration of such guardianship within the meaning of s. 7 of the Guardians and Wards Act of 1890, and the age of majority in such a case is therefore 21 under s. 3 of the Indian Majority Act of 1875 as amended by s. 52 of the Guardians and Wards Act. THIRUVENGADAMIER v. PERIASAMI TEVAR, 9 M.L.J. 24. [R., 89 P.R. 1906 = 90 P.L.R. 1907.]

(42)—S. 7 (2)—*Guardian under the Act—His powers—Implied removal of other guardians—Estoppel—Not applicable when plain provision of law would be defeated—Void deed—No consideration—Fresh contract of minor after attaining majority—Loan—Minor's necessities—Bond—Plain recital charging minor's estate.*—When a guardian is appointed under the Guardians and Wards Act, persons other than such guardian cannot bind the estate of the minor. (27 B. 390, R.) Under s. 7, cl. (2) of the Guardians and Wards Act, the appointment of a guardian by Court implies the removal of one not so appointed. (2 A.L.J. 460, 32 M. 276, R.) Cases dealing with the powers of natural guardians are no guide when considering the powers of those under the Act. (15 B. 259, 13 M.L.J. 223, 15 M.L.J. 223, 13 A. 288, 30 C. 539, 25 A. 407, R. & D.) The principle of estoppel cannot be invoked to defeat a plain provision of law. (19 M. 200, 19 I.A. 203, 11 W.R. 446, 16 M.L.J. 423, R. & Diss.) A void deed cannot form a good consideration for a fresh contract of the minor attaining majority. When necessities for the minor have been purchased with loans advanced by a creditor on a bond, he should take care to so word the deed as to make the minor's estate liable for the debt. A. R. KRISHNAN CHETTY v. VELLAI-CHAMI TEVAN, 10 M.L.T. 385 = 2 M.W.N. 1911, 461 = 21 M.L.J. 1077. (35 C. 320, R.)

(43)—S. 7 (3)—*Hindu Law—Guardian and Ward—Will—Capacity to appoint guardian of nephew by will.*—*Held*, that, under Hindu Law, a man has no power to appoint a guardian of his minor nephew, and any provision in a will made by a Hindu testator appointing a guardian of his nephew is not binding on Courts under s. 7 (3) of the Guardians and Wards Act. DHANPAT RAM v. PREM SINGH, 220 P.L.R. 1911.



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(44)—Ss. 7 (3), 8 (a), 13—*Mother and grandmother contesting guardianship of a minor, grandmother basing her claim on a will—Death of grandmother pending the proceedings—Brother of grandmother applying to continue the proceedings—Proceedings abated on her death.*—The guardianship of a minor was contested by the mother and by the grandmother of the minor basing her claim under a will. The Court of first instance decided in favour of the mother. The grandmother preferred an appeal and while this appeal was pending she died. Her brother applied to have his name entered on the record as her representative and to be allowed to continue this appeal. *Held*, that the brother had no right to continue the appeal; as the objection raised by the grandmother to the appointment of the mother to the guardianship was purely a personal one; it was based upon her own appointment by the will of the minor's father and it ceased on her death. *GANGABAI v. KHASHABAI*, 1 Bom. L.R. 363=23 B. 719.

(45)—S. 7 (3), 13, 48—*Procedure under Act—Its nature—Guardian appointed by will—Application by another person for certificate of guardianship.*—Ss. 13 and 48 of Act VIII of 1890 show that the procedure under the Act is not intended to be summary. [R., 7 Ind. Cas. 702.] When a guardian has been appointed for a minor under a Will, the District Court cannot appoint another person as guardian in his stead under s. 7 (3) of Act VIII of 1890, until it finds, after due investigation, that the Will is invalid. *SHAHU v. HAPIJA BEGAM*, 17 B. 560.

(46)—S. 8—*Court if may appoint as guardian a person who has not applied to be appointed—Appointment of nazir as guardian—Purdanashin lady, objection to appointment of.*—Under the Guardians and Wards Act, a Court has no power to make an order appointing a guardian of minors, except on a substantive application. Where the mother and the grandmother of the minor each applied to be appointed guardian, but the District Judge appointed the nazir temporarily as the guardian of the minor's properties. *Held*, that the appointment of the nazir was *ultra vires*. The fact of the applicant for appointment being a *purdanashin* lady is no obstacle to her being appointed guardian, for, though she may not be able personally to supervise the management, the safe custody of the property and its due administration may be sufficiently guaranteed by taking security from her. *MUSST. JAIWANTI KUMARI v. GAJADHAR UPADHYA*, 15 C.W.N. 676=14 C.L.J. 226=10 Ind. Cas. 334=38 C. 783.

(47 & 48)—S. 8—*Minor Hindu girl—Living with maternal grandmother—Father married again, whether a fit guardian.*—In an application for appointment of a guardian for a minor the Court has really to see what is for the benefit of the minor. Where a Hindu girl,

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aged 10 years, had been living with her grandmother since the age of 5, the grandmother being in good circumstances, and it appeared that the father had married again, on an application being made by the father to be appointed guardian of her person, *held*, that the father should not, under the circumstances, have been appointed guardian of the person of the girl, and having regard to her welfare, she should be restored to the custody of the grandmother. *BINDO v. SHAMLAL*, 4 A.L.J. 22=A.W.N. 1907, 24=29 A. 210. [R., 32 B. 50=9 Bom. L.R. 323.]

(49)—S. 8—*See NOS. 33, 34, 44, supra.*

(50)—Ss. 8, 42—*Appointment of guardian—Person not proposed by parties—Court's power to appoint—Object of the Act.*—*Held*, that the Court has power to appoint a person, who has not made an application himself, nor whose name has been mentioned in an application under s. 8 of the Act, as guardian under the Act, especially when it has considered the existing or previous relations of the proposed guardian with the minor or his property, and has come to the conclusion that it is undesirable for the welfare of the minor that he should be appointed guardian. The object of the Act is to safeguard the interest of minors by appointment of suitable guardians, and not merely to decide the claims of rival applicants *inter se*. *HAJI HIRJI v. KASIM HIRJI*, 3 S.L.R. 115=4 Ind. Cas. 603.

(51)—S. 9—*Ordinarily resides—Temporary residence.*—*Held*, that the words 'ordinarily resides' in s. 9 of the Guardians and Wards Act mean more than a temporary residence even though the period of such temporary residence may be considerable. *MUBARIK SHAH KHAN v. MUSSAMMAT WAJEH-UL-NISA*, 53 P.L.R. 1902.

(52)—S. 9—*Jurisdiction—Minor ordinarily resides—Domicile of the minor.*—At his father's death, a minor lived at Kapadwanj within the jurisdiction of the Court and had his property there. The minor was then taken to Baroda, outside the jurisdiction, where he was kept by the American Mission for two and a half years. He was thereafter again brought to Ahmedabad within the jurisdiction of the Court for a period of 28 days; but was again removed to Baroda. After his removal to Baroda, the minor's brother applied to the Ahmedabad Court to be appointed a guardian of the minor's person. The Court held that, as the minor's father lived up to the time of his death at Kapadwanj, the minor's domicile was in British India, and he resided ordinarily within the district, and appointed a guardian of the minor's person. On appeal, *held* that the Ahmedabad Court has no jurisdiction to appoint guardian of the minor, for the minor was living in Baroda and had no other place of residence, and, therefore, Baroda was the place where he ordinarily resided within the meaning of s. 9 of the Guardians and Wards Act, 1890. *Held*, also,



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the question of domicile was wholly irrelevant to the question of jurisdiction in a case like the present. *REV. ROBERT WARD v. VELCHAND UMEDCHAND*, 11 Bom. L.R. 1137=34 B. 121=4 Ind. Cas. 262.

(53)—S. 9—See NO. 25, *supra*.

(54)—S. 10—*Application for appointment of guardian—Evidence not recorded in the language in which it was given—Procedurs under s. 647, Civ. Pro. Code, not followed, effect of—No trial according to law—Attempt by the applicant to marry the minor to his own son pending decision of application—Desirability of appointing such person as guardian.*—The question was, whether, in an application for the appointment of a guardian for the person and property of a minor girl, where it was found that the evidence of the witnesses examined by the parties was not recorded in the language in which it was given and that the only record of evidence was the Judge's notes of the statements made by the witnesses, the case was tried in accordance with law. *Held*, that, having regard to the provisions of s. 647, Civ. Pro. Code, the evidence of the witnesses ought to have been recorded in the language in which it was given, and as this was not done, the case was not tried in accordance with law. Hence, the proceedings must be set aside and the case must be remanded to the Court below for trial according to law. The Court observed that it would be in the highest degree dangerous that the person and the property of the girl should be entrusted to such a person as the respondent, if, as alleged, he married the girl or attempted to marry her to his own son pending the decision of this case. *GANGA BAI v. NARAIN DAT*, A.W.N. 1905, 104.

(55)—S. 10—*Application by uncle to be appointed guardian of his nephew—Opposition by mother—Necessity of counter-application—Welfare of the minor.*—The uncle of a minor applied to be appointed guardian of his property. The minor's mother opposed the application, and asked that he should be appointed. The Court granted her prayer. *Held*, that in appointing a guardian, the welfare of the minor should be the determining factor in the decision, and that though the next heir is peculiarly interested in the good management of the property, he ought not to be appointed when he is otherwise unfit. (54 P.R. 1898, R.) *Held*, also, that it was not necessary for the counter-application made by the mother to be in the form prescribed in s. 10 of the Guardians and Wards Act. *AZIM ULLAH v. MUSSAMMAT ZAINAB*, 105 P.L.R. 1903.

(55-a)—S. 10—See NOS. 24, 33, 35, *supra*.

(56)—Ss. 10 and 11—*Failure to comply with its provision.*—*Held*, that omission to give in the application the several particulars mentioned in sub-s. (1), non-fulfilment of the requirements of sub-ss. (2) and 3 of s. 10 of Act VIII of 1890, and non-observance of the procedure laid down s. 11 of the Act, are grave

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irregularities which vitiate the whole proceedings and the order appointing the guardian of a minor. *BHAI SUCHET SINGH v. THE COLLECTOR OF AMRITSAR*, 58 P.W.R. 1910.

(57)—Ss. 10, 25, 45—*Suit by Hindu father for declaration of his right as guardian and custody of minor.*—No regular suit lies for the custody of a minor, the only remedy being an application under Act VIII of 1890. A Hindu father is, therefore, not entitled to sue, as guardian of his infant child, for the establishment of his right as such guardian, and for the custody of the child, detained by the defendant and who is the maternal grandmother of the child. *SHAM LAL v. BINDO*, 26 A. 594=1 A. L.J. 266=A.W.N. 1904, 135. (32 P.R. 1896, Appr.; 9 M. 31, 25 B. 574, D.; 8 C. 266, 4 B. L.R. App., 36, R.) [R., A.W.N. 1907, 24=4 A.L.J. 22.]

(57-a)—Ss. 10, 25, 45—See RIGHT OF SUIT—MISCELLANEOUS, 26 A. 594=A.W.N. 1904, 135=1 A.L.J. 266.

(58)—S. 11—See NOS. 33, 56, *supra*.

(59)—Ss. 11 (1), 13, 17 & 46—*Rival claimants for guardianship—Arbitration—Power to refer dispute to arbitraiton.—Per Curiam.*—Rival claimants to be appointed as the guardian of a minor are not in the position of ordinary litigants and cannot refer the matter in dispute to arbitration. Nor is any such power given to the Judge in the Guardian and Wards Act. The guiding principle, in appointing a guardian, is the consideration what is best for the welfare of a minor. *MAHADEO PRASAD v. BINDESHARI PRASAD*, 5 A.L.J. 101=A.W.N. 1908, 51=3 M.L.T. 203=30 A. 137.

(60)—S. 12—See NO. 27, *supra*.

(61)—Ss. 12, 25, 47—*Custody of minor—Application for, and right of—Reversion.*—An order of a Court, rejecting an application by a guardian for the custody of a minor, on the ground that the proper course was to bring a civil suit, is not appealable, but can be revised on the ground that the Court had failed to exercise a jurisdiction vested in it by law, as it ought to have directed the respondent to produce the minor that he might be made over to the petitioner. *WADHAW SINGH v. MUSST. MALANI*, 13 P.R. 1897.

(62)—S. 12 (1)—*Minor claiming as adopted son—Widow, denying adoption, in possession of property—Jurisdiction of Court to order widow to file inventory of deceased's property and to furnish security.*—Where the widow, who denies the adoption of the minor (who claims as adopted son), is in possession of the property of her deceased husband, the Court has no jurisdiction to order the widow, under s. 12 (1) of the Act to file an inventory of the deceased's estate, and to give security not to dispose of it to the minor claimant's detriment. Because, the adoption being denied, the minor must establish his claim to the deceased's estate by



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a suit, and until then no order under s. 12 (1), can be made regarding it. **MUSSAMAT POUNCH BAI v. DAYARAM TEKCHAND**, 3 S.L.R. 52=2 Ind. Cas. 369.

(63)—S. 12, cl. 2 (b)—*Order for the temporary custody of minor's property—Appointment of receiver of minor's property—Civ. Pro. Code (Act V of 1908), s. 141—Order 40, Rule 1—Applicability of the Code to proceedings under the Act.*—It is competent to a Court, on an application having been made to it under s. 12 of the Guardians and Wards Act, 1890, either to direct the payment of the money belonging to a minor into Court or to appoint a receiver of the property. *In re BAJ JAMNABHAI*, 13 Bom. L.R. 487=11 Ind. Cas. 554.

(64)—S. 12 (3) (b)—“Any person”—*Meaning of—Custody of Munsif.*—The custody of the Munsif under an order of the Court for the temporary custody and protection of minor's property is the custody of the Court and is not contrary to the provisions of s. 12 (3) (b). For the words “any person” in that section does not include the words “The Court.” **MUSSAMMET HIM KAUR v. RAI DAULAT RAM**, 10 P.R. 1898.

(65)—S. 13—*Husband claiming to be guardian of his minor wife—Absence of proper inquiry.*—Held, that a husband may, in many cases, be a suitable guardian of his minor wife, but where the question has not been settled, one way or the other, after proper inquiry as contemplated by s. 13 of Act VIII of 1890, the order of the District Judge is not maintainable. **TIRHU v. LACHEMAN**, 71 P.W.R. 1912=109 P.L.R. 1912.

(66)—S. 13—*Civ. Pro. Code, 1882, s. 647—Provisions of Civ. Pro. Code, applicable proceedings under the Act.*—The procedure to be followed in dealing with cases under the Guardians and Wards Act does not seem to be definitely prescribed in the Act itself, but the various allusions in the Act to the Code of Civil Procedure show the general intention, and no doubt it was contemplated that the Code would usually be in force where the Act is in force and that the provisions of s. 647 of the Code would be applicable to proceedings under the Act; and it is great anomaly that in certain provinces the Code should not be actually in force yet. The provisions of the Civ. Pro. Code should be followed as far as may be in proceeding under the Guardians and Wards Act. **MA HLA WIN v. MA PWE**, U.B.R. 1892—1896, Vol. II, 407.

(67)—S. 13—See NOS. 33, 44, 45, 59, *supra*.

(68)—Ss. 13, 39, 46—*District Judge—Subordinate Judge took evidence upon reference by District Judge—Evidence—Decision upon such evidence—Irregularity—Proceeding.*—The Guardians and Wards Act nowhere authorizes a District Judge to hand over the whole of an inquiry under the Act to a subordinate Judge, and to decide upon the evidence so taken by the subordinate Judge. Irregularity such as this vitiates the whole proceedings. **GANESH v. KUSABAI**, 1 Bom. L.R. 185=23 B. 698.

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(69)—S. 16—See NO. 26, *supra*.

(70)—S. 17—*Hindu Law—Minors—Appointment of guardians.*—Matters to be considered by the Court in appointing a guardian under s. 17 of the Guardians and Wards Act, 1890, viz., the legal right to be appointed a guardian, the preference of the minors and the existing or previous relations, are very minor considerations as compared with the main question—What order would be for the welfare of the minor. In making orders appointing guardians for the persons of minors, the most paramount consideration for the Judge ought to be—What order under the circumstances of the case would be best for securing the welfare and happiness of the minors? With whom will they be happy? Who is most likely to contribute to their well-being and look after their health and comfort? Who is likely to bring up and educate the minors in the manner in which they would have been brought up by the parents if they had been alive? In fact the main question for the Court to consider in the case of the unfortunate minors who have lost their natural guardian is, who amongst the relations or for the matter of that friends of the minors can you select who will supply as nearly as possible the place of their lost parent or parents? The interest, well-being and happiness of the minors ought to be the main and paramount consideration for the Court in selecting the guardian of the person of a minor. *Re GOOLBAI AND LILBAI*, 9 Bom. L.R. 923=32 B. 50.

(71)—S. 17—*Guardian of minor, qualifications for appointment as.*—On a reference to s. 17 of Act VIII of 1890, held, that, other things being equal and the minor not expressing or being old enough to express an intelligent preference, the Court should decide in favour of the person who is entitled to the custody of the minor under the law to which the minor is subject. Held further, that a Court is not bound to appoint the person, who is entitled to the custody of the minor under the law to which the minor is subject. The Court should weigh all the circumstances of each particular case and decide what would be for the welfare of the minor, which ought to be the paramount consideration in every case. **MIRZA MOHAMMAD ANJUM QADAR v. PERSONS OF MIRZA AZAM QADAR, MINOR**, 13 O.C. 140=6 Ind. Cas. 1001.

(72)—S. 17—*Guardian of a minor—Proper person—Test to be applied.*—For the appointment of a guardian of a minor, the proper test is what will be for the welfare of the minor. Where the applicant was a distant relation of the husband of a childless widow who was living happily with her father, held that the father of the minor widow was her proper guardian. **TOTA RAM v. RAM CHARAN**, 7 A.L.J. 1149=8 Ind. Cas. 785. (16 C. 584, R.)

(73)—S. 17—*Effect of change of religion on right of guardianship.*—One Mussammat Wazir Begam claimed to be appointed guardian to two minor children and of their property by right of her being their maternal grandmother as



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against their father who had embraced the Christian religion. *Held*, that the claim should be dismissed. The law of India while placing all religions on a level before the law and allowing to the fullest extent the right of aggregations of individuals, to be governed by their own personal law, protects individuals so far as may be from the loss of either rights or property by reason of renunciation of or exclusion from any religion. The preservation of such rights must be consistent also with the preservation of the rights of others and when these clash, the Courts have to decide between rival interests according to justice, equity and good conscience. Rights of guardianship over infants are rights within the purview of Act XXI of 1850. *Held*, also that the fact that the father has had his children, who were not of age to profess Christianity of their own choice, baptized into the Christian Church, cannot have any legal effect on the rights of guardianship. *GUL MOHAMMAD v. MUSSAMMAT WAZIR BEGAM*, 167 P. L.R. 1901=60 P.R. 1901.

(74)—S. 17—*Effect of—Right of father to guardianship and control of religion of minor—Right of Court to interfere.*—Under the Hindu Law, as under the English, the father is *prima facie* entitled to the custody and control of his infant child. It is for those who maintain the contrary to show that, under the particular circumstances of the particular case, he ought to be deprived of such initial parental right. (23 C. 290, 16 B. 307, R.) The Court will deprive the father of his initial right if it appears to be for the welfare of the child, to do so (using the term "welfare" in its widest sense and looking, not only to the question of money and comfort, but to the moral and religious welfare of the child and to the ties of affection). The father of an infant is *prima facie* entitled to say in what religion his infant child should be brought up, but, at the same time, in a proper case (e.g., when the father has abdicated his right), there is undoubted jurisdiction in the Court to disregard those wishes. But the circumstances must be at least unusual to justify the Court in so acting. So, a Hindu, who became a convert to Christianity may be deprived of the guardianship of his minor Hindu son, if it be for the welfare of the latter that he should not be handed over to the former. *MOKOOND LAL SINGH v. NOBODIP CHUNDER SINGHA*, 25 C. 381=2 C.W. N. 379 [D., 60 P.R. 1901=167 P.L.R. 1901.]

(74-a)—S. 17—*Death of father—Custody of minor daughter—Oral appointment of guardian by a Hindu father—Application by mother—Welfare of minor.*—In a petition by the mother for the custody of her minor daughter, entrusted to a missionary by her Hindu father and baptized at his instance and brought up by the mission for three years after the death of the father: *Held*, that the mother was not in the circumstances entitled to succeed. A Hindu father is entitled to appoint guardian for his child by will or word of mouth to the exclusion

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of the mother, and his right would not be lost by his conversion to Christianity. (7 W.R. 74, F.) *Prima facie* the father is entitled to say in what religion an infant child should be brought up, the paramount consideration in such cases being the welfare of the minor. Where, in the opinion of the Court, it would be injurious to the minor to give effect to the father's wishes, the Courts will interfere even in his lifetime. *REV. DR. GEORGE ALBRECHT v. BATHEE YELLAMMA*, M.W.N. 1912, 53=11 M.L.T. 53=22 M.L.J. 247. (25 C. 881, App.)

(75)—S. 17—*Right of guardianship—Competition between outcasted mother and paternal grandfather in caste—Hindu Law—See ACT XXI OF 1850*, A.W.N. 1905, 205=2 A.L.J. 663=28 A. 233.

(76)—S. 17—*Minor not heard of, for some months—Mother appointed guardian—S. 107, Evidence Act—See EVIDENCE ACT, 1872*, s. 107, 1 Ind. Cas. 465.

(77)—S. 17—*See NOS. 34, 36, 59, supra.*

(78)—Ss. 17, 19, 21, 39—*Construction of the section—Guardian of property of minor governed by Buddhist Law.*—The words "consistently with the law to which the minor is subject" in s. 17 are not altogether easy of construction, but it seems plain that they must be interpreted in a wide rather than in a narrow sense. In the appointment of a guardian, though the Court has to proceed "consistently with the law to which the minor is subject," it must still take into consideration what will be for the welfare of the minor in accordance with the provisions of sub-s 2 of s. 17 of the Act, having regard rather to fitness than to nearness of relationship. The objection to the appointment of a guardian of a minor belonging to an undivided Hindu family subject to the Mitakshara law does not apply in Burma where the conditions and the incidents of joint family property are different under Buddhist law. There is nothing to prevent a guardian appointed by the Court proceeding to realise the assets of an estate under the Succession Certificate Act for the benefit of the minor. *MA SHIN v. MAUNG CHIT PON*, U.B.R. 1892—1896, Vol. II, 418. (4 W.R., Mis. 3, 9 W.R. 334, 548, 19 C. 301, 13 W.R. 454, F.)

(79)—Ss. 17 and 19 (b)—*Right of natural father to guardianship of property of minor—Right to guardianship of the person of the minor, when might be lost—Right of adoptive father under Hindu Law—Matters to be considered by Court in appointment of a guardian.*—The Act gives the father no superior rights to the guardianship or the property of his children; under certain circumstances it may be even undesirable that he should be guardian of the boy's property. As regards his claim to be declared guardian of his person, where the summary powers of the Act are invoked, the Court will not support the rights of the father against the interest of the child. A father may lose his



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right to the guardianship of his children, when he has permitted another person to maintain and educate them and it would be detrimental to the interest of the children to alter the manner of their maintenance or the course of their education. Under Hindu Law, the adoptive father acquires a right of guardianship even against the natural father and so, a step-father, who has done everything that he can, short of formally adopting him, to make the boy as his own son, may acquire the rights of guardianship of the person of the minor even as against his natural father. The appointment or declaration of a guardian must be made consistently with the law to which the minor is subject. In appointing a guardian of a minor, the Court ought to take into consideration the wishes of a minor old enough to form an intelligent preference, and see whether the appointment of a person as a guardian will be for the moral, bodily, and intellectual well-being of the minor, and for the welfare of his estate. *PO CHO v. MA NYEN MYAT*, 5 L.B.R. 133.

(80)—S. 17, cl. (2)—*Adopted son minor—Death of adoptive parents—Natural father if may be appointed guardian—Guardian of property of minor, appointed executor of same property under father's Will—Probate supersedes guardianship order—Security, inventory, accounts.*—Both the adoptive parents being dead, the natural father of the minor adopted son was appointed guardian of his person, in preference to the brothers of the adoptive mother and the daughters of the adoptive father. (3 B. 1, R.) The appellant, who had been appointed by the District Judge the guardian of the properties of a minor, was required by the Judge to furnish security and to produce an inventory of the minor's properties and accounts within six months. During the pendency of the appeal, the appellant having obtained probate of the unadministered effects belonging to the estate of the father of the minor. *Held*, that the properties to which under his father's Will the minor was beneficially entitled having by the grant of probate become legally vested in the executor, no guardian in respect of that property could be appointed so long as the executorship continued, and the order of the District Judge, calling on the appellant to furnish security and file inventory and submit accounts became inoperative upon such grant and should be cancelled. *GANGA PRASAD BHATTACHARJEE v. HARA KANTA CHOWDHURI*, 15 C.W.N. 538=7 Ind. Cas. 234.

(81)—S. 18—*Act XL of 1858—Its scope.*—There is no indication whatever, in Act XL of 1858, of any intention to alter or affect any provision of Hindu or Mahomedan Law, as to guardians, who do not avail themselves of the Act. The scope of the enactment is merely to remove legislative prohibitions, to confer expressly a certain jurisdiction, and to define exactly the possession of those, who avail

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themselves of, or are brought under, the Act, leaving persons, to whom any existing rules of law apply, unaffected. The legislature did not mean, in 1858, to sweep away all ancient law on the subject, and to subject to one inflexible rule the property of all minors throughout Bengal. The Act contains no provision enabling the Court to act of its own motion. *RAM CHUNDER CHUCKERBUTTY v. BROJONATH MOJUMDAR*, 4 C. 929=4 C.L.R. 247 (F.B.).

(82)—S. 19—*Guardianship of illegitimate child—Adoption by Mahomedan.*—The Guardians and Wards Act applies not only to Europeans but to natives of the country, and it is not expedient to narrow its provisions according to any particular personal law without clear need for doing so. The Guardians and Wards Act in s. 19 preserves the right of the father only when he is not in the opinion of the Court unfit to be guardian of the person of the minor. The Courts will uphold paternal authority but they will interfere when the father forfeits his rights by gross moral turpitude or where he has by his conduct abdicated his paternal authority. The father of an illegitimate child, if not personally disqualified may be entitled to the guardianship of the child. (16 B. 307, R.) Adoption such as takes place under Hindu and Buddhist law is not recognized by Mahomedan law. In a very recent case (reported in 21 C. 149) the Privy Council observed: "Adoption is not known to the general law of Mahomedans," but this means the kind of adoption that puts the adopted child in the same place and within the same rights as a natural child. There seems to be nothing to hinder a Mussulman from adopting a child in the same way as an Englishman might adopt a child and making such provision for the child as he may be able, in accordance with his means and in accordance with the law governing the devolution of his estate. *M.O. RAHMAN v. G. GEORGE*, U.B.R. 1892—1896, Vol. II, 415. (10 A. 289, 21 C. 149 R.)

(83)—S. 19—*Guardian of illegitimate child—Father.*—Whether the father is living as in this case, s. 19 forbids the Court to appoint or declare a guardian, the father being deemed the natural guardian without appointment or declaration. The Court, therefore, has no authority to declare the father and mother guardians, provided, the fact that the child is illegitimate does not make any difference with respect to the father being a father for the purposes of the Act. There is no definition of the word "father" in the Act, nor is there anything apparently to limit the common meaning of the words; neither is there any thing of the kind in the preceding enactment, Act XL of 1858, s. 27 of which contains similar provisions to s. 19 of the present Act. It may be doubted whether the word "father" was intended to include the father of an illegitimate child in the Guardians and Wards Act, but in the absence of anything to the contrary the plain ordinary



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meaning of the word must be taken apparently. **M. O. RAHMAN v. G. GEORGE, U.B.R. 1892—1896, Vol. II, 413.**

(84)—S. 19—*Appointment of guardian of minor whose father is living.*—Under s. 19 of the Guardians and Wards Act, cl. (b), the Court is not authorised to appoint or declare a guardian of the person of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor. The father is treated as the natural guardian not requiring appointment. S. 19 precludes the appointment of a guardian of the minor's person unless the father is found to be unfit to be guardian. **MANG MAUNG GYI v. MAUNG PO THU, U.B.R. 1892—1896, Vol. II, 412.**

(85)—S. 19—See NOS. 78, 73, *supra*.

(86)—S. 21—See NOS. 36, 78, *supra*.

(87)—S. 22—*Guardian—Nazir—Remuneration—District Court disallowing remuneration—Appeal—Practice—Procedure.*—The Nazir of a District Court was appointed guardian of the property of the minors. When transferred, he handed over the charge of the estates to his successor and submitted accounts of his management, praying for remuneration. The District Judge refused to allow him any remuneration on the grounds that the accounts were irregularly and badly kept, that the estates had been mismanaged and that considerable unnecessary expense had been incurred. Against this order, the Nazir appealed: *Held*, that no appeal lay against the order, because the Act clearly gave the Judge a discretion in the matter and it allowed of no appeal against his order. **GANGADHAR v. SHIVLINGRAO, 1 Bom. L.R. 547=24 B. 95.**

(88)—Ss. 22 and 48—See APPEAL—GENERAL, 48 P.R. 1901.

(89)—S. 23—*Collector—Board of Revenue. Sanction by—Manager, Powers of.*—“*Delegatus non potest delegare*”.—Where the Collector is authorised by the Board of Revenue, as Court of Wards, under s. 23 of the Act, to raise a loan on mortgage of the Ward's properties, he can delegate his powers to the manager acting under him. The maxim “*delegatus non potest delegare*” is to be understood with this necessary qualification that, in any particular case, if no authority to delegate has been given, such authority may be implied from the circumstances of the case. **JOGESHWAR NARAIN SINGH v. RAI RADHA RAWAN, 3 C.L.J. 165.**

(90)—Ss. 24 to 27, 46—*Removal of guardian legally appointed—Consent—Jurisdiction—Order of Court extra cursum curiæ—Appeal.*—The legally appointed guardians entered into an agreement, to which the Court was also a party, and by such agreement gave away the duties imposed on them by ss. 24 to 27 of the Act to a manager, made the manager accountable to the Court and liable to removal by the Court and not by themselves, and undertook not to interfere with his management of the property or

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the education of the ward. The guardians also undertook that they might be removed if they so interfered. *Held*, that the Court had no jurisdiction to make an order in the above terms even though the guardians consented to the same. Neither the Court nor an arbitrator, considering the Court as such, has jurisdiction to take property out of the custody of a legally appointed guardian or to declare such a guardian a nominal one or to remove him under circumstances not specified for the purpose in the Act. Though it is true that, where an order of Court is *extra cursum curiæ* and is consented to by parties, it is in the nature of the arbitrator's award and not liable to reversal on appeal, yet, the Court cannot do what the parties cannot legally authorise an arbitrator to do, and if it does, such an order though passed with consent, is appealable. **INDAR NARAIN SINGH v. E. E. ADLAM, 8 C.W.N. 37,**

(91)—Ss. 24 and 43—*Order directing a third party to pay a certain sum to the minor's guardian, not warranted by any provision of the Act—Such order is made without jurisdiction and cannot be regarded as a decree in a suit—Scope and nature of jurisdiction conferred by the Act discussed.*—On an application under ss. 24 and 43 of the Guardians and Wards Act, by the guardian of a Hindu female minor, praying for permission to give the minor in marriage to a certain person and for an order directing the appellant herein, who is the step-mother of the girl and in possession of her deceased father's estate, to pay Rs. 800 for the expenses of the marriage, the District Judge sanctioned Rs. 300 without framing any issue and taking any evidence. Against this order the counter-petitioner presented both a Civil Miscellaneous Appeal and a Civil Revision Petition to the High Court. *Held*, that so much of the order as directs the appellant to pay Rs. 300 to the petitioner for purposes of the minor's marriage is not warranted by any provision of the Guardians and Wards Act; and that it was made without jurisdiction under the said Act, and therefore must be set aside under s. 115, Civ. Pro. Code. *Per Abdur Rahim, J.*—“The power vested in the District Court under the Guardians and Wards Act is so totally dissimilar to its powers as a Court of ordinary Civil jurisdiction that it will be going much too far to say that an order purporting to be made under, but which in fact is not warranted by, the provisions of that Act, can be treated as a decree in a suit. The two jurisdictions are totally distinct, though exercisable by the same official. It is not a case of exercise of the same jurisdiction by different forms of procedure.” “The jurisdiction or power conferred upon the District Court by this Act is of very special and limited character, and the procedure prescribed under the Act, which is of a summary character.....is very different from the procedure laid down by the Civ. Pro. Code, for the trial of suits.” (2 I.A. 219, L.R. 5, P.C., 516, 9 A. 191, 36 C. 193, D.)



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The proceeding in question ought also to be set aside on the ground that it is such a violent strain on the procedure that it puts it entirely out of its course, so that the Court of Appeal cannot review the decision. **KOMMA SOMAKKA v. KODIDALA PEDDA RAMIAH**, 2 M.W.N. 1911 519=10 M.L.T. 483.

(92)—S. 25—See NOS. 57, 57-a, 61, 90, *supra*.

(93)—Ss. 25 and 26—*Guardian—Person residing out of British India, heir of Ward.*—It is objectionable to appoint as guardian of a minor a person who resides out of British India though there is no express prohibition to that effect in the Act, nor is it unobjectionable to make a minor the ward of his own heir. **SAMAND SINGH v. DUSANDI**, 137 P.R. 1893.

(94)—S. 26—*Minor—Guardian of person of minor—Power of Judge to direct as to guardian's residence.*—Held, that so long as the guardian appointed to the person of a minor by a Judge under Act VIII of 1890 conforms to the provisions of s. 26 of the said Act, the Judge has no power to direct that the guardian shall reside in any particular place. **BUNDAO v. RAM DIN**, A.W.N. 1899, 204.

(95)—S. 26—See NOS. 90, 93, *supra*.

(95-a)—S. 27—See NO. 90, *supra*.

(96)—Ss. 27, 41, sub-ss. (3) and (4)—*Guardian's liability to account—Discharge from liability by Court—Guardian of property, power of—Arrangement between old and new guardians regarding minor's property.*—The terms of s. 41, sub-ss. (3) and (4) of the Act clearly imply that a guardian is not discharged from his liability to account, unless he has obtained from the Court an express order to that effect. The mere fact that the guardian has filed *nikshes* or abstract statements of assets and liabilities does not release him from liability to account, unless he gets a discharge from such liability from the District Judge. The value of the moveable properties of a minor amounted to Rs. 1,929, and the discharged guardian entered into an agreement with the newly appointed guardian, by which the latter agreed to accept only Rs. 875, not in cash, but in bonds: Held, that the arrangement, being made without the knowledge and sanction of the District Judge and not being beneficial but detrimental to the minor's interest, was not binding upon the minor; and that s. 27 of the Act did not confer on the guardian any power to make such an arrangement. **NABADWIPA CHANDRA SHAHA v. JUGOL DAS DASIA**, 7 Ind. Cas. 214. (34 C. 211, *Rel. on.*)

(96-a)—S. 28—See NO. 117, *infra*.

(97)—Ss. 28, 29 and 47—*Permission to transfer, order granting—Appeal against order granting permission to transfer.*—Held, that no appeal lies against an order of a District Judge sanctioning a mortgage in favour of a particular person in preference to another person. Such an order cannot be treated as an order refusing sanction to mortgage. **MUSAMMAT SHIAM KUNWAR v. SHIAM LAL**, 11 O.C. 29.

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(98)—S. 29—*Mortgage of minor judgment-debtors property—Sanction of District Judge.*—S. 29 of the Act forbids the guardian to mortgage or charge the immoveable property of his ward without the previous permission of the District Judge. A permission obtained from the Court executing the decree under s. 305, Civ. Pro. Code, 1882, to sell the property of the minor judgment-debtor, is not sufficient, and a guardian must obtain the sanction of the District Judge in spite of such permission. **SARJU v. DISTRICT JUDGE OF BENARES**, 6 A.L.J. 491=31 A. 378=2 Ind. Cas. 356.

(99)—S. 29—See NOS. 26, 97, *supra*.

(100)—Ss. 29, 30—*Mortgage by guardian without leave of Court—Effect.*—A mortgage executed by a Hindu mother, who was the certificated guardian of her minor son under Act VIII of 1890, of her son's estate, without obtaining the previous permission of the Court, is not void, and the minor's estate ought to be held liable to the extent to which the minor had in fact benefited by the transaction, before he is equitably entitled to be relieved of the mortgage. **TEJPAL v. GANGA**, 25 A. 59=A.W.N. 1902, 192, (18 A. 373, D.; 22 M. 289, F.) [R., 3 C.L.J. 260, 10 O.C. 321.]

(101)—Ss. 29, 30—*Mortgage by minor not void but only voidable.*—Ss. 29 and 30 of the Guardians and Wards Act (VIII of 1890) have reference exclusively to the disposal of immoveable property by the guardian, and there is no express provision in the Act as to the effect of a transfer, not by the guardian on behalf of the minor, but by the minor himself while under guardianship. The effect of the provisions of the Act is merely this, *viz.*, that a person wishing to take a transfer of property belonging to a minor has an opportunity of securing himself against the subsequent avoidance of the transfer by seeing that the transfer is duly executed by the guardian with the permission of the Court, but that, if it is not so executed, he takes the property subject to the risk of the transfer being afterwards avoided by the minor. The only question in such a case therefore is whether the mortgage by the minor has been avoided by him on his becoming a major and in order to constitute such an avoidance, it is necessary that there should have been a communication to the mortgagee of the intention to avoid the mortgage. **MADAN MOHAN v. RANGI LAL**, 23 A. 288=A.W.N. 1901, 78.

(102)—Ss. 29, 30—*Guardian and Ward—Sale by guardian of ward's property—Conditional permission—Condition not fulfilled—Sale voidable.*—The certificated guardian of a minor obtained permission from the Court to sell certain property belonging to the ward under the following conditions, namely, "provided the applicant files receipt for the amount paid over to the mortgagee in this Court and invests the balance in the minor's name in a security approved by the Court within six weeks' time."



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*Held*, by Banerji, J., that a sale, in the carrying out of which the vendee, who had knowledge of the Court's order, and the vendor entirely ignored the terms of the order granting permission to sell, was a sale which under the circumstances was voidable at the instance of the minor. KUNJA MAL v. GAURISHANKAR, A.W.N. 1905, 274=1 M.L.T. 52=3 A.L.J. 30.

(103)—Ss. 29 and 31—Guardian and minor—Mortgage of minor's property to secure a loan sanctioned by the Court—Interest.—In all cases where sanction is given for the raising of loans on the security of the property of minors, it is the duty of the Judge granting sanction to specify in his order of sanction not only the amount to be raised and the property to be mortgaged, but also the rate of interest, or at least the maximum rate of interest, at which the loans are to be raised. If nothing is said as to the rate of interest, the lenders are entitled only to a reasonable rate of interest on the moneys advanced. THAKUR PRASAD v. GAURIPAT RAI, A.W.N. 1908, 75=5 A.L.J. 260=30 A. 1888. (11 C. 379, F.)

(104)—Ss. 29, 39—Minor's property—Judge's power to deal with—Court's direction of its own motion to sell minor's property, ultra vires—Removal of guardian—Notice on guardian necessary, for showing cause.—S. 29 of the Guardians and Wards Act, which empowers the District Judge to deal with a minor's property, only enables him to give permission to the guardian to sell such portion of the properties as may be necessary, on an application properly framed by the guardian for that purpose. It confers no power whatever on the Judge to deal with the minor's property on his own motion in any way. Therefore where the Judge directed the guardian, of his own motion, to sell all properties of a minor, and convert them into cash to be invested in G.P. Notes: *Held*, that the order was wholly ultra vires. It is the duty of the Court, when it acts upon its own motion against the interest of any person subject to jurisdiction, to issue a rule informing the persons what there was against him and upon what evidence or information it was based and calling upon him to show cause. Where the Court removes a guardian of its own motion without hearing what he has to say, the order removing him is bad and must be set aside. JAGAT BAI v. GAJADHAR UPADHYA, 7 Ind. Cas. 46=12 C.L.J. 322.

(105)—S. 30—Mortgage by guardian on estate of minor—Restitution by minor of benefit received.—Where the guardian of a minor appointed under the Guardians and Wards Act, in order to be able to raise funds to recover certain property belonging to the minor, sold the mesne profits of such property, the sale-deed containing a covenant for the refund of consideration and hypothecating property, belonging to the minor, *held*, in a suit by the minor to set aside a decree obtained by the defendant on foot of the covenant on the ground that the decree was fraudulent and collusive, that the minor

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was bound to make restitution for the amount by which he was benefited, it having been found that the consideration had been actually paid and applied by the guardian for the purposes of the minor. *Held*, also that the hypothecation of property, having been made without the permission of the Court, was voidable. NUR BAKHSI v. RUKUM SINGH, 8 A.L.J. 754=11 Ind. Cas. 764. (22 M. 289, R.)

(106)—S. 30—Act XL of 1858 (Minors Act), s. 18—Guardian and minor—Lease by guardian in excess of his powers—Sale of leased property by minor on attaining majority—Suit by purchaser for possession—Limitation Act, XV of 1877 (Indian Limitation Act), sch. II, art. 91.—The certificated guardian of a minor granted, without previously obtaining the permission of the Court, a perpetual lease of certain immovable property, forming part of the minor's estate, on the 28th of March, 1893. The minor came of age on the 7th of December, 1901, and on 21st of October, 1902, sold the property, the subject of the lease mentioned above. On the 22nd of July, 1903, the purchaser sued for possession of the property purchased by him, asking for cancellation of the lease, if necessary. *Held*, that it was not necessary for the plaintiff to ask for cancellation of the lease as a condition precedent to his obtaining a decree for possession, and that the suit was not barred by limitation. ABDUL RAHMAN v. SUKHDAYAL SINGH, A.W.N. 1863, 176=2 A.L.J. 507=28 A. 30. (3 A. 852, 9 A. 340, 5 A. 490, 14 M. 26, R.)

(107)—S. 30—See REGISTRATION ACT, 1908, s. 77, 24 C. 668=1 C.W.N. 444.

(108)—S. 30—See NOS. 100, 101, 102, *supra*.

(109)—S. 31—See SPECIFIC PERFORMANCE, 22 C. 545.

(110)—S. 31—See NO. 103, *supra*.

(111)—S. 31 (2)—Not directory—Order permitting guardian to sell not embodying particulars required by s. 31 (2)—Effect—Revision—See CIV. PRO. CODE, 1908, s. 115, 12 O.C. 78=2 Ind. Cas. 237.

(112)—S. 31 (3) (a)—Order not appealable.—No appeal lies from an order passed under s. 31 (3) (d) of the Guardians and Wards Act VIII of 1890. BHIVA v. KESHA, 1 Bom. L.R. 1.

(113)—S. 31, sub-s. (4)—'Any person,' meaning of—Right of persons other than relatives and friends of the minor to be heard on the application—The words "any person" in the last part of sub-s. 4 of s. 31 of the Guardians and Wards Act are not restricted in their application to the relatives and friends of the minor. It is the duty of a Court to hear any person interested in an application made on behalf of the minor, even though he is not the minor's friend or relative. RAJAH VENUGOPAL BAHADUR v. THIRUMALA KANDAMA KONDALA NAGAYA RAMAKRISHNAN KADIR VELUSAWMI NAICKER. MINOR BY V. THOYAMMAL, 10 M. L.T. 259=2 M.W.N. 1911, 165=11 Ind. Cas. 946.



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(114)—S. 34—*Inventory—Sum to be allowed for minor's maintenance.*—When appointing a guardian for the estate of a minor, the Court should direct the guardian to file an inventory or list of minor's property in Court, and should allow a maximum sum for the maintenance, education and advancement of the minor, which sum should never be exceeded without the leave of the Court. **LACHMANDAS v. RAMDEI**, 10 Ind. Cas. 243.

(115)—S. 34—*District Judge—Administration bond.*—A bond under s. 34 of the Guardians and Wards Act is to be given to the Judge of the Court to enure for the benefit of the Judge for the time being, with or without sureties, as may be prescribed, engaging duly to account for what the guardian may receive in respect of the property of the ward. There is nothing in the section or in the form of the bond given in the schedule to the High Court Civil Circular Orders) which suggests that the bond ceases to operate either on the death of the guardian or of the ward or on the cesser otherwise of the guardianship. **GANPAT v. ANNA**, 7 Bom. L.R. 803=30 B. 164.

(116)—S. 34—See NO. 37, *supra*.

(117)—Ss. 34, 7 (3), 28—*Appointment of testamentary guardian by Court—His liability to furnish security.*—A guardian under a will, who has also applied for and accepted the position of a guardian under the Act, may be called upon to furnish security under s. 34 of the Act. **SUKH DIAL v. KARAM CHAND**, 99 P.R. 1908.

(118)—Ss. 34, 35, 41—*Guardian wasting property—Procedure for dealing with.*—S. 34 (3) empowers the Court to direct the guardian to pay into Court the balance due from him on the accounts, he has exhibited in Court, that is to say, the balance shown by such accounts, and not the balance which the Court finds to be due upon taking a separate account of the administration of the property. If a guardian of property wastes the property, he may be sued under s. 35 or he may be removed from his appointment as guardian, and may then be made to account under s. 41. **MA BU v. REV F. PERROY**, L.B.R. 1893—1900, 447.

(119)—Ss. 34, 39 (b)—*Guardian—Residing out of British India—Propriety.*—The Guardians and Wards Act does not prohibit the appointment, as guardian, of a person residing out of British India. **AMAR CHAND v. BAHADUR MAL**, 65 P.R. 1896.

(120)—Ss. 34, 41 — *Scope — Construction—Guardian's liability to account afterward attains majority.*—The object of s. 34 of Act VIII of 1890 is to give the Court, as representing the interest of the minor, certain summary powers for the protection of his property. As soon as the ward becomes *sui juris*, the necessity for the power conferred on the Court by s. 34 ceases. He can then sue his guardian for an account, and can ratify expenditure or dispense with

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accounts as he thinks fit. [*Diss.*, 16, M.L.J. 286.] S. 41 of the Guardians and Wards Act cannot be construed into giving the Court, by summary procedure, a power to order the guardian to render accounts after the termination of the guardianship. **NABU BEPARIV. SHEIKH MAHOMED**, 5 C.W.N. 207. [*Diss.*, 16 M.L.J. 286.]

(121)—Ss. 34 (e) 39 (e), and 45—*Direction of Court under s. 34 (e)—Failure to obey—Removal of guardian under s. 39 (e) — Imposition of fine for such omission — Not warranted by s. 45.*—Where a guardian omitted to obey the direction of the Court under s. 34 (e) of the Guardians and Wards Act, he could be removed from the guardianship under s. (39) (e) of the Act. But such omission is not punishable with the imposition of a fine, and s. 45 of the Act does not make such omission punishable. **NAJABAT ALI v. MUSSAMMAT MEHTAB BIBI**, 34 P.R. 1912=90 P.W.R. 1912=137 P.L.R. 1912.

(122)—S. 35—See NO. 118, *supra*.

(123)—Ss. 35, 36 and 37—*Administration bond—Assignment—District Judge.*—No appeal lies from an order, passed by the District Judge, under s. 35 of the Guardians and Wards Act, declining to assign the bond. It is competent to a District Judge to assign the bond, which is passed in his name, to a third person. **GANAPAT v. ANNA**, 7 Bom. L.R. 803=30 B. 164.

(124)—S. 36—See NO. 123, *supra*.

(125)—S. 37—See NO. 123, *supra*.

(126)—S. 39 — *Testamentary guardian — Application by another.*—A person though more nearly related to a minor cannot apply to be appointed guardian when there is a testamentary guardian, before he is removed from his guardianship under s. 39 of the Act. **LAKHMI CHAND v. GANDA MAL**, 39 P.R. 1893.

(127)—S. 39—*Testamentary guardian—Removal—Old age—Disability — Mismanagement — Presumption.*—The Court has no power under the Guardians and Wards Act to remove a testamentary guardian except for the reasons stated in s. 39 of the Act. Old age by itself raises no presumption of disability to manage. The disability must be shown by proving specific acts of mismanagement. **RINDABAI v. GIRDHARLAL**, 4 Bom. L.R. 799.

(128)—S. 39—*Guardian appointed by Court—Removal of guardian—"Instrument," meaning and scope of.*—The language of s. 39 of Act VIII of 1890 requires that the word "instrument" as used therein should be confined to instruments *ejusdem generis* with a Will, and a decree passed by a Civil Court is not an instrument within the contemplation of the section. **BAI HAKOR v. BAI SHANGAR**, 18 B. 375.

(129)—S. 39—*Appeal.*—There is no appeal against an order refusing to remove a guardian even if the applicant prays for the appointment



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of himself as guardian instead, PRAN BANDHU SINGH v. BRAHMAMAYI DASIA, 1 C.W.N. 693.

(130)—S. 39—See NOS. 38, 39, 68, 78, 104, 119, 121, *supra*.

(131)—Ss. 39, 47 (f, g)—*Order refusing to remove a guardian, whether appealable.*—An order refusing to remove a guardian, though an order under s. 39 does not fall within the terms of s. 47 in regard to the right of appeal against it. So, such an order is not appealable under cls. (f and g), s. 47. PAKHWANTI DAI v. INDRA NARAIN SINGH, 23 C. 201. (19 C. 487, F.)

(132)—S. 41 — *Death of guardian — Suit against guardian's son by ward for rendition of account.*—A ward cannot sue the son of his late guardian for a rendition of accounts. MAN-MOTHONATH BOSE MULLICK v. BASANTO KUMAR BOSE MULLICK, 22 A. 332 = A.W.N. 1900, 98. (A.W.N. 1882, 6 R.)

(133)—S. 41—*Guardian—Order of discharge by Court—Effect of.*—A declaration made by the Court under s. 41 of the Act discharging a guardian from liability, has the effect of protecting the guardian from all suits in connection with the management of the minor's property, except in the case of fraud discovered after the declaration. MURLIDHAR NATHA v. VALABHDAS MURLIDHAR, 11 Bom. L.R. 512 = 33 B. 419 = 3 Ind. Cas. 172.

(134)—S. 41—See NOS. 96, 118, 120, *supra*.

(135)—S. 41 (3) — *Joint Hindu family—Family property under the guardianship of the Nazir—One co-parcener attaining majority—Share of such co-parcener—Guardian's power to keep his property in lieu of some debts of his.*—No appeal lies from an order passed under s. 41, cl. 3, of the Guardians and Wards Act, 1890. A member of a joint Hindu family, the property of which was under the guardianship of the Nazir of the Court applied on attaining his majority, to have his share in the property entrusted to him. The District Judge ordered that his share should be made over to him, but the guardian should secure to himself and keep with him certain property in respect of a debt which the member owed to the other member of the family: *Held*, that the order was illegal and made without jurisdiction. BASALINGAPPA v. NAZIR, 1 Bom. L.R. 822.

(136)—S. 41 (3)—*Accounts, suit for, against deceased guardian's representatives, not maintainable—Practice — Plaintiff unable to prove his assertions—Suit to be dismissed.*—A wards suit against the widow and minor sons of his late guardian for rendition of accounts is not maintainable. (22 A. 332, F.; 1 Ind. Cas. 333 = 11 Bom. L.R. 190, 7 Ind. Cas. 214, D.; 5 C.W.N. 207, R.) It is not the business of the Courts to do a plaintiff's work for him, and if a plaintiff is unable to produce exact proof of his vague assertions, his suit should be dismissed. PRITAM SINGH v. SARDAR MUBARAK SINGH, 78 P.L.R. 1911 = 9 Ind. Cas. 591 = 74 P.W.R. 1911.

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(137)—S. 41 (3)—*Guardian and Ward—Removal of guardian—Return of property of minor.*—The Court, at the time of removing a person from guardianship, passed an order directing him to give up property of the minor in his possession. He contended that he should not be compelled to give up certain land, because he had purchased it from the minor's grandmother and set up his own title before having been appointed guardian. It appeared that mutation had been refused on the ground that the alienation was of a suspicious nature, and he only got possession in consequence of being appointed guardian, though he did not mention this property in the list and never accounted for it. *Held*, that he must, without prejudice to title or to anything he could establish by suit, be compelled to give up possession on ceasing to be guardian. PARMAN NAND v. ARURA RAM, 33 P.L.R. 1912 = 112 P.W.R. 1912 = 14 Ind. Cas. 674.

(138)—Ss. 41 (3) and 45—*Summary procedure — Guardian managing ward's property through a gumasta appointed with Court's sanctions—Defalcations by gumasta — Guardian's liability—Practice.*—S. 41 (3) of the Act provides for a very summary procedure, which can only be applied without hardship in cases where there is no room for reasonable doubt as to the guardian being in possession of certain property of the ward. The clause refers to the property in the actual possession or control of the guardian; and does not include all property for which he may, by the application of the law of principal and agent, be made legally responsible. The remedies for contumacy and recusancy provided by s. 45 of the Act are altogether inappropriate where a *bona fide* question, e.g., the guardian's liability for defalcations made by a *gumasta* appointed by him with the Court's sanction to manage the ward's property arises. MOTILAL KALAYANDAS v. BAI ICHHA, 11 Bom. L.R. 190 = 1 Ind. Cas. 338.

(139)—Ss. 41 (3), 51—*Attainment of majority by ward before Act came into force—“Guardian,” meaning of.*—Act VIII of 1890 (Guardian and Wards Act) has no application to guardians whose powers had ceased by reason of their words having attained majority, or otherwise, prior to the passing of the Act. The word “guardian” in s. 51, when read with the definition thereof in s. 4 (2) of Act VIII of 1890 can only mean a guardian who was such at the time when the Act came into force. VALLABDAS HIRACHAND v. KRISHNA BHAI, 17 B. 566.

(140)—S. 41, cl. 4—*Guardian's liability to render accounts—Suit for accounts.*—Where a previous guardian failed to deposit the process fee, which he was required to put in, for the purpose of notice being given to the succeeding guardian to come in and inspect the accounts, and the Court has made no order declaring the previous guardian to be discharged under s. 41, cl. 4 of the Act, a suit lies for the purpose of



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calling upon the previous guardian to render accounts. The mere fact that the succeeding guardian has neglected to inspect those accounts, although they were lying in the Court for about a year, is no legal bar to the suit being maintained. Although a question, as to whether certain properties, in respect of which accounts are claimed, really belonged to the estate of the minor or to the previous guardian personally, is a question of right, which cannot properly be gone into in such a suit, still, for the purpose of taking an account, it must be seen what are the properties, which the previous guardian took possession of, as guardian of the minor under the orders of the Court; and he is bound to render an account, in respect of all the properties, of which he received charge as such guardian. **KANIZ FATIMA v. SAJJAD HOSAIN, 34 C. 211.**

(141)—S. 42—See No. 50, *supra*.

(142)—S. 43—*Powers of Courts in respect of guardians regulated and limited by Guardians and Wards Act, 1890.*—New points can be taken, with the leave of the Court on appeal. The practice of the Court is not to refuse absolutely to hear argument on new points raised for the first time on appeal, especially when the new objection goes to the root of the matter. (U.B.R. 1882—1896, Vol. II, 265, 447, *F*.) Consent of parties cannot confer jurisdiction. Where the defendant is not a guardian appointed or declared by the Court, the District Court has no power to make an order regulating his conduct under s. 43 of the Guardians and Wards Act; and the Court has no power to make such an order in the exercise of any jurisdiction apart from that conferred by the said Act. **MAUNG PO GAUNG v. MA NYUN, U B.R. 1897—1901, Vol. II, 435. (16 B. 307, R.)**

(143)—S. 43—*Order against trustee—Jurisdiction.*—The District Court has no authority, under 33 of Act VIII of 1890, to make any order against trustees. **ASHRAFI KUAR v. JAI NARAIN, 6 Ind. Cas. 862.**

(144)—S. 43—See No. 91, *supra*.

(145)—Ss. 43, sub-secs. (1), (4), 45, sub-sec. (1), cl. (a)—*Minor, marriage of, in contravention of Court's order—Disobedience—Injunction—Order for appointment of guardian without jurisdiction—Jurisdiction.*—The petitioners were appointed guardians of a minor. At the time the order was made, it was directed that the minor should not be married without the consent of a certain person and without the leave of the Court. The petitioners, however, got the minor married in violation of the direction. Thereupon the guardians were called upon to produce the minor in Court. That order, however, could not be carried out because at the time the order was passed the minor was with the family of her husband. The petitioners were therefore fined under s. 45, sub-sec. (1), cl. (a) of the Guardians and Wards Act. *Held*, that, as the order for the production of the minor in Court was not made either under sub-section (1) of s. 12 or

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sub-section (1) of s. 25, s. 45, sub-section (1), cl. (a) had no application, and the order was without jurisdiction. *Held* also, that action under sub-section (4) of s. 43 of the Guardians and Wards Act was competent. *Held* further, that as the original order was made without jurisdiction, no proceedings could be taken under sub-sec. 4 of s. 43 of the Guardians and Wards Act. Sub-section (1) of s. 43 of the Guardians and Wards Act is not limited solely to cases where an irreparable mischief has not been done and where, therefore, the *status quo ante* might be restored; it applies to all cases of disobedience, whether or not the effect of the disobedience is capable of removal or reparation. *Quare*:—Whether it is open to a District Judge to give any directions to the guardian, under the Guardians and Wards Act, relating to the marriage of the infant. Before proceedings can be taken on account of disobedience of an injunction issued by Court, it must be ascertained that the Court had jurisdiction over the subject-matter in controversy. If the Court has no jurisdiction over the matter or if it has exceeded its powers by granting an injunction in matters beyond its jurisdiction, the injunction is absolutely void and the person who has disobeyed it cannot be punished for the alleged offence. There is a distinction between an order erroneously made with jurisdiction and an order made absolutely without jurisdiction. **SUBHADRA KOER v. DHAJADHARI GOSWAMI, 15 C.L.J. 1 Ind. Cas. 380.**

(146)—S. 43 (4)—See CIV. PRO. CODE, 1908, O. XXXIX, r. 1, O. XL, rr. 1, 2, 3, 23 M. 517 = 10 M.L.J. 305.

(147)—S. 45—*Termination of guardianship by minor attaining majority, effect of, on jurisdiction of Court.*—The fact that one of the minors under the guardianship has ceased to be a minor does not preclude the District Judge from taking action, under s. 45 of the Act, and requiring the guardian to deliver up any property of the ward that might be in his possession or under his control. **ABDUL RAHMAN SAHIB v. ABDULLA SAHIB, 16 M.L.J. 286. (5 C.W.N. 207, D.)**

(148)—S. 45—See NOS. 57, 57-a, 121, 138, 145, *supra*.

(149)—S. 46—*Practice—Procedure—Reference to Munsiff to record evidence and submit report—Report of Munsiff treated by Judge as evidence—Refusal to appoint guardian.*—Where an application was made to the District Judge by a pardanashin lady to be appointed guardian to her minor son, and after fixing a date for hearing the application, the District Judge, under s. 46 of the Guardians and Wards Act, sent the case to the Munsiff to take evidence and to report as to the fitness of the lady, and the Munsiff acted as directed, and the Judge, treating the Munsiff's report as evidence and upon the objection of the minor who was also examined, rejected the application, and the lady was not appointed guardian, *held* that the procedure



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was regular and legal. **JANAKRAJ KUARI v. PATESHRI PARTA NARAIN SINGH**, 7 A.L.J. 328=6 Ind. Cas. 565. (23 B. 698, 26 B. 716, D.)

(150)—S. 46—*Report—Evidence—Effect of the report.*—Apart from s. 46 of the Guardians and wards Act the report called for by the District Judge is not evidence. A Collector giving an opinion in reply to a letter of the District Judge asking whether he would undertake the management of the property does not send “a report.” A Judge has no discretion to refuse to take evidence, if offered to rebut the effect of the report (s. 13). **GANGAWA v. SANNA**, 4 Bom. L.R. 800.

(151)—S. 46—*District Judge—Trial of issues by subordinate Judge—Evidence—Report—Irregularity—Voidability of proceedings—Practice.*—In a proceeding under the Guardians and Wards Act, 1890, it is not competent to a District Judge to fix a day for hearing before a subordinate Judge and to direct that Court to take evidence and report on the whole case; since he is not authorized by the Act to dispense with the hearing of the evidence by himself and transfer the whole investigation of material issues of fact to the subordinate Court. Such an error in procedure vitiates the whole inquiry. **NARAYAN v. RAMCHANDRA**, 4 Bom. L.R. 511=26 B. 716.

(152)—S. 46—See NOS. 59, 68, 90, *supra*.

(153)—S. 47—*Order of District Judge refusing to remove guardian, whether appealable.*—There is no appeal against an order of a District Judge refusing to remove a guardian, for it does not fall within any of the cases mentioned in s. 47 of Act VIII of 1890. S. 47 gives an appeal in certain cases. **MOHIMA CHUNDER BISWAS v. TARINI SHUNKER GHOSE**, 19 C. 487. [F., 23 C. 201; D., 19 A. 131; R., 20 A. 433=A.W.N. 1898, 97.]

(154)—S. 47—See NOS. 27, 40, 61, 97, 131, *supra*.

(155)—Ss. 47, 48—*Indian Majority Act (IX of 1875), s. 3—Order made under the Guardians and Wards Act by a Judge in chambers can be altered, rescinded or set aside—The period of minority does not extend to twenty-one years by the setting aside of such order.*—S. 48 of the Guardians and Wards Act is intended to give finality to contested orders and to enact that once an order is made, except as provided in s. 47 and saving the provisions of s. 622 of the Civ. Pro. Code, the order shall be final and shall not be contested by a substantive suit or by any other form of litigation. The Guardians and Wards Act makes no provision for setting aside an order made under the Act. But if such an order is made by the Judge sitting in chambers, he has the power to vary, alter, modify, rescind, recall, or set aside, the order if he finds that it is one that requires in the interest of justice to be dealt with in that way, or if he is satisfied that it is one that ought

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not to have been made. If an order appointing a guardian is made and subsequently it is set aside, on the ground either that it was improperly obtained or erroneously made and that it was an order bad *ab initio* and one that ought never to have been made, the period of minority under the provisions of s. 3 of the Indian Majority Act is not extended to twenty-one years. **NAGARDAS v. ANANDRAO**, 9 Bom. L.R. 493=31 B. 590.

(156)—Ss. 47, 48—*Proper course for setting aside of compromise decree—S. 443, Civ. Pro. Code, 1882 (=O. XXVII, r. 3, new Code—Widow appointed by District Judge, guardian of minor adopted son—Right of widow to bring suit to set aside adoption.*—A compromise by the guardian without sanction granted by Court after a judicial determination that it was for the minor's benefit, can be set aside only by way of an application for review or by irregular a suit, and not by way of appeal. An appellate Court can determine the appeal only upon the materials on record. (5 C.W.N. 877, F.) Where a widow has been appointed by the District Court, under Act VIII of 1890, guardian of a minor as her husband's adopted son, s. 48 is no bar to a suit by her for a declaration that the said minor was not the adopted son of her husband. Such a suit is clearly contemplated by s. 443, para 2, Civ. Pro. Code, 1882. Such a suit is maintainable, even if the widow has been appointed guardian by her own consent. **RAKHAL MONI DASSI v. ADWYTA PROSAD ROY**, 30 C. 613=7 C.W.N. 419.

(157)—Ss. 47, 48—*Appeal—Minor's property in possession of third person—Remedy of guardian—Suit—Practice.*—There is no provision in the Guardians and Wards Act authorizing a Court to compel a person in possession of a minor's property to hand over the property to the person appointed guardian of the minor's property. No appeal lies against an order of the District Judge declining to compel a person in possession of a minor's property to hand it over to the guardian and referring the guardian to a separate suit. **NATHU RAM v. KARMON**, 40 P.L.R. 1912=13 Ind. Cas. 326=115 P.W.R. 1912.

(158)—Ss. 47 (g), 48—*Order refusing to remove guardian—Appeal.*—The effect of ss. 47 (g) and 48 of Act VIII of 1890, is to allow no appeal from an order refusing to remove a guardian. *In re BAI HARKHA*, 20 B. 667. [F., 20 A. 433=A.W.N. 1898, 97.]

(159)—Ss. 47, cls. (i) and (j)—*Appeal.*—R, having been removed by order of Court from the guardianship of the property of a minor, produced accounts the correctness of which was objected to by the minor's mother. The District Judge declined to enquire into the correctness of the accounts filed by R: *Held*, that no appeal lies from the District Judge's order. **CHAMBELLIA v. RAM DULARE**, 1 O.C. 48.



### Guardians and Wards Act (VIII of 1890) —concluded.

(160)—S. 48—See SPECIFIC RELIEF ACT, 1877, s. 42, 24 P.L.R. 1900.

(161)—S. 48—See NOS. 40, 45, 88, 155, 156, 157, 158 *supra*.

(162)—S. 50—See ACT IX OF 1875, s. 3, P. L.R. 1900, p. 419.

(163)—S. 51—See NO. 139, *supra*.

(164)—S. 52—Act IX of 1875 (*Indian Majority Act*, s. 3—Guardian and minor—Effect of appointment of guardian—Civ. Pro. Code, s. 440.—Where a guardian has once been appointed under the provisions of Act VIII of 1890, the attainment of majority by the ward is postponed, until he reaches the age of twenty-one years, notwithstanding that the guardian appointed by the Court may be discharged before that time arrives. *SADHO LAL v. MURLIDHAR*, A.W.N. 1937, 213=4 A.L.J. 597=29 A. 672. (21 B. 281, F.; A.W.N. 1891, 118, D.

(165)—S. 52—See ACT IX OF 1875, s. 3, 21 B. 281.

(166)—S. 52—Guardian appointed under—Competency of minor to make will—See WILL—GENERAL, 6 Ind. Cas. 6.

(167)—S. 52—See NO. 41, *supra*.

(168)—S. 53, *Guardian ad litem*.—S. 53, Act VIII of 1890, amending Civ. Pro. Code, expressly requires the appointment of a guardian *ad litem* in a suit against a minor, whether or not a guardian is appointed under Act VIII of 1890. Otherwise, the decree in that suit would be illegal. *DAKESHUR PERSHAD NARAIN SINGH v. REWAT MEHTON*, 24 C. 25.

(169)—S. 53—See CIV. PRO. CODE, 1908. O. XXXII, rr. 1, 4 (2) 9 Bom. L.R. 553=31 B. 413.

### Guardianship.

See GUARDIAN.

See GUARDIAN AD LITEM.

See GUARDIANS AND WARDS ACT, 1890.

See LUNATIC.

See MINOR.

### Gujarat Taluqdars Act, Bombay.

See BOM. ACT VI OF 1888.

### Gum.

Lease of—trees—Registration—Whether necessary—See REGISTRATION ACT, 1908, s. 2, 5 M.L.J. 27.

### Gumastah.

(1)—Debt due to firm—Suit by gumastah—A gumastah of a firm cannot sue as representing the firm. *THAKUR DASS v. GULAM MOHYUDDIN*, 20 P.R. 1882. [R., 8 P.R. 1886; Cons. & Disc., 156 P.R. 1889.]

See ACT XX OF 1863, ss. 3, 18, 4 M.H.C. 410.

### Gumastah—concluded.

Assignee of landlord—Right to sue—See BEN. ACT X OF 1859, s. 24, 6 B.L.R., App., 17.

Receipt of rent by landlord's gumastah from various tenants—Division of holding—See BEN. ACT VIII of 1885, ss. 65, 88, 6 C.W.N. 823.

Rent receipt signed by landlord's—Containing certain recital, effect of—See BEN. ACT VIII OF 1885, s. 88, 25 C. 533, Note.

See CIV. PRO. CODE, 1908. O. III, r. 1, s. 85, O. III, rr. 2, 3, O. XXVII, r. 2, 5 B.L.R. App., 11=13 W.R. 345.

See GRANT—CONSTRUCTION, 12 B. 80.

Deshmukh and gumastah—Right of former to dismiss latter—Hereditary office—See HEREDITARY OFFICE, 16 B. 374, P.C.=19 I. A. 39.

If can bind landlord by recognising transferee of *jote*—Burden of proof—See LANDLORD AND TENANT—TRANSFER OF TENANTS' INTEREST, 15 C.W.N. 953.

Suit in the name of—Ben. Act VIII of 1869 s. 32—See PARTIES TO SUITS—GENERAL, 9 C. 450=12 C.L.R. 55.

See PARTIES TO SUITS—GENERAL, 2 Agra. 101, 2 Agra. Mis. 4.

See PRIVY COUNCIL, PRACTICE OF—COSTS, 5 W.R. 33, P.C.=1 M.I.A. 351.

Non-resident trader carrying on business through resident gumastah—How the conduct of gumastah may amount to an act of insolvency by the principal—See ST. 11 & 12, VIC. C. 21, 23 C. 26, P.C.=22 I.A. 162.

See ST. 11 & 12, VIC., C. 21, s. 9, 20 C. 771.

See ST. 11 & 12, VIC., C. 22, s. 9, 5 C. 605=6 C.L.R. 387.

Gumastah's sunnad—Stamp—See STAMP ACT, 1862, sch. A, art. 43, 1 B.L.R. F.B.. 55=10 W.R., F.B.. 39.

### Gunja.

This circular draws attention to rules regarding the weighment of gunja. Rev. Cir. No. 4, 22 W.R. Rev. Cir. 5.

### Gunti-tenure.

Grant of permanent—Resumption by Government and temporary settlement with heirs of former proprietor—Effect on right of lessee under grant—Parties—See BEN. ACT VIII of 1879, s. 10, 30 C. 811, P.C.=7 C.W.N. 601.

### Guru.

See JURISDICTION OF CIVIL COURTS, 19 M. 62=5 M.L.J. 209.

Alienating Muth property—See LIMITATION ACT, 1908, art. 134, 4 Bom. L.R. 743=27 B. 363.



### Guzara Land.

(1)—*Guzara land, Suit for possession of—Estate for life—Grant for maintenance in perpetuity, how to be construed—Award by British Indian Association—Oudh Estates Act of 1869, s. 33.*—The plaintiff's great-grand-father granted a village as *Guzara* to the defendant's father. Subsequently in consequence of certain disputes the plaintiff's grand-father agreed to give the defendant's father a further cash allowance which was changed for land. The plaintiff brought a suit against the defendants to recover possession of this land on the ground that the grant was only for the life of the defendant's father. *Held*, that the grant was for life only and that the plaintiff was entitled to possession. When the purpose of the grant is '*Guzara*' or the maintenance of the grantee, it is immaterial whether the words 'in perpetuity' or words to that effect appear, and the grant must be taken to be for life only. Upon the facts found, the Court held that there had been no award by the British Indian Association and that the rules of that body did not apply. **RAJA RAMESHAR BAKHSH SINGH v. BABU BHAGWAN BAKHSH SINGH, 7 O.C. 90.**

### Gya.

Pilgrimage to—Whether a pious duty—See **HINDU LAW—ALIENATION, 21 C. 190, Note.**

Alienation by widow—Necessity—Sradhat—See **HINDU LAW—ALIENATION, 11 B.L.R. 118=19 W.R. 426.**

### Habeas Corpus.

(1)—*Mahomedan Law—Habeas Corpus—Marriage of infant girl without consent of apostate father—Custody of wife—Ben. Act IV of 1866, s. 31—Order of Magistrate.*—A writ of *habeas corpus* was issued to one S commanding him to produce before the Court an infant M, who was alleged to be unlawfully detained in his custody. The writ was issued upon an affidavit of C in which he stated that M was his daughter, that he was a Jew by birth, but had embraced the Mahomedan faith about 35 years before suit, that about 16 years before suit he married one J, a Mahomedan, by whom he had four children, one of whom was M, an infant then of the age of about nine years; that M was detained by S upon the allegation that she was married to him; that the said marriage was invalid and illegal, C never having given his consent to it and that he had returned to the Jewish creed about 2½ years before suit. The return to the writ showed that C and his wife, the infant's mother, having carried her off from S's house, the latter made a complaint against them at the Police Court under s. 31 of Ben. Act IV of 1866 and that, the question as to the marriage having been raised, the Magistrate took evidence and found that a marriage had taken place, and had accordingly ordered the infant to be given up to S, her husband, which was done. *Held*, that the girl, in the custody of S, her husband, was not in illegal custody and that the writ should therefore,

### Habeas Corpus—continued.

be quashed. To validate the marriage of a Mahomedan infant girl, the consent of her father who has become an apostate from the Mahomedan faith is not necessary and the consent of her mother who is a Mahomedan woman is sufficient. Under the Mahomedan law, although the mother's custody of an infant wife who has not attained puberty may be legal, custody by the husband is not necessarily illegal. *In the matter of MAHIN BIBI, 13 B. L.R. 160.*

(2)—*Habeas corpus, Writ of—Minor—Discretion—Return to writ of habeas corpus—Affidavit.*—The writ of *habeas corpus ad subjiciendum* is in its aim single. It has for its object the vindication of the right of personal liberty. It is issued for the purpose of taking care that no subject of the Queen shall be illegally confined against his will. It is issued on behalf of the person said to be illegally confined. It is not issued for the purpose of lending the arm of the law to any person claiming to have authority over him. It is only where the person confined is under any personal disqualification, that the guardian or protector is looked to in the enquiry; and in such a case, the Court considers that it sets the person confined at liberty by handing him over to the charge of his rightful guardian. The return to a writ of *habeas corpus* must be taken to be true, and cannot be controverted by affidavit. In England, 56 Geo. III, c. 100, s. 4, allows affidavits to be used to controvert the return in criminal matters, but that statute does not apply to India. The return to a writ of *habeas corpus*, can however be amended. In this country, as in England, a girl under 16 years has not a discretion such as enables her by giving her consent to protect any one from the criminal consequences of inducing her to leave the keeping of a lawful guardian; in other words, she is not allowed by law to choose for herself. **THE QUEEN v. VAUGHAN, 5 B.L.R. 418. [R., 5 B.L.R. 557, 9 M. 391.]**

(3)—*Habeas corpus—Detention of prisoner in custody—Regulation III of 1818, applicability—Act XXXIV of 1850—Act III of 1858, 3 and 4 Will IV, c. 85, s. 43.*—Where a prisoner is in custody of a Jail Superintendent under a writ in the form given in s. 2 of Regulation III of 1818, his detention is legal. In the Regulation, there is no mention of the original reception of the prisoner and it was the plain meaning of the legislature that a detention covered by an actually existing warrant of the Governor-General in Council couched in the terms prescribed by the section should be legal without regard to the facts which had antecedently occurred. The Regulation is not confined to the cases of political prisoners who are aliens; it extends to natural born subjects of the Queen in this country, where reasons of State are supposed to exist for their confinement. [R., 29 C. 286, 37 C. 467=14 C.W.N. 1115, 15 C.W.N. 1053.] Whatever doubts may have existed as to the legal force of Regulation III of 1818 have been set at rest by the enactment of Acts XXXIV of 1850 and III of 1858 which have



**Habeas Corpus—concluded.**

expressly re-enacted the substance of the Regulation, and, in these enactments, the Indian Legislature has in no wise exceeded the powers conferred on it by the Stat. 3 and 4, Will. IV, c. 85, s. 43. *In the matter of AMEER KHAN*, 6 B.L.R. 459.

(4)—*Reg. III of 1818 (B.C.)—Jurisdiction of High Court—Charter Act, 1865.*—The High Court has jurisdiction to issue a writ of *habeas corpus* into the mofussil. The issuing of this high prerogative writ of *habeas corpus ad subjucendum* is not a matter of ordinary original civil jurisdiction. In England, it issues on the Crown side of the Queen's Bench, and in the Supreme Court, the motion for such *habeas corpus* was made in the Supreme Court, and not on any side, such as the plea side or the equity side of the Court. The limits within which such writs can be issued are not affected by the 11th clause of the Charter of 1865. The local limits within which such *habeas corpus* may be issued depend on the jurisdiction which the late Supreme Court possessed under the Charter of 1774. *In the matter of AMEER KHAN*, 6 B.L.R. 392. [F., 37 C. 467=14 C.W.N. 1115.]

(5)—*Issue of writ of—Practice as to—Powers of Supreme Court of Bombay.*—The Supreme Court of Bombay has no power to issue a writ of *habeas corpus* except when directed to a person resident within those local limits wherein it has a general jurisdiction, or to a person out of those limits who is personally subject to its jurisdiction. The Supreme Court has no power to issue a writ of *habeas corpus* to the gaoler or officer of the native Court as such officer, it having no power to discharge persons imprisoned under the authority of a native Court. The Supreme Court is bound to notice the jurisdiction of a native Court without having it set forth specially in the return to a writ of *habeas corpus*. *In re JUSTICES OF THE SUPREME COURT OF JUDICATURE, BOMBAY*, 1 Knapp. 1.

(6)—*Habeas corpus—Return—Contradiction.*—The return to a writ of *habeas corpus* is not necessarily conclusive as to the facts stated therein. It does not preclude enquiry into the truth of the matters alleged therein, although 56, Geo. III, c. 100. does not apply to India. *In the matter of KHATIJA BIBI*, 5 B.L.R. 557.

(7)—*Habeas corpus—Perpetual suspension.*—*In re AMEER KHAN AND HASHMADAD KHAN*, 6 M.J. 68.

See ARREST, 1 C. 78.

Minor—Education and prospects—Change of religion—Natural guardian—Conduct—See CUSTODY OF CHILDREN, 16 B. 307.

See MAHOMEDAN LAW—MARRIAGE, 13 B.L.R. 160.

**Hackney Carriage.**

Dispute between hirer and letter of hackney carriage—Jurisdiction—See ACT XIV OF 1879, s. 9, A.W.N. 1893, 203.

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**Hackney Carriage Act.**

See ACT XIV OF 1879.

**Hak.**

See TODA GARAS HAK.

See ACT XXIII OF 1871, ss. 4, 11, 16 B. 731.

**Hak Chaharum.**

(1)—*Halk Chaharum, in execution sales, Zamindar's right to.*—In execution of a decree a grove was sold. The zamindar claimed a fourth of the sale price plus the encumbrance notified as his Hak Chaharum established by custom. *Held*, that the custom entitling him to Hak Chaharum in the case of private sales, does not of itself confer this right in the case of execution sales, without proof of special custom entitling him to the same in the case of execution sales. BHAGWANTA v. MOHAMMAD MUMTAZ ALI KHAN, 1 O.C. 2. (Oudh Rulings, 2nd Ed., Ap. VII, Diss.; 6 A. 47, F.) [Rel. on, 13 O.C. 366.]

(2)—*Haq Chaharum, liability of vendee to the landlord for—Wajib-ul-arz.*—*Held*, that, unless the right of the landlord is limited by the *wajib-ul-arz* to right to claim *haq-i-chaharum* from the vendor, the right can be enforced against the vendee also. UTRI DIN v. MUNSHI PRAG NARAIN, 11 O.C. 84. (A.W.N. 1901 61, Not F.)

**Hakhuha.**

See PUN. ACT XVII OF 1887, s. 3 (10), 11 P.R. 1880, Rev.

**Halalkore Tax.**

Notice essential to levy—See BOM. ACT II OF 1884, s. 57, 20 B. 732.

**Half-blood Relations.**

See HINDU LAW—INHERITANCE, 2 Bom. L.R. 139=24 B. 317.

**Half Notes.**

Effect of sending, to creditor—See DEBTOR AND CREDITOR, 5 M.L.T. 82=19 M.L.J. 283=2 Ind. Cas. 611.

**Hamesha.**

See DEED—CONSTRUCTION OF DEEDS, 23 A. 324=11 M.L.J. 160=28 I.A. 65, P.C.

**Handwriting.**

Value of opinion of expert in—See BANKER AND CUSTOMER, 8 Ind. Cas. 98.

Comparison of, by expert—See CIV. PRO. CODE, 1908, s. 20, 62 P.R. 1897.

See DEED—EXECUTION OF DEEDS, 11 B. 690.

Correspondence with other evidence, a test of genuineness—Comparison of—See EVIDENCE—ACCOUNTS, 16 A. 157=21 I.A. 6, P.C.

Proof of—See EVIDENCE ACT, 1872, s. 47, 5 Bom. L.R. 663=28 B. 58.



**Handwriting—concluded.**

Expert in—See EXPERT, 9 Bom. L.R. 819=31 B. 430.

Meaning of—in s. 20, Limitation Act, 1908—See LIMITATION ACT, 1908, s. 20, 5 L.B.R. 108=4 Ind. Cas. 374.

Evidence of—Test of genuineness of signature—See MORTGAGE—REDEMPTION, 3 Ind. Cas. 291.

**Hansard's Reports.**

Admissibility of, in evidence—See LIBEL, 14 C.W.N. 713=6 Ind. Cas. 81=37 C. 760.

**Haq.**

See HAK.

**Haq Buha.**

Suit for the recovery of—Jurisdiction—See PUN. ACT XVI OF 1887, ss. 4, cl. (12), 77 (3) (j), 95 P.R. 1907, Footnote=120 P.L.R. 1908. note.

Suit for declaration that plaintiffs who are occupancy-tenants, are not liable to pay—Jurisdiction—See JURISDICTION OF REVENUE COURTS, 33 P.R. 1908, F.B.=83 P.W.R. 1908=171 P.L.R. 1908.

**Haqq Levy of, etc., Act, Bombay.**

See BOM. ACT XX OF 1839.

**Haqtora.**

See SMALL CAUSE COURT MOFUSSIL JURISDICTION OF—GENERAL, 33 P.R. 1887.

**Harbour of Bombay Rules.**

(1)—*Vessel's duty to show lights.*—Rules of Bombay harbour with regard to the showing of lights by vessels in the harbour considered. Independently of special regulation or legislation, there is no general obligation by maritime law in sailing vessels, either under way or at anchor, to carry a light throughout the night, although, for the sake of avoiding a misfortune, it may, under particular circumstances, become their duty to carry or show a light. Although that is so, yet the Court will go some way to treat the dark boat as the wrong-doer; and if a vessel by either under way or at anchor at night in a channel, fair way, or ordinary track or path of other vessels, she is bound by general maritime law either to carry or show a light, in order to indicate her position, when other vessels are approaching her, and in sufficient time to enable them to avoid her. MUHAMMAD YUSUF v. PENINSULA AND ORIENTAL STEAM NAVIGATION COMPANY, 6 B.H.C. O.C., 98.

**Harbour Trust Act, Madras.**

See MAD. ACT II OF 1886.

**Harbour Trust Board.**

Liability of, to maintain hartour works—Injury caused by the seas in consequence of existence of harbour, board not liable in damages for—See MAD. ACT II OF 1886, 23 M. 389=9 M.L.J. 370.

**Hard Bargains.**

Unless they amount to fraud cannot, be relieved against by English Equity Courts—See FRAUD—FRAUD, ELEMENTS OF, PROOF OF, 8 Bom. L.R. 491=3 A.L.J. 495=10 C.W. N. 849=9 O.C. 188.

**Hardship.**

Interpretation of statutes—Question of hardship—See STATUTES, CONSTRUCTION OF, 24 A. 532, F.B.=A.W.N. 1902, 112.

**Hats.**

(1)—S. 2, cl. 5, General Clauses Act, 1868—“*Hat*,” immovable property—A hat is a benefit arising out of land, and falls within the definition of immovable property as given in s. 2, cl. 5 of the General Clauses Act, 1868. SURENDRA NARAIN SINGH v. BHAI LAL THAKUR, 22 C. 752.

(2)—*Hat, Mortgage of, if valid*—Covenant the mortgage will subsist on removal of hat—Rights of purchasers at mortgage-sale and certificate sale.—The rents and profits derivable from a hat can be validly mortgaged. The defendant's purchase of a hat at a certificate sale, was therefore subject to a plaintiff's purchase of the same at a mortgage sale, and the latter was entitled to have possession of the hat from the former. A covenant in the mortgage that it should subsist notwithstanding the removal of the hat to another shop, whether valid or not, did not affect the plaintiff's right as, at the time of his purchase, the hat was in the same place in which it existed at the time of the mortgage. SYED GOLAM MOHIUDDIN HOSSEIN v. MUSST. PARBATI, 13 C.W.N. 596=36 C. 665=1 Ind. Cas. 520.

See SPECIFIC RELIEF ACT, 1877, s. 9, 29 C. 614.

**Hatchitta.**

(1)—*Frame of suit—Hatchitta.*—On the lower appellate Court dismissing a suit, brought to recover a sum of money due on an adjusted account, for which it was alleged that the defendant had signed a hatchitta, on the ground that the defendant never signed the hatchitta and that the plaintiff's had filed to prove their case, held, that regard being had to the frame of the suit, the plaintiff's ought not to be allowed to ask the Court to determine whether the original debt for which the hatchitta was given had been paid off as the defendant alleged and the suit could not be treated as a suit for the original debt. GOSSAIN RAM KISSAIN PURI v. MIAH JAN SHEIK, 1 C.W.N. 710.

Suit on—Interpolation in entry of acknowledgment of debt—Interpolation regarding interest—Effect of such interpolation—See CONTRACT—ALTERATION OF CONTRACTS, 9 C.W. N. 695.

See STAMP, 23 A. 851.

**Hath.**

Profits from not liable to roadcess—See BEN. ACT IX OF 1880, s. 4, 5 Ind. Cas. 254.



**Havala.**

Stamp on—See STAMP ACT, 1899, arts. 23, 24, 4 Bom. L.R. 951=27 B. 150.

**Hazaribagh Lohardugga Rural Police Act, Bengal.**

See BEN. ACT VIII OF 1878.

**Headman of Village.**

Acts of, to bind co-sharers—See PRINCIPAL AND AGENT—AUTHORITY OF AGENTS, Agra, F.B., 31=Ed. 1874, 23.

**Head of Mutt.**

Patrika issued by—Stating that a certain sect are not entitled to perform vedic rites—See DEFAMATION, 6 M.L.J. 58.

**Hearing.**

Munsarim's power to fix date for—See REVISION—GENERAL, 13 O.C. 341=8 Ind. Cas. 876.

**Hearsay Evidence.**

See EVIDENCE—HEARSAY EVIDENCE.

See EVIDENCE ACT, 1872, ss. 32, 33.

**Heir.**

(1)—*Heir of deceased debtor, Liability of.*—A deceased debtor's heir is only liable to pay the debt out of the property of the deceased which comes into his hands. RASH MUN. JOREE CHOWDHRAIN v. RADHA SOONDUREE DOSSEE, 23 W.R. 283.

(2)—*Reg. XXIX of 1802, s. 7—Heirs.*—In s. 7 of Reg. XXIX of 1802, the term "heirs" means persons who, in the event of death, would inherit from their preceding incumbent. ARUMUGAM v. VIJAYAMMAL, 4 M. 338.

Joinder of causes of action in suits against—See CIV. PRO. CODE, 1908, O. II, rr. 4, 5, 8 Bom. L.R. 734=31 B. 105.

Liability of heirs of tenant—See LANDLORD AND TENANT—TENANT'S LIABILITY FOR RENT, 7 Ind. Cas. 840=12 C.L.J. 642.

Suit for possession as—Impleading of different alienees in one suit—See MISJOINDER OF PLAINTIFFS AND CAUSES OF ACTION, 167 P.L.R. 1911.

Gross negligence—Liability of heir—See NEGLIGENCE, 20 A. 74, Note.

Wrong person sued as heir of a deceased person—True heir not taking steps for a long time—Effect—See NON-JOINDER OF PARTIES, 10 Ind. Cas. 344.

**Heiress**

Legal representative including widow and heiress—See CIV. PRO. CODE, 1908, s. 52, 22 C. 259.

**Hereditary Allowance.**

(1)—*Suit for share in—Plea by defendant of thirty years possession—Lapse of time, no bar.*

**Hereditary Allowance—concluded.**

—In a suit brought for a share in an hereditary family allowance, where the defendants pleaded possession for more than thirty years. *Held* that the lower appellate Court was in error in holding that "If a claimant is proved to be one of the *bhauband* of the defendants, no lapse of time since the active enjoyment of the privileges would bar his claim to such a share as he would be entitled to." RANE v. RANE, 3 B.H. C.A.C. 173. (S. A. No. 4268, 7 Bom. S.D.A. Dec. 372. F.) [D., 6 B.H.C. 238; R., 10 B. H.C. 444, 1 B. 286.]

**Hereditary Grant.**

(1)—*Hereditary grant—Ancient custom—Sunnad confirming previous grant—Omission of "inheritance"—Effect—Evidence.*—In ancient grants before the British rule in India, it was customary, when the tenure was in part hereditary and passed as hereditary from father to son, to take out a new *sunnad* on each descent. [R., 21 W.R. 358.] The omission of words of inheritance in a *sunnad*, dated in 1743, granted by the then ruling power, which confirmed a previous grant is not sufficient proof *per se* that such grant was not hereditary, when evidence of long uninterrupted usage shows that the lands have descended from father to son as *ghatwaly* for more than a hundred years. KOOLDEEP NARAIN SINGH v. GOVERNMENT OF INDIA, 11 B.L.R. 71, P.C.=14 M.I.A. 247. [R., 9 A. 591.]

**Hereditary Interest.**

Meaning of—See BOM. ACT III OF 1874, s. 4, 21 B. 787.

**Hereditary Office.**

See RIGHT OF SUIT—OFFICE OR EMOLUMENT, SUITS RELATING TO

(1)—*Deshmukh and gumastha—Right of former to dismiss latter.*—Plaintiff, a hereditary *deshmukh*, contended that he was entitled to dismiss the defendant who was a hereditary *gumastha* appointed to collect, in the *watan* of the former, *deshmukhi* allowances from the villages. It was shown by the documentary evidence that the defendant's ancestor had been appointed by the ruling power of the day from which authority also the *deshmukhi* had been derived. No change had been made under the British rule. *Held* that the hereditary *gumastha* acquired a title from Government independently of the *deshmukh*, and could not be displaced at his will. The right of the *gumastha* to act as such, and receive the payments, had been either granted or else so recognised and confirmed, by an authority binding on the plaintiff, that he could not oust the defendant and deprive him of an office and function which Government had conferred upon him, and still allowed him to enjoy; and this being so, the plaintiff had not the right as against him to collect the allowances himself directly, either from the village officers or from the treasury. RAMCHANDRA NARSING ROW v. TRIMBAK NARAIN EKBOTE, 16 B. 374, P.C.=19 I.A. 39=6 Sar. 122.

(2)—*Deshmukh allowances—Watan—Life*



**Hereditary Office—continued.**

*interest—Attachment after death of life tenant.* The holder for the time being of a *deshmukhi watan* having only a life-interest in the allowances pertaining to such *watan*, allowances, accruing due after his death, cannot be attached as part of his estate. **HANMANTRAV v. BHAVANRAV, 10 B.H.C. 299.**

(3) — *Succession — Resumption — Adverse possession—Limitation.*—J held the office of *patel* more than fifty years ago as representative of two branches descended from a common ancestor, and then united in interest, there being two other branches descended from the same ancestor, but served in interest from those represented by J. J died in 1824 and was succeeded by his son T without any opposition from the two other branches. T was temporarily displaced from the office by G, who represented the two other branches, but recovered it in 1850. In a suit by the plaintiff, as representative of G in 1873, to establish his right to the office held by T's sons, the plaintiff in answer to the defendants' plea of limitation, alleged that in the absence of evidence of the circumstances under which T succeeded to the *patelship*, T must be presumed to have been nominated to that office by all the members of the *vatandar* family jointly, or with their assent sought and granted and was, consequently, the representative of all of them. *Held* that the succession of a son to his father in an hereditary office is based upon the relation subsisting between them, just as would be the son's succession to his father's property. *Held*, also, that the presumption thus arising against T, having been a nominee of all the branches of the family not having been rebutted by evidence of any assertion and admission of the rights of the other branches. T's occupation of the *patelship* was adverse to the plaintiff's right, and being adverse at its inception was no less adverse when, after a temporary displacement by G, (whom the plaintiff now represents), T recovered it in 1850. *Held*, also, that an interval of more than twelve years having elapsed between 1850 and the institution of the present suit in 1873, the claim was barred, and the possession of the office obtained by T's representatives could not be prevailed. **GIRIAPA v. JAKANA, 12 B.H.C. 172. [R., 5 B. 198, F.B.]**

(4) — *Hereditary Office—Performance of duties—Limitation for suits for fees.*—The offices of *Mujoomdar*, *Parsek* and *Mehta* are hereditary and do not cease upon a grant by the Government of a village in *jaghire* or *inam* tenure. In order to entitle the parties in possession of the offices to the fees incident to them, it is not essential that the duties of the offices should have been performed by the parties so possessed, if they were prepared to discharge them if required. In a suit, however, for the recovery of the fees, such claim is limited by Bombay Regulation V of 1827, s. 4, to a period of twelve years. **BEEMA SHUNKUR v. JAM-ASJEE SHAPOCRJEE, 5 W.R. P.C. 121=2 M. I.A. 23=1 Suther. 84=1 Sar. 149. [R., 9 B. H.C. 260, 5 B. 68.]**

**Hereditary Office—continued.**

(5) — *Hereditary Office, Dismissal of claim relating to—Evidence as to descent of office in family.*—The claim in the case related to an office alleged to be hereditary in the plaintiff's family. The Judicial Committee held that, admitting the office to exist and admitting it to be hereditary, in which both parties appeared to agree, yet, because there was no evidence whatever of the descent of such office in the family of the plaintiff claiming it, his claim was liable to be rejected. **BABUN WULLAD RAJA KARTICK v. DAVOOD WULLAD NUNNOO, 6 W.R. P.C. 10.**

(6) — *Act XI of 1843—Service land—Co-parceners—Bequest.*—*Held* that the interest enjoyed by one of a body of co-parceners, in possession of land attached by way of emolument to an hereditary office, cannot be bequeathed to one or more of the other co-parceners; as the estate held by each sharer is only a life-interest, subject to the right of the Collector, under Act XI of 1843, to assign a fit remuneration, from the rent and profits, for the maintenance of the person appointed to conduct the duties of the office. **BHIMAPPA v. MARIAPPA, 3 B.H.C.A. C. 128.**

(7) — *Vadilki in Patelship — Civil Court—Jurisdiction of, to entertain suit to enforce—Revenue Officer to nominate representative.*—In a suit brought for a declaration of right to the *vadilki*, or eldership in a family of *patels*, with a view to prove title to the *Patilki* or to the office of *Patel*. *Held* that a Civil Court had no right to entertain such a claim, in order to influence the controlling revenue officer, who had the power, in certain cases, to nominate, from among the sharers of a family of hereditary officers, a representative to discharge the duties of the hereditary office. **ABAJI S. BHOSLE v. NILOJI BHOSLE, 2 B.H.C. 342. [Appr., 2 B. 370; D., 7 B.H.C. 72, 11 B.H.C. 232; R., 8 B.H.C. A.C. 35, 2 B. 375, 29 B. 480 = 7 Bom. L.R. 497.]**

(8) — *Alienation of office by mother-in-law to son-in-law—Validity.*—In this case a woman alienated a hereditary office in favour of her son-in-law, as she herself could not perform the ceremonies and carry out the other duties of the office. *Held* that the alienation conveyed the rights as a manager to the son-in-law, though, as an alienation to continue in force beyond the lifetime of the mother-in-law, it may be invalid. **SUBRAYA KAKRANNAYA v. SUBRAYA PAD-YAYA, 8 M.L.T. 325=7 Ind. Cas. 715.**

(9) — *Estates or emoluments attached to a—Transferability—Joshpan in Berar.*—When estates or emoluments are attached to a hereditary office and represent the remuneration to be enjoyed by the office-holder for the time being in return for his performance of the duties of the office, such estates or emoluments are inalienable by any office-holder beyond the term of his incumbency in the office. When he dies or retires from office, the right to officiate devolves, as if it were land and the estates or emoluments attached to the office



**Hereditary Office—concluded.**

inseparably devolve upon it. An office-holder may, of course, transfer his own right, title and interest, which is necessarily only an estate for the term of his life; but all rights created by such transfer cease and determine with his death. Even where such a transfer is made to a person who happens on the death of the transferor to be the heir to the office, from and after the date of such death, the transferee will hold by right of inheritance and not by virtue of the transfer. Hence, where estates or emoluments are attached to the hereditary office of *Joshipan* in Berar as remuneration for performing the duties thereof, they are inseparable from and necessarily devolve upon such office. Therefore, an office-holder cannot alienate any part of such estates or emoluments for a term beyond his own incumbency in the office. *RAJARAM v. WAMAN*, 3 N.L.R. 15=1 Ind. Cas. 244. (6 M. 76, F.)

Office of village carpenter, whether "hereditary office"—See BOM. ACT III OF 1874, s. 4, 21 B. 733.

See BOM. ACT III OF 1874, s. 25, 22 B. 344.

Grant of land conditioned on service—Land granted as remuneration in respect of, when resumable—See GRANT-RESUMPTION OF GRANT, 22 B. 422.

*Yajman vritti* whether a—Rights of officiator—See HINDU LAW—GENERAL, 13 Bom. L. R. 1171.

See HINDU LAW—INHERITANCE, 5 M.H.C. 161.

See JURISDICTION OF CIVIL COURTS, 19 M. 62=5 M.L.J. 209.

See LIMITATION ACT, 1908, s. 28, 1 M. 343.

See MAHOMEDAN LAW—KAZI, 18 B. 103, 3 B. 72, 1 B. 633.

See POSSESSION—ADVERSE POSSESSION, 3 Ind. Cas. 8.

Dues incidental to—Nature of dues, whether moveable or immovable property under Act XX of 1866—See REGISTRATION ACT, 1908, s. 17, 18 B. 92.

See SUCCESSION, 6 M.L.J. 255.

Dismissal of hereditary trustee—Effect—Right of heirs—See TRUST, 9 M.L.T. 495.

**Hereditary Officers Act, Bombay.**

See BOM. ACT XI OF 1843.

See BOM. ACT III OF 1874.

**Hereditary Offices (Amending Bom. Act III of 1874.)**

See BOM. ACT V OF 1886.

**Hereditary Right.**

See DECLARATORY DECREE, SUIT FOR—ENDOWMENTS, 1 A.L.J. 44.

**Hereditary Right—concluded.**

Suit for declaration of right to office of Dharmakarta of temple and possession of property attached to it—Prescription—Hereditary right—Right to possession dependent on right to office—See LIMITATION ACT, 1908, arts. 120, 124, 144, 26 M. 113.

**Hereditary Service Vatan.**

See BOM. ACT III OF 1874, s. 13, 19 B. 250.

**Hereditary Tenure.**

See GHATWALI TENURE.

See SERVICE TENURE.

See JOINT TENANCY, 2 P.R. 1867, 57 P.R. 1868.

**Hereditary Village Offices Act, Madras.**

See MAD. ACT III OF 1895.

**Hermit.**

Trust for religious purposes, what constitutes—Succession to property of Hindu religious mendicant who is not—or 'ascetic'—See HINDU LAW—INHERITANCE, 3 O.C. 281.

**Hiba.**

See MAHOMEDAN LAW—GIFT.

Fraud upon creditors—Equity and good conscience—See DEBTOR AND CREDITOR, 10 C. 616, P.C.=11 I.A. 10.

**Hiba-ba-shart-ul-ewaz.**

See MAHOMEDAN LAW—GIFT.

**Hiba-bil-ewaz.**

See MAHOMEDAN LAW—GIFT.

Document called "*hiba-bil-ewaz*," but on the face of it a sale-deed—"Instrument of sale"—See LIMITATION ACT, 1908, art. 10, 12 O.C. 185=3 Ind. Cas. 590.

A copy of Koran is a valid consideration for—See MAHOMEDAN LAW—DOWER, 13 C.W. N. 160=4 Ind. Cas. 466.

**Hidden Treasure.**

See TREASURE TROVE.

(1)—S. 8—Reg. V of 1817—Finder of hidden treasure—Notification of discovery to Zillah Judge within one month—Failure—Effect of Reg. V of 1817.—Under s. 8, Reg. V of 1817, the finder of hidden treasure loses his right to it if he does not notify his discovery to the Zillah Judge within one month. Any custom there might have been in respect to the ownership of discovered treasure is done away with by the enactment of Reg. V of 1817. *OMA CHURN BANERJEE v. THE COLLECTOR OF HOOGLY*, 15 W.R. 525.

**High Court.**

See HIGH COURT, JURISDICTION OF.

(1)—Judgments of High Court.—A judgment of the High Court by a majority is binding on the Courts subordinate to it, until it is overruled by the High Court itself. *VEDANTA v. KANNIYAPPA*, 9 M. 14, F.B.



**High Court—continued.**

(2)—*Matters of procedure—Decisions of various High Courts.*—In matters of procedure, it is very important that the decisions of the various Benches of the High Court should, if possible, be in harmony. *AKIKUNNISSA BIBEE v. ROOP LAL DAS*, 25 C. 133.

(3)—*Decision of one High Court, if binding on other High Courts.*—Except in cases to which the principle of *res judicata* applies, a High Court, although it should give due consideration to the reasons stated by another High Court for its decision, is not bound to follow that decision unless it agrees with it. *BHAGWAN SINGH v. BHAGWAN SINGH*, 17 A. 294 F.B., = A.W.N. 1893, 167.

(4)—*Appellate order of High Court—Interference—Privy Council.*—An order of a High Court, being a final decision by way of appeal on a question arising in a suit, cannot be interfered with except by the Privy Council. *NUBO KRISTO MOOKERJEE v. NUDIAR CHAND HATTEE*, 12 W.R. 374.

(5)—*Power of the—to interfere with the jurisdiction of the lower Court.*—Where a Court has jurisdiction over a matter, whether it exercises it rightly or wrongly, the High Court cannot interfere. *GODU RAM v. SURAJ MAL*, 2 A.L.J. 18 = A.W.N. 1905, 10 = 27 A. 380.

(6)—*Indian High Courts Act, s. 9—Letters Patent (Madras), cls. 11 and 44—Ordinary original civil jurisdiction of High Court—Power of Indian Legislature to alter limits of—S. 539, Civ. Pro. Code, 1882—Whether confers jurisdiction to High Court to try suits relating to charities in the Mofussil.*—A suit was instituted by the Advocate General, on the Original Side of the High Court at Madras, for the appointment of trustees and for the settlement of a scheme for the management of the Rameswaram Temple in the Madura District. *Held*, that the Indian Legislature has the power of altering the local limits of the ordinary original civil jurisdiction (*vide* cls. 11 and 44 of the Letters Patent), and that the exercise of such power would not be opposed to the provisions of s. 9, Indian High Courts Act, (5 I.A. 178, F.) S. 539, Civ. Pro. Code, 1882, does not confer on the High Court in its original jurisdiction, power to entertain suits about charities in the Mofussil. (9 M. 253, 17 M. 467, *Not F.*; 28 A. 117, *Appr.*) S. 539 does not, in a sufficiently clear and unambiguous manner, manifest the intention of the Indian Legislature to override the limitation imposed by the Letters Patent, under the authority of Parliament, on the exercise of original jurisdiction by the High Court, beyond the Presidency Towns. *THE ADVOCATE-GENERAL OF MADRAS v. A.L.A.R. ARUNACHALAM CHETTY*, 7 M.L.T. 292 = 5 Ind. Cas. 729 = 20 M.L.J. 387.

*Constitution of Bench—Practice—Division Court if empowered to hear references under s. 14, Legal Practitioners Act—See ACT XVIII OF 1879, ss. 13, 14, 14 C.W.N. 275 = 37 C. 173 = 5 Ind. Cas. 406.*

**High Court—concluded.**

*Ghair-mumkin* land attached to a well, suit for possession of—Chief Court's power to revise findings on facts relating to jurisdiction—*See PUN. ACT XVI OF 1887, s. 4 (1), 12 P.R. 1907 = 6 P.L.R. 1908 = 92 P.W.R. 1907.*

When closed—*See APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE*, 10 C.L.J. 118 = 3 Ind. Cas. 400, 10 C.L.J. 120 = 3 Ind. Cas. 401.

*See APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE*, 6 W.R. Mis. 50.

*See ATTACHMENT BEFORE JUDGMENT*, 8 B.H.C. O.C. 29.

Revisional powers of—*See CIV. PRO. CODE*, 1908, s. 20, O. VII, r. 10, s. 115, L.B.R. 1872—1892, 487.

Appeal to Privy Council against decree of, dismissing a suit for damages for libel—Practice of, to ascertain the appealable value within the meaning of s. 596, Civ. Pro. Code—*See CIV. PRO. CODE*, 1908, s. 110, 9 C.W.N. 370.

*See CIV. PRO. CODE*, 1908, O. XXI, rr. 58, 60, 61, s. 115, 1 L.B.R. 180.

Incompetency of Division Bench to re-open questions decided by a single Bench in the order of reference to a Division Bench—*See CIV. PRO. CODE*, 1908, O. XXI, r. 90. 150 P.W.R. 1909.

Contempt of the authority of the—What amounts to—*See CONTEMPT OF COURT*, 15 C.L.J. 335.

Decree, damages subsequent to—Power of the High Court to award damages in respect of continuing causes of action accruing subsequent to a decree—*See CONTRACT ACT*, 1872, s. 27, 7 Bom. L.R. 107 = 29 B. 107.

**High Court Judges.**

(1)—*Statute 24 and 25, Vic., Chap. 104, ss. 7 and 16—Scope of power created under, to appoint acting Judges of High Court—Presumption in favour of validity of appointment.*—The Judge referred to in the words "upon the happening of a vacancy in the office of any other Judge" occurring in s. 7 of the Statute 24 and 25 Vic., Chap. 104, signifies only such a Judge as has been appointed to his office by Her Majesty, and not a person appointed to act as a Judge under the latter part of the section. Further, the appointment authorized by s. 7 could not be made except within a reasonable time after the happening of a vacancy in the office of the Judge, nor, could the power to make such an appointment, having been once exercised on a vacancy in the office of a Judge, be again exercised in relation to that particular vacancy. The appointment in the exercise of such a power after the lapse of several years from the happening of the vacancy, though it would, so far as regards the provisions of the statute, be invalid as *ultra vires*, yet, where the person appointed has long exercised the functions of a



**High Court Judges—concluded.**

Judge, the appointment is capable of being presumed to have been validly made by the exercise of some peculiar power in the Secretary of State for India. *QUEEN-EMPRESS v. GANGA RAM*, 16 A. 136, F.B. = A.W.N. 1894, 39.

**High Court, Jurisdiction of.**

- 1.—BOMBAY.
- 2.—CALCUTTA.
- 3.—MADRAS.
- 4.—N.W.P.

See CIV. PRO. CODE, 1908, SS. 113 TO 115, O. XLVI, O. XLVII.

See JURISDICTION.

See JURISDICTION OF CIVIL COURTS.

See LETTERS PATENT.

See REFERENCE.

See REVIEW.

See REVISION.

See SUPERINTENDENCE OF HIGH COURT.

**—1.—Bombay.**

(1) — *Extraordinary jurisdiction of High Court.*—Distinction between the High Court's extraordinary jurisdiction under cl. 2 of s. 5 of Reg. II of 1827, and its general power of superintendence, under s. 15 of State. 24 and 25, Vict. Chap. 104, pointed out, and the occasion for the exercise of the former stated. The High Court has power, in the exercise of its extraordinary jurisdiction, to set aside an order made by a Mamlatdar under Bombay Act V of 1864, as they are Subordinate Civil Courts within the meaning of cl. 2, s. 5, Reg. II of 1827. *MAHADAJI GOVIND v. SONU bin DAVLATA*, 9 B.H.C. 249. [F. 5 B. 137. Rat. Un. Cr. 149; R., 10 B.H.C. 479, 4 B. 168, F.B., 7 B. 341, F.B., 13 B. 552, 600, 14 B. 371, 27 B. 357.]

(2) — *Ordinary original civil jurisdiction of High Court—Letters Patent, 1865, cl. XII—Cause of action—Hundi—Consideration—Usage of shroffs.*—The High Courts can exercise no ordinary original civil jurisdiction over the whole of the territories, of the presidencies to which they belong, and there is no presumption in favour of jurisdiction beyond what is expressly conferred by the Letters Patent, constituting the High Courts. The decisions of the English Courts on ss. 18 and 19 of the Common Law Procedure Act (15 and 16 Vic., ch. 76), relating rather to matters of procedure than jurisdiction, are not so much germane to the interpretation of cl. XII of the Letters Patent, 1865, as the decisions on s. 128 of the English Country Courts Act (9 & 10 Vic., ch. 95) which are directed to the marking out and limiting the jurisdiction of a Court. Some remarks of *Holloway, J.*, in *De Souza Coles* (3 M.H.C. Rep. 413) as to the propositions involved in *Luckmichand v. Zarawar Mull.* 8 Moore I.A. 291, Dissented from. Where a hundi drawn out of Bombay upon a person in Bombay, indorsed and delivered, out of Bombay, to one who, out

**High Court, Jurisdiction of—continued.****—1.—Bombay—continued.**

of Bombay, indorsed the same and sent it to a person who, in Bombay, received, got, accepted and presented it for payment to the drawee, by whom, in Bombay, it was dishonoured: *Held* that the dishonour of the hundi by the drawee in Bombay, was a material part of the cause of action by the Bombay holder against the first indorser, and consequently, that such material part of the cause of action having arisen in Bombay and the holder having obtained leave to bring his suit under cl. 12 of the Letters Patent, 1865, the Court had jurisdiction to entertain the suit. The plaintiff, as agent and banker of an Ajmir constituent, received a hundi for collection, and on its acceptance by the drawee, credited the Ajmir constituent with the amount as of the date when the hundi would become payable. *Held* that, as between the plaintiff and the Ajmir constituent, the plaintiff upon such credit in account being given, became a holder for value. *Held*, also, that on the hundi being dishonoured at due date by the drawee, the plaintiff was justified, by the usage of shroffs, in treating the Ajmir constituent as still entitled to credit for the amount, and himself as a holder for value. *Held*, also, that, as between the Ajmir constituent and the first indorser (the defendant), the giving by the Ajmir constituent to the defendant of another hundi, which was never presented in Bombay for acceptance or payment, was a consideration for the indorsement by the defendant to the Ajmir constituent of the hundi sent by the latter to the plaintiff and sued on by him. *SUGANCHAND SHIVDAS v. MULCHAND JOHARIMAL*, 12 B.H.C. 113. [R., 12 B. 507.]

(3) — *Jurisdiction—Revision—Appeal—Consular Court of Zanzibar—High Court at Bombay—Zanzibar Order in Council, 1884, art. 21—Civ. Pro. Code, 1882, s. 622.*—The High Court of Bombay has no power of revision over cases tried by the Consular Court at Zanzibar. The High Court derives its jurisdiction over the Zanzibar Court by art. 21 of the Order in Council of 1884, which provides only for the hearing of appeals from that Court, as if it were a District Court, but which does not provide for revision. And a power of revision is not an incident of appellate powers, but, on the contrary, can only be exercised where there is no appeal, and, had it been intended to give such power to the High Court, it would necessarily have been expressly provided for. *Per Jardine, J. (dissenting)* held, that under any circumstances the Consular Court at Zanzibar is bound to obey a writ issued by the High Court for certifying the papers of a civil case. And the High Court is competent to exercise revisional jurisdiction in civil matters under ss. 9 and 10 of the Bombay Civil Courts Act, XIV of 1869, taken with art. 21 of the Zanzibar Order in Council of 1884, and s. 622 of the Civ. Pro. Code, 1882. *KHOJA SHIVJI v. HASHAM GULAM*, 20 B. 489, F.B. [Expl. & D., 27 B. 575.]



**High Court, Jurisdiction of—continued.****—1.—Bombay—continued.**

(4)—*Jurisdiction—Letters Patent, cl. 12.*—A defendant does not “carry on business” so as to come within cl. 12 of the Letters Patent of the High Court of Bombay, and render himself subject to the ordinary original civil jurisdiction of that Court, though he may have an agent at Bombay for certain purposes connected with his business, where that which is the essential ingredient in his business does not take place within the local limits of the jurisdiction of the Court. A retail dealer in European goods residing and carrying on business at an up-country station is not within the jurisdiction of the High Court of Bombay on the ground that he has an agent in Bombay for the purpose of purchasing and forwarding goods to be used in his trade. *FRAMJI KAVASJI MARKER v. HORMASJI KAVASJI MARKER*, 1 B.H.C. 220. [F., 8 B.H.C., O.C. 102; R., 8 B.H.C.O.C. 15, 17 B. 662.]

(5)—*Defendant holding appointment in Sind—Temporary stay in Bombay—“Dwell”—Jurisdiction—Letters Patent, cl. 12.*—The defendant, an officer in the Bombay Staff Corps, holding an appointment in Sind, came to Bombay on leave, and remained about ten days. During his stay in Bombay he was served with a writ of summons on a cause of action arising in Sind. *Held*—that the defendant did not “dwell” within the local limits, so as to give the Court jurisdiction under cl. 12 of the Letters Patent. *KAVASHI FRAMJI v. WALLACE*, 1 B. H.C. 113. [Appr., 18 B. 290; F., 9 B.H.C. 270; R., 3 B. 227, 8 B. 380, 14 B. 541.]

(6)—*Inference of law—Findings of fact.*—The High Court can on second appeal interfere with incorrect inferences of law as to the legal consequences regarded as following from facts found by the lower Court. *VENKATESH v. BHAVANISHAKER*, 5 Bom. L.R. 174.

(7)—*Matter of legal inference—Power of High Court.*—The determination of the question whether an incapacity to adopt on the part of a senior widow results from the facts found by the lower Courts, under the circumstances of a particular case, involves matter of legal inference and is consequently open to inquiry on second appeal. *LAXMIBAI v. SARASWATIBAI*, 1 Bom. L.R. 420=23 B. 789.

(8)—*Transfer of case, Mamlatdar's Court—Mamlatdar's Courts Act (Bom. Act III of 1876)—Mamlatdar.*—The High Court has jurisdiction to transfer a suit under the Mamlatdar's Courts Act (Bom. Act III of 1876), from the Court of one Mamlatdar to that of another. *BHAGWANDAS v. JEDU*, 4 Bom. L.R. 970.

(9)—*European British subject—Jurisdiction—St. 28 and 29. Vic. c. 15—Privilege—Waiver of privilege.*—Under Statute 28 and 29 Vic., c. 15 and Notification 178-J of 23rd September, 1874, the High Court of Bombay has jurisdiction to decide whether an accused, an European British subject residing at the Residency Bazaars, Hyderabad (Deccan), is an European British

**High Court, Jurisdiction of—continued.****—1.—Bombay—continued.**

subject and also to decide whether the accused has waived his privilege to be dealt with as such and what is the legal effect of such waiver, if any. *In re GANNON*, 5 Bom. L.R. 869.

(10)—*Injunction not to carry on suit—Interlocutory application—Letters Patent, cl. 13—Practice and procedure.*—The High Court, on its original side, cannot in the course of a suit pending before it grant an injunction, on an interlocutory application, to restrain a party to it from carrying on his suit, which he has already instituted in the Presidency Small Cause Court; but it may remove the latter suit into the High Court and try the same under cl. 13 of the Letters Patent, 1865. *JIRAMDAS v. ZAMENLAL*, 5 Bom. L.R. 201=27 B. 357.

(11)—*Injunction to a person not to proceed with his suit in the Small Causes Court at Bombay—Jurisdiction.*—The High Court of Judicature at Bombay has the power to issue an injunction against a person from proceeding in the Presidency Small Causes Court at Bombay with a suit referring to the same matter to which the suit in the High Court relates. *UDERAM KESAJI v. HYDERALLY ABDUL KAYUM*, 10 Bom. L.R. 1141=33 B. 469.

(12)—*Receivers, Appointment of, Original side—Interlocutory motion—Receiver.*—It is the practice on the original side of the Bombay High Court, on an interlocutory motion, to require before any order for injunction or receiver is passed that the plaintiff makes a sufficient affirmative case, a strong *prima facie* case, to show that he is entitled to the relief which he seeks. *SHANKER v. SADASHIV*, 7 Bom. L.R. 925.

(13)—*Summary jurisdiction of High Court to enforce solicitor's lien.*—The High Court of Bombay has a summary jurisdiction over its suitors for the purpose of enforcing a solicitor's lien for costs; and in enforcing it the Court must be guided by the principles of English law. *CALLIANJEE v. RAGHAWJEE*, 6 Bom. L.R. 879=30 B. 27.

(14)—*Summary jurisdiction.*—There exists a summary jurisdiction in the High Court to enforce the solicitor's lien, but the exercise of that jurisdiction is discretionary. *In re TYABJI & CO.*, 7 Bom. L.R. 547.

(15)—*Appellate side, First appeal.*—An appeal lies to the High Court from the decision of a First Class Subordinate Judge in a suit tried by him under his special jurisdiction, where the claim was originally Rs. 10,000 although owing to subsequent realisation of sums on account of the defendants, the plaintiffs gave credit to them for the same, and reduced the claim to Rs. 1,786-12-0. The original claim having given rise to that jurisdiction, the jurisdiction itself continued and could not be ousted by the mere fact of the subsequent reduction. *NANCHAND v. MUSSA*, 6 Bom. L. R. 692.



**High Court, Jurisdiction of—continued.****—1.—Bombay—continued.**

(16)—*Appeal from Tribunal of Appeal—Jurisdiction—Provincial Legislative Council—Acts passed by the Council—Powers of the High Court to inquire into their validity—Powers of Provincial Legislature to amend or repeal an Act passed by the Supreme Legislative Council in so far as it affects the Province—City of Bombay Improvement Act (Bom. Act IV of 1898)—Tribunal of Appeal—Appeal to High Court.*—The question whether a particular Act passed by the Bombay legislature is within the scope of their authority is a legitimate subject of discussion by the High Court of Bombay; for the Governor of Bombay in Council is a subordinate legislature, whose authority in the way of law-making is subject to, and dependent upon, the Acts of Parliament from which these legislative powers are derived. It is open to a provincial legislature to repeal or amend as to the Province, an Act passed by the Legislative Council of the Governor-General of India: such amendment or repeal can be made to affect a particular corporation in a particular locality; it is not essential that it should affect the whole of the Province. The Tribunal of Appeal constituted by the City of Bombay Improvement Act, 1898, is not a Court of Justice. The High Court of Bombay has no appellate or revisional jurisdiction over the decision of the Tribunal of Appeal, except the qualified appellate jurisdiction provided by the Act itself. *HARI v. SECRETARY OF STATE*, 5 Bom. L.R. 431=27 B. 424.

(17)—*Second appeal, Appreciation of evidence—Jurisdiction.*—An appreciation of evidence by the lower appellate Court is binding upon the High Court in second appeal; but, where such appreciation is influenced by an erroneous view of the plaintiff's cause of action as stated in his plaint, it is open to the High Court in second appeal to interfere. *BALA v. SHIVA*, 5 Bom. L.R. 85=27 B. 271.

(18)—*Burden of proof—Misplacement of the burden.*—Where misplacement of the *onus* has been acquiesced in by the parties in the Court of first instance, or in the lower appellate Court, the High Court would be very reluctant to interfere with the result unless there were reasons to suppose that the error may have produced error in the decision of the case on the merits. *GANGADAS v. DAMA*, 5 Bom. L.R. 177.

(19)—*Misjoinder of causes of action.*—Where a suit is not objected to on the score of misjoinder of causes of action at or before the settlement of issues in the Court of first instance, under s. 53 (b) (iii) of the Civ. Pro. Code, it is not permissible to dismiss the suit on that ground in second appeal. *SANNA v. GANAPA*, 5 Bom. L.R. 185.

(20)—*Discovery of fresh evidence—Withdrawal of appeal—Review petition.*—Where a party on coming to the High Court on second appeal discovers that there is evidence which ought to have been placed before the lower Courts, the practice is to allow the second appeal

**High Court, Jurisdiction of—continued.****—1.—Bombay—continued.**

to be withdrawn in order that a review petition may be presented to the lower appellate Court. *RAMCHANDRA v. KRISHNAJI*, 5 Bom. L.R. 818=28 B. 4.

(21)—*Findings of fact.*—The High Court cannot accept a finding of fact arrived at without an application of sound principles to the consideration of evidence, as binding upon it. *SHARIFA v. MUNE KHAN*, 3 Bom. L.R. 167=25 B. 574.

(22)—*Findings of fact—Jurisdiction.*—Findings of fact arrived at by the lower Courts are binding upon the High Court in second appeal but when the lower Courts attach erroneous legal inferences to findings of pure facts, they are open to correction in second appeal. *RAJARAM v. NANCHAND*, 5 Bom. L.R. 225.

(23)—*Original side—Decree in instalments—Power to grant instalments in decree.*—Under s. 210 of the Civ. Pro. Code, 1882, the High Court has the power to make its money decrees payable by instalments. *POMA v. GILLESPIE*, 9 Bom. L.R. 143=31 B. 348.

(24)—*Erroneous findings of fact—Second appeal.*—The High Court has generally no jurisdiction to entertain second appeals on the ground of erroneous findings of fact however gross or inexcusable the error would seem to be; but it will interfere in those cases when it is clear that the lower appellate Court has completely failed to appreciate the points which justly weighed with the Court of first instance. *AMRITA v. DADA*, 4 Bom. L.R. 822.

(25)—*Inferences from facts found.*—The High Court in second appeal is bound by the finding of facts arrived at by the lower appellate Court; yet it is open to the High Court to consider the propriety of the inference drawn by the lower appellate Court from the facts. *GANESH v. VITHAL*, 6 Bom. L.R. 312.

(26)—*Question of fact—Second appeal.*—The sufficiency or insufficiency of accommodation for residence to a Hindu widow is a question of fact determinable by the exigencies of each case, and the High Court in second appeal will not disturb the conclusions arrived at by the Courts below. *KISANDAS v. RANGUBAI*, 9 Bom. L.R. 382.

(27)—*Guardian, Power to appoint.*—The High Court has, under its general jurisdiction, and apart from the Guardians and Wards Act, 1890, power to appoint a guardian of the property of a minor who is a member of a joint Hindu family and where the minor's property is an undivided share in the family property. *In re MANILAL*, 3 Bom. L.R. 411=25 B. 353.

(28)—*Leave to appeal to Privy Council—Question of jurisdiction raised in interlocutory order can be taken in appeal to the Privy Council.*—Leave to appeal to the Privy Council can be given where the order appealed from transferring a case from one Court to another is interlocutory, and raises a question of jurisdiction. *MUNICIPAL OFFICER, ADEN v. ABDUL KAREEM*, 6 Bom. L.R. 85=28 B. 292.



**High Court, Jurisdiction of—continued.****—1.—Bombay—continued.**

(29)—*Jurisdiction—Practice—Suit cognizable by Small Causes Court brought in High Court—Non-joinder—Contract of sale made subject to rules of Rice Merchants Association—Rule ousting jurisdiction of Court of Law—Rule providing for fixing *vaida* rate of goods for purpose of ascertaining differences in case of non-fulfilment of contract—Suit by buyer for damages for non-delivery—Plea that no damages recoverable having regard to the rate fixed—Allegation by plaintiff that rate fixed was not binding inasmuch as the rules were not observed—Construction of rule—Principal and Agent—Agent's power to bind his principal to arbitration—Indian Contract Act (IX of 1872), s. 93—Sale—Tender.*—The Bombay United Rice Merchants Association was a commercial body of which most of the principal rice merchants in Bombay were members. Its rules were printed and circulated and they prescribed a certain form of contract which was very generally used in Bombay. By these rules a Sub-Committee was nominated to decide all disputes which may arise as to contracts and do all other business relating to contracts. It was also provided that the "exclusive authority" to decide all such disputes should be the said Sub-Committee and the Association, and that no party should be at liberty to go to Court with respect to any matter connected with such contracts except to enforce the decision of the Sub-Committee and the Association. It was further provided that the Sub-Committee should keep a record of the daily rates and, on the last day of the *vaida*, should fix the *vaida* rate (*i. e.*, the market rate of the day), on the basis of which differences should be calculated which became payable in cases in which contracts were not carried out. The plaintiffs who were rice merchants in Rangoon were not members of the Association, but they employed agents in Bombay, who were members, to purchase rice for them and on the 24th November, 1906, these agents bought from the defendants 1,340 bags of rice at Rs. 9 per bag deliverable at the *vaida* of Magshir Sud, 1963 (*i. e.*, from the 18th November, 1906, to 30th November, 1906.) The contract which was in the printed form framed under the rules as above mentioned contained the following clause: "This contract is made subject to the rules of the Bombay United Rice Merchants Association. Each party is bound to act in accordance with the same." For delivery at this *vaida* a large number of the members of the Association had made contracts of sale. The plaintiffs and a few others were purchasers and they were apprehensive that, in setting the *vaida* rate, the interests of the buyers would be disregarded in favour of those of the sellers. They accordingly wrote to the President of the Association, calling upon him to see that no interested person was allowed to act on the Sub-Committee for fixing the *vaida* rate. In accordance with the practice, a general meeting of the Association was held on the 30th November, 1906, at which after discussion a special Sub-Committee was appointed

**High Court, Jurisdiction of—continued.****—1.—Bombay—continued.**

to fix the rate, consisting only of three persons one of whom was not a member of the standing Sub-Committee, and another of whom had large contracts of sale due at this *vaida*. This Sub-Committee fixed the rate at Rs. 8-11-0 per bag. The plaintiffs alleged that it should have been fixed at Rs. 9-2-0 or Rs. 9-4-0 per bag which was the real market rate of the day; that the rate fixed was dishonestly fixed in the interest of sellers; that the Sub-Committee was not constituted according to the rules, two members of it being ineligible, one because he did not belong to the standing Sub-Committee, and the other because he was interested in fixing a low rate, and they contended that for these reasons, *inter alia*, they were not bound by the rate fixed. They had duly demanded delivery of the rice contracted for, and the defendants failed to give delivery and the plaintiffs now sued for the difference between the contract price (Rs. 9) and the market price on the 30th November, 1906. The sum claimed as damages was less than Rs. 1,000. The defendants pleaded:—(1) That, having regard to s. 15 of the Civ. Pro. Code (XIV of 1882) and s. 18 of the Presidency Small Cause Courts Act (XV of 1882), the suit was not maintainable in the High Court. (2) That certain alleged partners of the plaintiffs not being parties to the suit, it should be dismissed for non-joinder. (3) That, having regard to the rules of the Association which provided a remedy in case of disputes among its members and forbade their going to law, the plaintiffs were precluded from suing at law, at all events, until they had exhausted the remedies provided by the rules. (4) That the plaintiffs were bound by the *vaida* rate fixed by the Sub-Committee appointed by the Association. *Held*, (1) That the High Court has jurisdiction and that the suit should proceed, subject to the provisions as to costs, contained in s. 22 of the Presidency Small Cause Courts Act (XV of 1882). (2) That the alleged partnership was proved but nevertheless the suit could not be dismissed for non-joinder. (3) That the plaintiffs were entitled to sue at law, notwithstanding the provisions contained in the rules of the association requiring all disputes to be submitted for decision to the Association and restricting the right of members to sue each other. (4) That, at the meeting of the Association held on the 30th November, 1906, the plaintiffs (through their agents) had consented to the appointment of a Sub-Committee of three persons to fix the *vaida* rate, and that they were therefore bound by the rate then fixed. Any stipulation that the award of an arbitrator shall be accepted as final, restricts the rights of contracting parties to invoke the aid of the ordinary Courts and to that extent is void. The effect of s. 28 of the Indian Contract Act (IX of 1872), s. 21 of the Specific Relief Act (I of 1877), read with the related sections of the Indian Arbitration Act (IX of 1899), and of the Civil Procedure Code dealing with arbitration, is, that a person may not contract himself out of his right to



*High Court, Jurisdiction of—continued.**—1.—Bombay—continued.*

have recourse to Courts of law, but that, in the event of any party having made a lawful agreement to refer a matter of difference to arbitration as a condition precedent to going to law about it, the Courts will recognise the agreement and give effect to it by staying proceedings in the Courts. *MULJI TAJ SINGH v. RANSI DEVRAJ*, 11 Bom. L.R. 273=34 B. 13=3 Ind. Cas. 837.

(30)—*Decision by Small Cause Court—Application to High Court for re-hearing Act XV of 1882 (Presidency Small Cause Courts), s. 38.*—Under s. 38 of Act XV of 1882 (Presidency Small Cause Courts), the High Court cannot grant an application for a re-hearing of a case decided by the Court of Small Causes, when the High Court feels that the evidence is doubtful, without forming any opinion as to whether the conclusion arrived at by the Small Cause Court is a wrong one. The forming of such an opinion by the High Court is a condition precedent to the grant of such application, and, further, it must be a distinct opinion and not merely what is termed the inclination of opinion. *HASSANBHOY VISRAM v. THE BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED*, 12 B. 579.

(31)—*High Court, Revisional jurisdiction of—Civ. Pro. Code, s. 622—Extraordinary civil jurisdiction—Reg. II of 1827, s. 5—Letters Patent, s. 15.*—The question referred for the decision of the Full Bench in this case was, whether the High Court should exercise its extraordinary jurisdiction under s. 622 of the Civ. Pro. Code, or otherwise, on behalf of persons who feel themselves aggrieved by orders passed by Courts below in cases in which the law has specially prescribed another remedy, by suit or otherwise. The High Court held that the question did not admit of a categorical reply, that the Court could not impose on itself limitations without regard to circumstances, and that the case in question might be taken to be governed by the rules below. Where a decree or order of a subordinate Court is declared by the law to be, for its own purposes, final or conclusive, though in its nature provisional as subject to displacement by the decree in another more formal suit, the Court will have regard to the intention of the Legislature that promptness should in such cases be accepted instead of juridical perfection. Where the alleged error of the inferior Court consists in a misappreciation of evidence or misconstruction of the law intrinsic to the enquiry and decision and there has been no infringement of any of the extrinsic conditions of its legal activity, the High Court will refuse to interfere unless it is manifest that, by the ordinary and prescribed method, an adequate remedy, or the intended remedy, cannot be had. The High Court will, in all cases, regard its exercise of the extraordinary jurisdiction as discretionary, and subject to considerations of the importance of the particular case, or of the principle involved in it, of delay on the part of

*High Court, Jurisdiction of—continued.**—1.—Bombay—continued.*

the applicant, and of his merits with respect to the case in which the interference of the Court is sought. *SHIVA NATHAJI v. JOMA KASHI-NATH*, 7 B. 341. [*F.*, 9 B. 82, 6 A. 172=A, W.N. 1884, 16; *R.*, 9 B. 432, 7 A. 245=A.W. N. 1885, 73, 10 B. 610, 10 A. 119, 16 B. 91, 1 C.W.N. 617, 8 P.R. 1897, 80 P.L.R. 1901, 13 P.R. 1903=57 P.L.R. 1903, 66 P.R. 1904=138 P.L.R. 1903, 33 C. 487=3 C.L.J. 293; *R.*, 1 S.L.R. 226, 11 Bom. L.R. 754; *D.*, 12 C.P.L. R. 52.]

(32)—*High Courts—Jurisdiction—Express grant by Charters.*—The jurisdiction of the High Court in its original civil side is clearly defined by the Letters Patent constituting it. Though in some respects, such original jurisdiction is wider than that of the District Courts, it is yet limited, and there is no presumption in favour of jurisdiction beyond what is to be found expressly conferred by the Charter constituting it. *MULCHAND JOHARI MAL v. SUGANCHAND SHIVDAS*, 1 B. 23. [*R.*, 12 B. 507.]

(33)—*Jurisdiction in matters concerning revenue.*—By the Charter of Justice of the 23rd of December, 1823, establishing the Supreme Court at Bombay, that Court was prohibited (in like manner as the Supreme Court at Calcutta under the 21st Geo. III., c. 70, s. 8) from entertaining any jurisdiction in any matter concerning the revenue, under the management of the Governor and Council, or any act done in the collection thereof. In an action of trespass brought against the Collector of revenue at Bombay, for distraining for arrears of Government "quit-rent," the defendant pleaded "not guilty" only. The Supreme Court at Bombay held, that the "quit-rent" was not "revenue" within the meaning of the Charter, and that the act complained of was not warranted by the usage of the country and the Company's Regulations, and that the Court had jurisdiction to entertain the action; and found for the plaintiffs. *Held*, reversing such finding and judgment.—first, that the "quit-rent" was part of the "revenue" of the East India Company at Bombay; and secondly, that, it being a matter concerning the revenue, and the collection thereof, the Supreme Court had no jurisdiction, and that the Court being excluded by the Charter from any matter concerning the revenue, the plea of "not guilty" was sufficient, and that the Judge ought, at the trial, to have directed a non-suit or a verdict to be entered for the defendants. *SPOONER v. JUDDOW*, 4 M.I.A. 353.

See ACT XV OF 1865, 12 B. 302.

*Jurisdiction—Marriage out of British India—Validity—Suit for dissolution—See ACT XV OF 1865, ss. 3, 26, 30, 53, 16 B. 136.*

*Cases to which English Law is applicable—Construction of—Extent of applicability of Act to Hindu trusts—Equitable jurisdiction of High Court—See ACT XXVII OF 1866, s. 3, 5 B. 154.*



**High Court, Jurisdiction of—continued.****—1.—Bombay—concluded.**

Aden Court, Civil—Power of the High Court to transfer a civil case from the resident's Court at Aden to itself—See BOM. ACT II OF 1864, 5 Bom. L.R. 562=27 B. 575.

Resident's Court at Aden—Revisionary powers of Bombay High Court—See BOM. ACT II OF 1864, ss. 8, 15, 12 Bom. L.R. 149=34 B. 267.

See APPELLATE COURT—MISCELLANEOUS, 6 B. 304.

To interfere in second appeal—New case set up by lower appellate Court—Finding of fact unsupported by evidence—See CIV. PRO. CODE, 1908, s. 100, 29 B. 1, P.C.

Jurisdiction of High Courts to commit for contempt—Civ. Pro. Code, ss. 136, 591—Order of committal for contempt, appeal lies from, under s. 15 of Letters Patent, 1865—See CONTEMPT OF COURT, 7 B. 5.

See CONTEMPT OF COURT, 7 B. 1.

See GOVERNOR OF BOMBAY IN COUNCIL, 8 B. 264.

Application for appointment as guardian of minor children—One of the minors resident in England—High Court's jurisdiction—See GUARDIAN—APPOINTMENT OF GUARDIANS, 21 B. 137.

Power of High Court to order sale of mortgaged land beyond jurisdiction of limits—See JURISDICTION—SUITS FOR LAND, 14 B. 353.

Disciplinary jurisdiction of High Court—Nature of inquiry under—Proof of professional misconduct of pleader—See LEGAL PRACTITIONERS—PLEADER, 11 Bom. L.R. 1150=4 Ind. Cas. 266=10 Cr. L.J. 526.

Mortgage—Suit by mortgagee—Appointment of receiver on application by mortgagee—High Court, powers of, with regard to appointing receivers—See RECEIVER, 14 B. 431.

See SEQUESTRATION, 8 B.H.C.O.C. 236.

**—2.—Calcutta.**

(1)—*Jurisdiction—Perjury or forgery in Civil Court—Power of High Court—Stay of criminal proceedings—Crim. Pro. Code, 1861 (Act XXV of 1861), s. 171.*—If, in the course of hearing a suit, a Civil Court commits a party to the suit for trial on a charge of perjury or forgery, or directs that the case be made over to a Magistrate for investigation of such charge, the High Court, in the exercise either of civil or criminal jurisdiction, cannot, in the event of a regular or special appeal being lodged against the decision of the lower Court, interfere to stay the criminal proceedings until the appeal shall have been heard and determined. *In the matter of the petition of RAMPRASAD HAZRA, B.L.R. Sup. Vol. 426=5 W.R. Mis. 24. [F., 6 C. 308, 23 C. 610; Appr., 1 A. 17; Cons., 34 C. 848=11 C.W.N. 712=6 C.L.J. 531; D., 31 M. 510=4 M.L.T. 186=18 M.L.J. 466=8 Cr. L.J. 390.]*

**High Court, Jurisdiction of—continued.****—2.—Calcutta—continued.**

(2)—*Act XXIII of 1861, ss. 11, 12, 35—Act VIII of 1859, s. 364—Execution of decree—Sale—Appeal—Revision—Powers of High Court—24 & 25 Vict. c. 104, s. 15.*—The High Court has no power to interfere with the order of a lower Court setting aside a sale of moveable property in execution of decree, even though the lower Court has thereby acted wholly without jurisdiction, and done injury to a bona fide purchaser. *In the matter of the petition of T. DACOSTA, B.L.R. Sup. Vol. 432.*

(3)—*Act XXIII of 1861, s. 35—Act X of 1859 s. 108—Subordinate Court—Sale by Deputy Collector—Appeal.*—Where a Collector, on appeal, affirmed an order of a Deputy Collector for the sale of an under-tenure in execution of a decree for rent, but afterwards on a review of judgment, set aside his former order as made without jurisdiction. *Held* that the High Court had no power under s. 35, Act XXIII of 1861, to interfere with the order of the Deputy Collector which was final, and that, even if the Collector had not set aside his former order, the mere circumstance of his having by mistake assumed jurisdiction, to interfere with the order for want of jurisdiction on appeal would not make it right for the High Court, in setting aside the Collector's order for want of jurisdiction, to interfere with the order of the Deputy Collector which the law intended to be final, and with which the High Court, but for the mistake of the Collector, could not have interfered. *Quære*:—Whether the Collector is a Court subordinate to the High Court within the meaning of s. 35, Act XXIII of 1861? *In the matter of the petition of DOCOWRI KAZI, B. L.R. Sup. Vol. 517=6 W.R. Act X, Rul. 53.*

(4)—*Act XXIII of 1861, s. 35—Power of High Court to interfere.*—The true construction of s. 35 of Act XXIII of 1861 is that the High Court may call for the record in any case in which a Subordinate Court exercises a jurisdiction when it has none, or exceeds it when it has jurisdiction. Where a Court exceeds its jurisdiction, the High Court may set aside that part of the order which is in excess of jurisdiction. Where the decision of the Subordinate Court is made on appeal in a case in which it has no appellate jurisdiction, the proper order is to set aside the decision altogether. Where an appeal is heard by a Subordinate Court, which has no jurisdiction to hear it when it ought to be heard by another Subordinate Court which has jurisdiction to hear it, the High Court may set aside the decision of the Court which had no jurisdiction, and may, if they think it right, refer the case to the Court which had jurisdiction, even if it be too late to prefer a fresh appeal to that Court. *In the matter of the petition of SUBJAN OSTAGAR, B.L.R., Sup. Vol. 531=6 W.R. Mis. 77 [R., B.L.R. Sup. Vol. 985=9 W.R. 402, 6 W.R. Mis. 119.]*

(5)—*Revenue-matters—Mandamus—Jurisdiction of High Court—Bengal Act X of 1869.*



**High Court Jurisdiction of—continued.****—2.—Calcutta—continued.**

s. 9, as amended by Bengal Act III of 1872.—S. 9 of Act XI of 1859, as amended by Bengal Act III of 1873, runs as follows:—"Whenever a license (for the retail sale of liquors) shall be granted under this Act, the Collector shall be authorised to demand, in consideration of the privilege granted, such fee or tax or duty, as may from time to time, be fixed with the sanction of the Board of Revenue, or a fee, tax or duty adjusted or regulated in such manner and in accordance with such rules as the Board of Revenue may prescribe. The Board of Revenue put up the liquor licenses for a certain year to public competition without issuing the rules prescribing the fee payable for licenses. *Held* that the matter wholly related to Revenue and the High Court had no jurisdiction to issue a *mandamus* compelling the Board of Revenue to issue rules prescribing the fee payable for licenses. *In the matter of* AUTHUR CHUNDRA SHAW, 11 B.L.R. 250.

(6)—*Jurisdiction—High Court—Equitable mortgage—Joint mortgagors—Property partly within local limits of jurisdiction—Deposit of deed—One joint mortgagor not party to deed—Jurisdiction not affected—Transfer of Property Act, 1882, s. 59.*—Where certain documents were pledged, by way of equitable mortgage, by the authority of all the mortgagors, as security for the re-payment of a debt which they jointly incurred, and where part of the property so made security for the re-payment of the joint debt was within the local limits of the jurisdiction of the High Court. *Held*, that the mere fact that one of the joint mortgagors was not a party to the deed which was deposited as security will not affect the jurisdiction of the High Court on the mortgage which all the defendants joined in making in favour of the plaintiffs. *MATIGARA COAL CO., LTD. v. SHARGERS, LTD.*, 38 C. 824.

(7)—*Jurisdiction—Receiver—Appointment—Property outside jurisdiction—Quære.*—Whether the High Court at Calcutta can appoint a receiver for property which is within the jurisdiction of the Bombay High Court? *HADJEE ISMAIL HADJEE HUBBEEB v. HADJEE MAHOMED HADJEE JOOSUB AND ROHIMABYE HADJEE MAHOMED HADJEE JOOSUB*, 13 B. L.R. 91 = 21 W.R. 303.

(8)—*Powers of High Court over Municipalities.*—The legislature have deliberately withdrawn from the Courts in this country that power, which is possessed by the Courts of justice at home to compel Municipal Corporations to do their duty and to restrain them from doing that which it is not in their province to do,—a power which has been reserved to the High Court in its ordinary original jurisdiction with respect to the Presidency Town but which has been withheld in respect of any of the Municipalities in the mofussil. *MORAN v. CHAIRMAN OF MOTIHARI MUNICIPALITY*, 17 C. 329. [Cons. 21 A. 348 = A.W.N. 1899, 97.]

**High Court, Jurisdiction of—continued.****—2.—Calcutta—continued.**

(9)—*Jurisdiction of the High Court, Appellate side, to execute decrees—Civ. Pro. Code, (of 1877), s. 649.*—The circumstance of the High Court, in its appellate side, not executing its own decrees generally, does not affect the vitality of its jurisdiction in this respect; so that it could not be classed, under s. 649 of the Civ. Pro. Code, among Courts that have ceased to have jurisdiction to execute decrees. *HURRO PERSHAD ROY CHOWDHRY v. BHUPENDRO NARAIN DUTT*, 6 C. 201 = 7 C.L.R. 79.

(10)—*Santhal Pargannahs—Suits above Rs. 1,000—Appeal to High Court.*—An appeal lies to the High Court in all civil suits of over Rs. 1,000 in value. *SURBOJIT ROY v. GANESH PROSAD MISSEER*, 10 C. 761. [Commented upon, 18 C. 133.]

(11)—*Jurisdiction of the High Court in Sonthal Pergannas.*—The High Court has no jurisdiction to entertain appeals in civil suits tried in the Sonthal Pergannas. *SURDHAREE LALL v. MANSOOR ALLY KHAN*, 3 C. 298.

(12)—*Power of the Supreme Council—Jurisdiction of the High Court.*—The power of the Supreme Legislative authority of India to remove any place or territory from the jurisdiction of the High Court is expressly authorised and contemplated by the Statutes and Letters Patent which affect the constitution and jurisdiction of the High Court. *SOONDERJEE NANJEE v. MAYLON*, 26 C. 874 = 3 C.W.N. 564. (4 C. 172 = 5 I.A. 178, R.)

(13)—*Writ of fieri facias—Jurisdiction—Suit begun in Supreme Court—St. 24 and 25, Vic. c. 104, s. 12.*—In an ordinary suit commenced in the High Court, a writ of *fieri facias* could not issue except within the limits of the Court's original jurisdiction; but in a suit originally commenced in the Supreme Court, the High Court had power, under 24 and 25 Vic. c. 104, s. 12, to issue a *fieri facias* beyond the limits of its original jurisdiction, and to sell under it property situated there. *MONOMOTHO NATH DAY v. GREENDER CHUNDER GHOSE*, 24 W.R. 366.

(14)—*Necessitous judgment-debtor, Relief of—High Court, Interference of—Attachment of salary—Small Causes Court.*—There is no law authorizing the High Court to interfere for the relief of a necessitous judgment-debtor whose salary has been attached in execution of a decree of a Small Cause Court. *A. HARRIS v. R. BRITAIN*, 15 W.R. 534.

(15)—*Jurisdiction—High Court—Injunction—Restraining person not resident within its jurisdiction from proceeding with suit in a Court outside jurisdiction—Absence of power to issue.*—The High Court has no jurisdiction to issue an injunction against a person, who, though possessed of property within its jurisdiction, does not reside within such jurisdiction, restraining him from proceeding with a suit instituted by him in a Court situate



**High Court, Jurisdiction of—continued.****—2.—Calcutta—continued.**

beyond the local limits of its jurisdiction. *JUMNA DAS v. HARCHARAN DASS*, 38 C. 403 = 16 C.W.N. 4 = 11 Ind. Cas. 416. (36 C. 233, F.; 34 C. 101, Not. F.)

(16)—*Testamentary jurisdiction of Supreme Court and High Court, how originated.*—Testamentary jurisdiction was first given to the Supreme Court by their original charters as a branch of ecclesiastical jurisdiction. In its progress of development the ecclesiastical origin of such jurisdiction has been completely discarded, and the legislature has gradually evolved an independent system of its own, largely suggested, no doubt, by English law, but also differing much from that law, and purporting to be a self-contained system. Even in the case of High Courts, the testamentary jurisdiction which the charters purport to confer upon them is not given as a branch of ecclesiastical jurisdiction, and is not made dependent upon the law administered by English Courts. *MIRZA KURRATULAIN v. NAWAB NUZHAT-UD-DOWLA*, 7 Bom. L.R. 876 = 9 C.W.N. 938 = 1 C.L.J. 594, P.C. = 33 C. 116 = 15 M.L.J. 336 = 2 A.L.J. 758 = 32 I.A. 244 = 8 Sar. 839.

(17)—*Jurisdiction of the Bench taking cases of Presidency Group over S. C. Court at Calcutta.*—The Bench taking cases of the Presidency Group has no jurisdiction over the Presy. S. C. Court at Calcutta, and cannot set aside the decree of the latter Court. *SAMSHER MUNDUL v. GANENDRA NARAIN MITTER*, 29 C 498. (23 C.W.N. 247, D.; 11 B. 261, 24 C. 455, F.) [Expl., 30 C. 588 = 7 C.W.N. 547.]

(18)—*Jurisdiction of High Court Criminal Bench to question validity of order, when remedy available from Civil Court—Proceedings under Ch. XII, Crim. Pro. Code—Order re-management of property attached, under s. 146—Ss. 145, 146, 435, Crim. Pro. Code.*—It is not desirable that a Criminal Bench of the High Court should consider the propriety or legality of an order, when a remedy can be easily obtained from a Civil Court. S. 435 places proceedings under Ch. XII beyond the powers of the High Court in revision, leaving the parties to their remedies in the Civil Court. The High Court can, however, under the powers conferred by the Charter Act, take cognizance of such matters, if it is shown that the proceedings are without jurisdiction. Where a subordinate Magistrate passed an order attaching certain lands under s. 146, Crim. Pro. Code, and, in the management of this property, granted a lease, and the District Magistrate cancelled such lease, *held*, that the High Court could not interfere with an order relating to the management of property under attachment by reason of an order under s. 146, and that, if anything was done during the attachment, to which a party to the proceedings had any objection, he should have recourse to the Civil Court, which would deal with the whole question and remedy anything done likely to injure the party who might ultimately succeed

**High Court, Jurisdiction of—continued.****—2.—Calcutta—continued.**

in obtaining possession of the property. *LOKENATH SHAH CHOWDHURY v. NEDU BISWAS*, 29 C. 382 = 6 C.W.N. 469. [R., 17 C.P.L.R. 133.]

(19)—*High Court, Power of—Cl. 12, Letters Patent, 1865, ss. 11, 17, Civ. Pro. Code, 1882 (ss. 9 & 20, new Code)—Suit to set aside decree of mofussil Court, on ground of fraud.*—The jurisdiction of the High Courts in India is the creation of the Letters Patent and the Civ. Pro. Code, the Original Side of the High Court is a Court within the meaning of s. 11, Civ. Pro. Code, 1882. The Original Side of the High Court under cl. 12, Letters Patent under ss. 11, 17, Civ. Pro. Code, 1882, has jurisdiction to entertain a suit to set aside a decree of a Mofussil Court (of concurrent jurisdiction), on the ground of fraud, where the cause of action has arisen either wholly or in case the leave of the Court has been first obtained by fraud, in part, within the local limits of its (ordinary Original Civil Jurisdiction). *NISTARINI DASSI v. NUNDO LAL BOSE*, 30 C. 369 = 7 C.W.N. 353. *Bandon v. Bechler*, (1835) 3 Cl. and Fin. 479; *Allen v. Macpherson*, (1841) 1 H.L.C. 191, *Queen v. Saddler's Co.*, (1863) 10 H.L.C. 404; *Moxon v. Payne*, (1873) L.R. 8 Ch. App. 881, R.) (3 B.L.R. O.C., 85, 27 C. 11, R.) [Afflr., 33 C. 180, P.C. = 9 C.W.N. 961 = 2 C.L.J. 189 = 7 Bom. L.R. 887 = 15 M.L.J. 331, 32 I.A. 193; *Rel. on*, 11 C.W.N. 489 = 6 C.L.J. 404, 11 C.W.N. 579, 1 S.L.R. 160.]

(20)—*Mahomedan law — Wakf property, Dealings with.*—The High Court has jurisdiction under Mahomedan law to authorise dealings with wakf property. In the matter of *WOOZATUNNESSA BIBEE*, 36 C. 21 = 1 Ind. Cas. 512. (3 C.W.N. 158, F.)

(21)—*On the original side to entertain suit for damages for breach of agreement where document was executed, parties resided and property affected was, in mofussil.*—The plaintiff sued the defendant as administrator *pendente lite* of a certain estate. The owner of the estate had entered into an agreement with the plaintiff, undertaking to furnish him with funds to enable him to prosecute certain appeals then pending in the High Court of Calcutta in consideration of the plaintiff's selling him the subject-matter of the appeal which was situate in Gaya. The present suit was for damages for breach of the abovesaid agreement. It was contended on behalf of the defendant that the High Court, on the Original Side, had no jurisdiction to try the suit inasmuch as the agreements on which the suit was based were made by parties, who resided outside the jurisdiction and who did not contemplate anything which necessarily had to be performed within the jurisdiction and the agreements related to property which was outside the jurisdiction. *Held*, the documents were executed, the parties resided and the property affected by them was in the Mofussil. The looking after and managing the appeals was not necessarily to be done



**High Court, Jurisdiction of—continued.****—2.—Calcutta—continued.**

in Calcutta. It was not necessary that the instructions should be given or cost be paid within the jurisdiction of the High Court. Consequently, the High Court had no jurisdiction to entertain the suit. **UMA SHANKAR PROSAD v. DWARKA NATH MITTER**, 1 C.L.J. 219.

(22)—*Letters Patent (Calcutta), 1865, cl. 12, Suit for land, what is a—Lessor in possession during the absence of lessee—Suit by lessee for rents and mesne profits.*—T took a lease from P of a house situate outside the ordinary original civil jurisdiction of the High Court for a period of 15 years. Before the expiry of the period, T was sentenced for a term of imprisonment and he vacated the premises of which P, the lessor, took over possession. T, the lessee, brought a suit in the Calcutta High Court against P, for the recovery of rents and mesne profits realised from the premises pending the termination of the lease, on the ground that P, the lessor, was his trustee during his absence in respect of the said rents and profits. *Held* that, as what the plaintiff is seeking to do is to do something which will directly affect the property, *viz.*, to obtain possession of it by receipt of rent, this is a suit for land outside the jurisdiction of the High Court and cannot be entertained. **EBRAHIM ISMAIL TIMOL v. PROVAS CHANDER MITTER**, 36 C. 59=1 Ind. Cas. 472. (1 C. 249, 2 C. 445, 29 C. 315, F.; 26 C. 204=2 C.W.N. 718, D.)

(23)—*High Court—Jurisdiction over Sambalpur District—Extension of High Court's jurisdiction to place not within jurisdiction of any High Court, if ultra vires—Interpretation of Statute—Reference to repealed Statute—28 and 29 Vic., c. 15, s. 3.*—Under s. 3 of 28 and 29 Vic., c. 15, the Governor-General in Council can extend the jurisdiction of a High Court or any portion of its jurisdiction to a place not originally within the jurisdiction of any High Court. The proclamation whereby the Calcutta High Court was authorised to exercise jurisdiction over the Sambalpur District, when it was transferred from the Central Provinces to Bengal, was not *ultra vires*. The repealed provisions of ss. 18, 24 and 25 Vic., c. 105, were referred to as throwing light on the construction of s. 3 of 28 and 29 Vic., c. 15. Construction of Statutes by reference to repealed Statutes when permissible discussed by *Mookerjee*. **J. BALESWAR BAGARATI v. BHAGARATHI DAS**, 12 C.W.N. 637=35 C. 701=7 C.L.J. 563.

(24)—*Re-trial—Setting aside order of discharge—Presidency Magistrate—Crim. Pro. Code (Act V of 1898), ss. 243, 437, 439—Charter Act (24 and 25, Vic., c. 104 s. 15.)*—The High Court has full power under the Crim. Pro. Code to set aside an order of discharge passed by a Presidency Magistrate and to order further inquiry. (15 C. 608, 26 C. 746, 27 B. 84, F.; 6 C.L.J. 705, 33 C. 1282, 27 C. 126, Diss.) Interference under s. 15 of the Charter Act is limited to cases where there is

**High Court, Jurisdiction of—continued.****—2.—Calcutta—continued.**

an error that affects jurisdiction, either a want of jurisdiction, or a refusal of jurisdiction, or an illegality in the exercise of jurisdiction. **MALIK PRATAP SINGH v. KHAN MAHOMED**, 11 C.L.J. 50=13 C.W.N. 1221=3 Ind. Cas. 861=10 Cr. L.J. 388=36 C. 994. (1 A. 101, 26 C. 74, F.)

(25)—*Order by High Court Judge under misapprehension of jurisdiction—Power of High Court to set right.*—If a High Court Judge makes an order under a misapprehension of the extent of his jurisdiction, the High Court is competent, by appeal or otherwise, to set right such miscarriage of justice. **HURRISH CHUNDER CHOWDHRY v. KALISUNDERI DEBI**, 9 C. 482, P.C.=10 I.A. 4=12 C.L.R. 511=4 Sar. 407. (On appeal from 6 C. 594.) [Appl., 23 C. 580; R., 23 M. 517, 14 M.L.J. 436=28 M. 127.]

(26)—*Second or special appeal—Jurisdiction to deal with decree on the merits—Jurisdiction to dismiss the case in the absence of evidence.*—Though, where the decree appealed from to the High Court being a decree after remand, on a second or special appeal, the High Court has no jurisdiction to deal with it on its merits, it would be within its jurisdiction to dismiss the case, if it was satisfied that there was, as an English lawyer would express it, no evidence to go to the jury, because that would not raise a question of fact, but a question of law for the consideration of the Judge. **ANANGAMANJARI CHOWDHRAIN v. TRIPURA SUNDARI CHOWDHRAIN**, 14 C. 740=14 I.A. 101, P.C.=5 Sar. 45. [F., 18 C. 23, P.C.; App., 1 A.L.J. 637, P. C.=29 B. 1=6 Bom. L.R. 770=8 C.W.N. 865; R., 2 C.W.N. 649, 25 B. 202, 4 C.L.J. 198.]

(27)—*Admission of appeal after time—Power of High Court to rectify such error.*—The High Court, in special appeal, can examine the grounds on which an appeal has been admitted by the lower Court after the period allowed by the law of limitation. **CHUNDER DOSS v. BOSHOON LALL SOOKUL**, 8 C. 251=11 C.L.R. 177. (2 B.L.R. A.C. 184, Note=10 W.R. 178, R.)

(28)—*Charter Act, s. 15—High Courts Act—Error of law—False statement—Pending proceedings.*—The High Court will interfere, under s. 15 of the Charter Act, if an order be made by a lower Court, which is merely contrary to law, when that order has been passed in consequence of a wilfully false statement made by the opposite party. **ROGHONUNDUN LALL v. MOHESH LALL**, 3 C.L.R. 137.

(29)—*High Court, Extraordinary jurisdiction of—24 & 25 Vic. c. 104, s. 15.*—Though there would be a strong inclination to interfere under s. 15 of 24 and 25 Vic. c. 104, whenever an erroneous decision of a lower Court is brought to the notice of the High Court, an important consideration to move it into exercising these powers is a charge of judicial misconduct in the Court below, *i.e.*, not misconduct of a moral kind only, but an entire misconception of its duty (*Per Markby, J.*) Some special



**High Court, Jurisdiction of—continued.****—2.—Calcutta—continued.**

ground, something more than a mere error of law or a wrong conclusion on evidence, must be established for the High Court to interfere under the extraordinary powers of the section. (*Per Mitter, J.*) Where a remedy lies by regular suit though it may not be quite complete, the High Court is reluctant to interfere. **MADHUB CHUNDER GIREE v. SHAM CHAND GIREE, 3 C. 243.** [*R.*, 2 C.L.J. 241, 1 C.W.N. 617.]

(30)—*Summary suit on promissory note—Power to extend time for defendant to apply for leave to defend.*—The High Court has power to extend the time within which a defendant in a summary suit, on a promissory note, can come in and obtain leave to defend. **GROOM v. WILSON, 3 C. 539.** [*D.*, 5 C.W.N. 259.]

(31)—*Jurisdiction of High Courts, subject to the Indian Legislature.*—By the terms of 24 and 25 Vic., c. 104, the exercise of jurisdiction, in any part of Her Majesty's Indian territories by the High Courts was meant to be subject to, and not to be exclusive of, the general legislative power of the Governor-General in Council as to "all Courts of justice whatever." [*R.*, 10 B. 422, 11 A. 490, F.B., 26 C. 188.] An exercise of legislative authority by the Governor-General in Council removing any place or territory from the jurisdiction of the High Court is expressly contemplated and authorised both by Statutes 24 and 25, Vict. c., 104 and by the Letters Patent issued thereunder. **THE EMPRESS v. BURAH, 4 C. 172, P.C.=5 I.A. 178=3 C.L.R. 197=3 Sar. 834.** [*R.*, 26 C. 874=3 C.W.N. 564.]

(32)—*Powers of High Court in appellate capacity—Order of inquiry into facts by District Court in respect of suit decided by another District Court—Act VIII of 1859, s. 12—Decrees of District Courts—Powers of appellate Court to amend—Change of two suits into one totally different from either.*—Neither under s. 12 of Act VIII of 1859 (the old Code), nor in any other way, has the High Court in its appellate capacity power to give jurisdiction to a District Court to inquire into facts, as upon a remand, in a suit decided in the Court of another district, and relating to lands in the latter. [*F.*, 17 C. 699, F.B.; *R.*, 23 B. 22.] Although wide powers of amendment, of framing new issues, and of modifying decrees, are conferred upon the High Court by provisions in the Civ. Pro. Code, of which the plain meaning is not to be narrowed by judicial construction to change two suits into one suit of a totally different description from either of them, and that without the consent of the parties, exceeds the powers conferred by the Act. **KAMINI SUNDARI CHAUDHRANI v. KALI PROSUNNO GHOSE, 12 C. 225=12 I.A. 215, P.C.=4 Sar. 632.**

(33)—*Petition for review heard by four Judges of the Agra Sudder Court—All four Judges equally divided in opinion—The same heard by the Chief Justice of N.W.P.*—A petition of review was heard in 1865, before four of the

**High Court, Jurisdiction of—continued.****—2.—Calcutta—continued.**

Judges of the Sudder Court at Agra, who were equally divided in opinion, and though under the 7th section of Ben. Reg. VI of 1831, power is given in such circumstances to refer the suit for the opinion of one or more of the Judges of the High Court at Calcutta, no such reference appeared to have been made. Under the provisions of the Statute, 24th and 25th Vic. c. 104, the Crown, by Letters Patent, dated the 17th of March, 1865, abolished the Sudder Court at Agra, and erected instead a High Court for the North-Western Provinces. In August, 1866, the Chief Justice of the High Court for the North-Western Provinces heard the petition of review and made a decree. *Held*, that the Chief Justice had, by the 27th section of the Letters Patent, jurisdiction. **MUSSUMAT OODEY KOOWUR v. MUSUMAT LADDOO, 15 W. R. 16, P.C.=6 B.L.R. 283=13 M.I.A. 585.**

(34)—*Suits for land—Land in possession of receiver.*—The High Court cannot exercise jurisdiction in respect to land which is situate out of its local limits, even though it be in possession of the receiver. **DENONAUTH SREEMANY v. HOGG, 1 Hyde 141.**

(35)—*Power of execution of decree—Execution out of jurisdiction.*—The High Court, in the exercise of its civil jurisdiction, had not the power to execute its own decree, or serve its own process, out of the local limits of such jurisdiction. **SAGORE DUTT v. RAM CHUNDER MITTER, 1 Hyde 136.**

(36)—*Irregularity in title of suit—Immaterial mistake.*—Where a suit, cognizable by the High Court by reason of the testamentary and intestate jurisdiction of the Court, was wrongly entitled as being brought in the ordinary original civil jurisdiction.—*Held* that the Court had jurisdiction to entertain the suit. It was a mere blunder which the Court could correct. **TOYLUCK NAUTH DASS v. MEGNATH DASS, 2 Ind. Jar. N.S. 245.**

(37)—*Cause of action arising in district in which British subjects were subject to Supreme Court.*—The High Court, previously to the issue of the Order in Council No. 4366, dated 22nd November, 1865, had jurisdiction in cases in which the cause of action arose in a district in which British subjects were formally subject to the jurisdiction of the Supreme Court. **INDIAN CARRYING CO. v. MC CARTHEY, Cor. 116.**

To deal with Copyright Registers kept at Bombay—*See ACT XX OF 1847, s. 6, 9 C.W.N. 591=1 C.L.J. 278.*

Infringement of copyright—*See ACT XX OF 1847, ss. 6, 14, 2 C.L.J. 511=10 C.W.N. 134=33 C. 571 (on appeal from 9 C.W.N. 591=1 C.L.J. 278.)*

In the exercise of its ordinary original civil jurisdiction, whether included in the term "District Court," in s. 29, Inventions and Designs Act—*See ACT V OF 1888, s. 4 (9) and (10), 12 C.W.N. 446.*



**High Court, Jurisdiction of—continued.****—2.—Calcutta—continued.**

If can review the order of Collector—*See* ACT I OF 1894, ss. 11, 18, 12 C.L.J. 505=8 Ind. Cas. 107.

Power of High Court to revise order made by a Civil Court under s. 59, Bengal Land Registration Act—*See* BEN. ACT VII OF 1876, 35 C. 571.

Fraudulent decrees and deeds, setting aside of—*See* ADMINISTRATION SUIT, 2 C.L.J. 189, P.C.=9 C.W.N. 961=15 M.L.J. 331=7 Bom. L.R. 887=33 C. 180=32 I.A. 193.

Powers of High Court after special leave to appeal is granted by Judicial Committee—*See* APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE, 10 C.L.J. 326=7 Ind. Cas. 452.

To entertain application for substitution of legal representatives of deceased parties—*See* APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE, 10 C.L.J. 331.

To restrain suit in Presidency Small Cause Court—*See* CIV. PRO. CODE, 1882, ss. 20, 211, 9 C.W.N. 748.

Institution of suit or appeal in wrong Court—Power to transfer—Jurisdiction of High Court and District Court—*See* CIV. PRO. CODE, 1908, s. 24, 25 C. 39.

Amendment of its decree by Court of first instance after it was confirmed on appeal—Jurisdiction of—to revise amended decree under s. 522, Civ. Pro. Code—*See* CIV. PRO. CODE, 1908, s. 152, O. XX, r. 6, s. 104, O. XLIII. r. 1 s. 115, 9 C.W.N. 605.

Power of High Court under s. 584, Civ. Pro. Code, to interfere when Subordinate Court erroneously exercised discretion by rejecting document that ought to have been received—*See* CIV. PRO. CODE, 1908, O. XIII, r. 1 (1), O. XIII, r. 2, s. 100, 12 C.W.N. 312=8 C.L.J. 147.

*See* CIV. PRO. CODE, 1908, O. XXI, r. 68, s. 115, 5 C. 878, F.B.

Suit against person carrying on business in firm's name—Person living outside but carrying on business within—Jurisdiction—*See* CIV. PRO. CODE, 1908, O. XXX, r. 10, 10 Ind. Cas. 895.

Jurisdiction of High Court, Calcutta, to wind up Company at Bombay—*See* COMPANY—WINDING UP OF COMPANY, 1 Ind. Jur. N.S. 330.

*See* CONTEMPT OF COURT, 4 C. 655.

Stamp duty—Refund of excess—Powers of High Court—Power of Government—*See* COURT FEES ACT, 1870, 11 B.L.R. 370=20 W.R. 106.

High Court—Original side, if may restrain disturbance of possession of immoveable property out of jurisdiction—*See* COURT OF WARDS, 12 C.W.N. 1065=36 C. 28=1 Ind. Cas. 514.

**High Court, Jurisdiction of—continued.****—2.—Calcutta—continued.**

*See* CRIM. PRO. CODE, 1898, s. 145, 3 C.W. N. 461=26 C. 625.

*See* CRIM. PRO. CODE, 1898, s. 195, 8 C.W. N. 797.

*See* CUSTODY OF CHILDREN, 1 Hyde 143.

Power of High Court to amend decree after leave granted to appeal to Privy Council—Practice of Calcutta High Court—*See* DECREE—ALTERATION OR AMENDMENT OF DECREE, 11 C.L.J. 155=5 Ind. Cas. 723.

*See* GUARDIAN—APPOINTMENT OF GUARDIANS, 21 C. 206.

Injunction sought in High Court to restrain proceedings in a Small Cause Court—Power of High Court to grant the injunction—*See* INJUNCTION—SPECIAL CASES, 34 C. 97.

Stay of suit—Foreign Court—Power to restrain person outside jurisdiction—*See* INJUNCTION—SPECIAL CASES, 13 C.W.N. 346=36 C. 233=1 Ind. Cas. 927.

Injunction to restrain proceedings in a Subordinate Judge's Court—Suit in the High Court for money due on a balance of account—Power of High Court to grant injunction—*See* INJUNCTION—SPECIAL CASES, 34 C. 101.

Jurisdiction—Collision—Collision between foreign vessels at sea—Jurisdiction of High Court, Calcutta—*See* JURISDICTION—ADMIRALTY AND VICE ADMIRALTY JURISDICTION, 1 Hyde 275.

Power to arrest ship for repairs—*See* JURISDICTION—ADMIRALTY AND VICE ADMIRALTY JURISDICTION, Cor. 113=2 Hyde 255.

*See* JURISDICTION—MATRIMONIAL JURISDICTION, Bourke Mat. 1.

Rent-suit—Suit for land—High Court's jurisdiction, when suit land is situate outside its limits—*See* JURISDICTION—SUITS FOR LAND, 26 C. 204=2 C.W.N. 718.

*See* JURISDICTION—SUITS FOR LAND, 2 C. 445.

*See* JURISDICTION—TESTAMENTARY AND INTESTATE JURISDICTION, 1 Hyde 70.

Jurisdiction of High Court to dispense with the production of the certificate mentioned in Rule 116 of the Original Side of the High Court—Power to interfere with the discretion of Board of Examiners—*See* LEGAL PRACTITIONERS—ATTORNEY, 12 C.W.N. 873=4 M. L.T. 157=35 C. 915.

Letters of Administration to Administrator-General during minority of heir—Suit by Administrator-General for partnership accounts and for recovery of sums, in the hands of Receiver—Jurisdiction of High Court over assets realized outside original jurisdiction—Limitation—*See* LETTERS OF ADMINISTRATION, 3 C.W.N. 186=23 B. 549, P.C.



**High Court, Jurisdiction of—continued.****—2.—Calcutta—continued.**

See LETTERS OF ADMINISTRATION, 1 B.L.R. O.C. 3.

Decree of High Court—Execution—Transfer of decree—Limitation—See LIMITATION ACT, 1908, sch. I, art. 183, 11 Ind. Cas. 216.

Application for sanction to sell *wakf* property—Jurisdiction—Procedure—See MAHOMEDAN LAW—WAKF, 7 Ind. Cas. 33—37 C. 870.

See MANDAMUS, 11 B.L.R. 250.

Effect of O. XXXIV, Civ. Pro. Code, 1908, on practice of High Court—See MORTGAGE—GENERAL, 37 C. 907.

See MORTGAGE—MISCELLANEOUS, 8 C.W. N. 690.

See PARTITION—RIGHT TO PARTITION, 14 C. 835.

Precedents to be followed by lower Courts—Conflicting decisions of several High Courts—See PRACTICE AND PROCEDURE, 13 C.L.R. 256.

See PRESIDENCY SMALL CAUSES COURTS ACT, 1882, s. 69, 30 C. 458.

To grant probate and letters of administration—Original Side of High Court—Property not situate within jurisdiction—See PROBATE AND ADMINISTRATION ACT, 1881, s. 87, 37 C. 224.

High Court if may grant *interim* protection and appoint receiver pending appeal—See PROVINCIAL INSOLVENCY ACT, 1907, ss. 2, sub-sec. 1, cl. (g), 47, 46, 16 (6), 13, 18, 14 C. W.N. 586=11 C.L.J. 435=6 Ind Cas. 95.

To transfer suit from the file of Agent to Governor at Vizagapatam—Consent of parties, how far cures defect of jurisdiction—See RES JUDICATA—COMPETENCY OF COURT, 9 C.W. N. 257, P.C.=7 Bom. L.R. 97=2 A.L.J. 135=28 M. 42.

Sheriff, Jurisdiction of, to issue *fiery facias*—See SALE—SALE IN EXECUTION OF DECREE—WRONGFUL AND INVALID SALES, 8 C.L.R. 4.

Powers of High Court to interfere with appellate judgment under s. 195, cl. (6), Crim. Pro. Code—See SANCTION TO PROSECUTE, 11 C.W.N. 195=5 C.L.J. 219=5 Cr. L.J. 29.

Powers of High Court to interfere in second appeal with findings of facts, based on misconstruction of deeds—See SPECIAL OR SECOND APPEAL—PRACTICE AND PROCEDURE IN SPECIAL APPEAL, 9 C.W.N. 154.

Reference to High Court—See ST. 11 AND 12, VIC., C. 21, s. 50, L B.R. 1872—1892, 646.

High Court has jurisdiction in its appellate side to pass orders on application under s. 73 of the Insolvent Debtors Act—See ST. 11 AND 12, VIC., C. 21, s. 73, 36 C. 512=2 Ind. Cas. 572.

**High Court, Jurisdiction of—continued.****—2.—Calcutta—concluded.**

See SUCCESSION ACT, 1865, ss. 182, 264, 6 C.L.R. 228.

Transfer of appeal from one Court to another by High Court—See TRANSFER OF CIVIL CASES, 6 C. 30.

See TRANSFER OF CIVIL CASES, 5 C. 766=6 C.L.R. 221.

**—3.—Madras.**

(1)—*Jurisdiction—Supreme Court—Letters Patent, 1865.*—The Supreme Court, in 1862, had jurisdiction over a suit for partition, where the parties were inhabitants of Madras, and a decree could be executed by the High Court, prior to the Letters Patent of 1865, by selling immoveable property, situated outside the local jurisdiction of the Madras High Court. JAMUNA BHAI v. SADAGOPA, 7 M. 56. [R., 26 M. 120.]

(2)—*Suit for immoveable property partly outside local jurisdiction—Court sale—Jurisdiction of High Court before Letters Patent of 1865.*—The High Court had no jurisdiction before the Letters Patent of 1865 in suits relating to immoveable property partly situated outside the local jurisdiction, and, therefore, the purchaser at a Court sale of property situated outside this jurisdiction acquired no title to it. SADAGOPA v. JAMUNA BHAI, 5 M. 54 [Overruled, 7 M. 56.]

(3)—*Jurisdiction—Complaint against Governor and Council of Madras—St. 21, Geo. III, c. 70, s. 5. 39 and 40 Geo. III, c. 79, s. 3, 4 Geo. IV, c. 71 s. 17.*—Having regard to the provisions of the several Statutes, 21 Geo. III, c. 70, s. 5. 39 and 40 Geo. III, c. 79, s. 3 and 4 Geo. IV, c. 71, s. 17, where a person makes a complaint to the High Court, of certain Acts of the Governor and Members of Council of this Presidency, which he alleges to be oppressive and injurious and applies to the High Court to take evidence, to be hereafter used by him in the prosecution of his complaint in a competent Court in Great Britain, the High Court have no power to entertain such an application. *In re WALLACE*, 8 M. 24, F.B.

(4)—*Power to extend time for payment where appeals are dismissed on ground of limitation—Delay in presenting second appeals.*—Even in cases in which appeals are dismissed on the ground of limitation in presentation of the same, the High Court has power to extend the time for payment. VENKATAPATHY AIYAR v. TIRUPATHI GOUNDAN, 4 M.L.T. 341. (18 M. 214, 22 M. 293, 31 M. 28, F.)

(5)—*Criminal proceedings ordered by civil Court. Power of High Court to stay—S. 15, Charter Act, Scope of—Ss. 28, 29. Letters Patent—S. 476, Crim. Pro. Code.*—The power of general superintendence given by s. 15 is not limited by any other provisions of law, and it includes the power to point out to the subordinate Courts, the inexpediency of trying a case when it is likely to interfere with the due



**High Court, Jurisdiction of—continued.****—3.—Madras—continued.**

course of justice. The power of superintendence (s. 15) and transfer (s. 29), implies the power to send for the records in any case in the lower Courts, which must necessarily stay further proceedings in that case. Therefore, the High Court has the power to stay proceedings (ordered by a Civil Court) in Criminal Courts till the appeal from that Court is disposed. The fact that the Court may not have the power to set aside the order under s. 476, Crim. Pro. Code, is in itself no reason for holding the other way. *In re L. JOGIAH*, 4 M.L.T. 186. (34 C. 848, *Expl.*; B.L.R. F.B. 426, *Not Expl.*)

(6)—*Suit against Collector of Sea Customs at Madras for act done without jurisdiction—Jurisdiction of High Court.*—*Per Innes and Kernan, JJ. (C.J., Diss.)* The High Court of Madras has jurisdiction to try original suits against Revenue Officers for acts done *ultra vires* in their official capacity. The Letters Patent of the High Court have impliedly repealed the exception from jurisdiction of such suits contained in the Letters Patent of the Supreme Court. (*Per Kernan, J.*) After the passing of 53 Geo. III, c. 155, land revenue was the only matter upon which the exception from jurisdiction operated. *COLLECTOR OF SEA CUSTOMS v. CHITHAMBARAM*, 1 M. 82, F.B. [*Cons.*, 27 B. 189; *R.*, 4 M. 344, 5 M. 273, 12 A. 115, 6 Bom. L. R. 131.]

(7)—*High Court—Original Side—Leave to sue refused—Appeal.*—An appeal lies from the decision of a Judge exercising original jurisdiction refusing to give leave to institute a suit on the original side of the High Court, in a case in which the cause of action has arisen in part within the ordinary original jurisdiction of the High Court; but the appellate Court, ought not to interfere with the discretion exercised by the Judge in such a matter. *DESOUZA v. COLES*, 3 M.H.C. 384. [*F.*, 11 C.W.N. 649 = 34 C. 619 = 5 C.L.J. 405; *Cons.*, 17 W.R. 364 = *R.*, 9 B.H.C. 398, 1 M. 148, 11 A. 375 = A.W.N. 1889, 70, 14 M. 406, 22 M. 68, F.B. = 8 M.L.J. 231, 23 M. 329, 11 Bom. L.R. 241; *D.*, 18 M. 142.]

Power of the Court to assess a "just" rent, where *varam* not ascertained—*See MAD. ACT VIII OF 1865*, s. 11, 5 M.L.T. 211.

High Court—Power to issue Mandamus—Marriage of a ward under Court of Wards—Postponement of—Power to remove ward from Court of Wards—*See MAD. ACT I OF 1902*, ss. 3, 23, 48, 7 M.L.T. 73 = 5 Ind. Cas. 740.

To examine in second appeal the evidence as to "usages having the force of law"—*See CIV. PRO. CODE*, 1908, s. 100, 29 M. 24 = 16 M.L.J. 8.

Inspection of documents—High Court's interference in revision with the exercise of discretion by inferior Courts under s. 130 of the *Civ. Pro. Code*—*See CIV. PRO. CODE*, 1908, O. XI, r. 14, 17 M.L.J. 79 = 2 M.L.T. 88 = 30 M. 230.

**High Court, Jurisdiction of—continued.****—3.—Madras—concluded.**

High Court, power of, to interfere with order of Subordinate Courts passed without jurisdiction—S. 15, Charter Act—*See COMMISSION*. 3 M.L.T. 246 = 31 M. 60.

*See CONTEMPT OF COURT*, 21 M.L.J. 832.

Constitution of Bench of five Judges—Reference of a question to such Bench—One Judge ceasing to be Judge after hearing and before delivery of judgment already written—His judgment if legal—Validity of judgment of four Judges—*See JUDGMENT—GENERAL*, 21 M.L.J. 246.

Carry on business, meaning of—Suit against Collector representing Government—Collector residing and carrying on business outside local limits—Cause of action also outside local limits—Jurisdiction of High Court to entertain suit—*See JURISDICTION—CAUSES OF JURISDICTION*, 1 M.H.C. 286.

Power to compel native to prove Will in solemn form—*See JURISDICTION—TESTAMENTARY AND INTESTATE JURISDICTION*, 1 M.H.C. 59.

Appellate jurisdiction over proceedings of Commissioner in Insolvency—*See LEGAL PRACTITIONERS—VAKIL*, 18 M.L.J. 565.

Power of High Court to question whether application for review was rightly admitted—*See PROVINCIAL SMALL CAUSE COURTS ACT*, 1887, s. 25, 5 M.L.T. 73 = 19 M.L.J. 56 = 2 Ind. Cas. 488.

Powers of High Court to revoke sanction—*See SANCTION TO PROSECUTE*, 27 M. 223 = 14 M.L.J. 24.

Certificate by Head-Quarters Deputy Collector that documents are exempt from duty—Reference by Revenue Board to High Court—*See STAMP ACT*, 1899, s. 57, 25 M. 752.

**—4.—N.W.P.**

(1)—*Act XVII of 1886 (Jhansi and Morar Act).*—The Governor-General in Council had power to pass Act XVII of 1886, and the town and fort of Jhansi are subject to the jurisdiction of the N.W.P. High Court in the same manner as the rest of the Jhansi District. *ABDULLA v. MOHAN GIR*, 11 A. 490, F.B. = A.W.N. 1889, 194. [*Appl.*, 18 B. 636.]

(2)—*Indian Divorce Act (IV of 1869)*, s. 55—*Petition for divorce, Order of District Judge dismissing, Appeal from, not entertainable by High Court—District Court in Oudh—Appeal.*—Where an appeal presented to and admitted by the High Court, from an order of a District Judge in Oudh dismissing a petition for divorce, came on for argument, a question arose as to whether the High Court, N.W.P. had jurisdiction to entertain and determine the appeal. It may naturally be thought that in those cases in which an appeal is given by Act IV of 1869 from a decree or order in a matrimonial suit passed by a District Judge, the appeal



**High Court, Jurisdiction of—continued.****—4.—N.W.P.—continued.**

would lie to the High Court which had the power, under s. 8 of the Act, to withdraw such suit before decision from the Court of the District Judge, to advise upon reference made under s. 9 by the District Judge, and to confirm under s. 17 the decree for dissolution of marriage when passed by the District Judge. It cannot, however, be assumed that, because the High Court of the N.W. Provinces is, for certain purposes, the High Court for Oudh under Act IV of 1869, appeals from the District Judge of Oudh lie under s. 55 of the Act, to the High Court. In framing s. 55, the jurisdiction in appeal has been made to depend on the original civil jurisdiction, and, at no time had the High Court any jurisdiction to hear appeals from decrees of Courts in Oudh passed in the exercise of their original civil jurisdiction. *F.H. PERCY v. J. PERCY*, 18 A. 375 = A.W.N. 1896, 110. [R., 98 P.R. 1909.]

(3)—*Legal Practitioners Act (XVIII of 1879), s. 8—Enrolment of Vakils in Kumaun.*—The Commissioner of Kumaun is the High Court for the purposes of the Legal Practitioners Act in the Kumaun Division; and merely because the High Court (N.W.P.) has been appointed the High Court of the Kumaun Division for some purposes, it cannot be said that the Commissioner of Kumaun and the Courts in his Division are subordinate to the High Court (N.W.P.) within the meaning of s. 8 of the Legal Practitioners Act. *Held*, therefore, that a Vakil who has been duly enrolled as such in the High Court (N.W.P.) is not, by virtue of such enrolment, entitled to practise in the Courts of Kumaun, nor has the High Court (N.W.P.) any jurisdiction to reverse an order of the Commissioner of Kumaun refusing to enrol a Vakil in the roll of the legal practitioners entitled to practise in his Courts. *In the matter of the petition of PADMA DAT JOSHI*, 24 A. 348, F.B. = A.W.N. 1902, 86.

(4)—*Subordinate Court erroneously exercising jurisdiction—Appeal to High Court.*—When the High Court is the Court of appeal from a particular subordinate tribunal, and that subordinate tribunal acts without jurisdiction in the trial of a suit or an appeal, the High Court has power, in the form of an appeal, to set right the proceedings of such subordinate tribunal. *JWALA PRASAD v. SALIGRAM*, 13 A. 578 = A.W.N. 1891, 158. (4 A. 237, A.W.N. 1887, 76, *Overruled*.)

(5)—*Letters Patent, N.W.P., s. 2—Stat. 24 and 25 Vic., c. 104, ss. 7, 16, 17—High Court—Omission to fill up vacancy on the Bench—Legality of constitution of Court—Civ. Pro. Code, s. 575—Delivery of dissentient judgments—No reservation—Reference to Full Bench—Legality of reference.*—Where a vacancy occurred among the Judges of the High Court, s. 2 of the Letters Patent of the High Court did not render it obligatory on the Crown of the Government to fill up the vacancy under the powers conferred by 24 and 25 Vic., c. 104, s. 7, and an omission to fill up

**High Court, Jurisdiction of—continued.****—4.—N.W.P.—continued.**

the vacancy did not make the constitution of the Court illegal and the remaining Judges incompetent to exercise the functions assigned to the High Court. [R., 16 A. 136.] Where the Judge of the High Court differed and delivered dissentient judgments as judgments and without any reservation they could not make an order of reference to the Full Bench under s. 575, Civ. Pro. Code, and the order of reference so made was *ultra vires*. *LAL SINGH v. GHANSHAM SINGH*, 9 A. 625, F.B. = A.W.N. 1887, 154. (6 A. 468, R.)

(6)—*Act IX of 1887, s. 25—Civ. Pro. Code, ss. 203 and 578—Small Cause Court suit—Revision, High Court, Powers of.*—The High Court has no power to act under s. 25 of Act IX of 1887 merely because the judgment in a suit tried by a Court of Small Causes does not comply with the provisions of s. 203 of the Code of Civil Procedure when the decree in the suit is unassailed and is on the face of it a good decree. *RAMCHANDAR v. JAI RAM*, A.W.N. 1892, 150. (13 A. 533, *Diss.*)

Judge declaring certain persons to be touts—Practice of High Court on application for revision of such order—See ACT XVIII OF 1879, s. 36, A.W.N. 1908, 279 = 6 A.L.J. 22 = 31 A. 59 = 1 Ind. Cas. 143.

High Court's power to call for records of its own motion for revision and pass orders—Power of revision where other remedy is open—See CIV. PRO. CODE, 1908, ss. 47, 115, A.W.N. 1905, 191 = 2 A.L.J. 749 = 28 A. 72.

Issue left untried by lower appellate Court, power of High Court to remand—See CIV. PRO. CODE, 1908, O. XLI, r. 25, 17 A. 117 = A.W.N. 1895, 121.

Reference of question of Court-fee—Jurisdiction of Division Bench to hear—See COURT FEES ACT, 1870, s. 7. 7 A.L.J. 842 = 7 Ind. Cas. 315.

Of N.W.P. in the matter of appointments of guardians for infants—See GUARDIANS AND WARDS ACT, 1890, ss. 3, 9, 10, 2 A.L.J. 81.

Power to make rules—See JUDGMENT—FORM AND CONTENTS, 9 A. 93, F.B.

Refusal to grant certificate to mukhtear to practise in Criminal Courts—Revision—Jurisdiction of High Court—Rules for Kumaon and Garhwal districts issued under s. 6 of Act XIV of 1874 (Notification No. 45 A, dated the 23rd May, 1879)—Crim. Pro. Code, s. 439—Letters Patent, s. 15—See LEGAL PRACTITIONER—MUKHTEAR, A.W.N. 1892, 236.

See LEGISLATURE, POWERS OF, 11 A. 490, F.B. = A.W.N. 1889, 194.

Powers of High Court to interfere with impossible findings of lower appellate Court—See PRACTICE AND PROCEDURE, 2 A.L.J. 27 = 27 A. 356 = A.W.N. 1904, 276.



**High Court, Jurisdiction of—concluded.****—4.—N.W.P.—concluded.**

High Court in revision has the power vested in a Court of appeal to fix a fresh date for deposit of money — See PRE-EMPTION—MISCELLANEOUS, 11 O.C. 144.

Ajmere Courts Reg. (I of 1877), s. 18, powers of High Court on reference made under — See REFERENCE TO HIGH COURT, 21 A. 163=A. W.N. 1899, 4.

Power of High Court to consider questions of fact—See REMAND, 13 O.C. 352=8 Ind. Cas. 878.

**High Court Rulings.**

(1)—*Practice—Different rulings by different High Courts — Duty of Subordinate Courts—Practice.*—Where there are different rulings by different High Courts on the same point a Judge must follow the ruling of the High Court to which he is subordinate. BALAJI GANESH v. SAKHARAM PARASHRAM ANGAL, 17 B. 555. [Cons., 27 B. 1; R., 8 C. W.N. 66=31 C. 83.]

(2)—*High Court's ruling — Duty of subordinate Court to follow.*—Subordinate Courts in the N.W.P. should follow the rulings of the Allahabad High Court and should not be guided by conflicting decisions of other High Courts. IMAM ALI v. SAADAT ALI, A.W.N. 1882, 106.

Construction of—See LIMITATION—GENERAL, 1 B.L.R. A.C. 17=10 W.R. 59.

**High Court's Act, Presidency.**

See ACT XX OF 1862.

**High Priest.**

Defendant a — in Odeypore — Arrival at Bombay on tour as High Priest— Suit against defendant during stay at Bombay, whether maintainable in Bombay High Court— "Dwelling," "carrying on business," meaning of, in Letters Patent, 1865—See JURISDICTION—CAUSES OF JURISDICTION, 14 B. 541.

**High Seas.**

(1)—*Offence committed on — Jurisdiction of the Presidency Magistrate of Bombay.*—The Presidency Magistrate of Bombay has authority to convict a person for an offence, under the Indian Penal Code, where the said offence is committed in a British ship during her voyage on the high seas. KING-EMPEROR v. THE CHIEF OFFICER OF "S. S. MUSHTARI," 3 Bom. L.R. 253.

**High Way.**

(1)—*Obstruction to — Necessity of special damage for cause of action — Exception when plaintiff is owner of soil of highway.*—The general rule is that a person cannot maintain an action against another for obstruction to a highway unless some special damage has accrued to him (7 C.P.L.R. 97, 9 M. 463, 31 C. 839, 10 A. 553, R.) This rule, however, has

**High Way—concluded.**

no application where the plaintiff is the owner of the soil of the highway. His ownership is subject to the right of the public to use the highway. But any use of the soil of the highway other than the legitimate use of it for the purposes of highway is a trespass upon the soil for which the owner can sue, even without proof of special damage. BHUKAN LAL v. MIR, 2 N.L.R. 110.

(2)—*Public user—Dedication—Unrestricted dedication, Presumption as to—Burden of proof—Rival religious sects—Marching in procession with music on a highway—Hindu temple—Dedication by trustees, Presumption of.*—Dedication must be presumed from the user by the public of a thoroughfare as a highway, whoever was the owner of the soil at the time of dedication. The rule of English Common Law that dedication of a highway arises by the fact of the private ownership of the soil does not apply to India. Where a Hindu temple stood on such highway, there is no presumption that the dedication was by the trustees of the temple any more than that the common owner of the site of the temple and of the road founded the temple and gave it the site and dedicated the highway to the public. Where there has been a general user by the public, a dedication without reservation would be presumed, if that was possible, and the burden of proving the reservation will lie on the party contending for it. (3 W.R. 372, 3 C.L.R. 686, R.) Though the proper use of a highway is for passing and re-passing, and user for any other purpose may amount to a trespass, marching in procession with music is not an excessive use of a highway. (30 M. 185, 4 A.L.J. 333, 11 C.W.N. 595, 5 C.L.J. 566, 17 M.L.J. 240, 9 Bom. L.R. 663, 2 M.L.T. 204, R.; 26 M. 376, 32 M. 478, 6 Ind. Cas. 716, 32 M. 527, 6 M.L.T. 285, 19 M. L.J. 467, 4 Ind. Cas. 870, F.) Though property vested in trustees cannot be presumed to have been dedicated as a highway, where such dedication would be contrary to the purposes of the trust, a procession with music by Mahomedan inhabitants will not, in the absence of evidence, contravene the purposes of the trusts of a Hindu temple, even assuming that the dedication was by the trustees of the temple. VIBUDAPRIYA v. ESOOF SAHIB, 8 Ind. Cas. 175=20 M.L.J. 879.

Lawful use of—Obstruction—Suit for declaration of right to carry religious emblems—See JURISDICTION OF CIVIL COURTS, 24 O. 524.

See JURISDICTION OF CIVIL COURTS, 4 C. P.L.R. 142.

See LIMITATION ACT, 1908, art. 149, 19 M. 154.

Rights of persons to the use of common—See MAGISTRATES, JURISDICTION OF, 2 M. 140.

See RIGHT OF SUIT—OBSTRUCTIONS TO PUBLIC HIGHWAY, SUITS CONCERNING, 9 M. 463,



**Highway Rate.**

(1)—*Principle of assessment.*—By Stat. 33 Geo. III, c. 52, s. 158 (for among other things, making better provisions for the good order and Government of the towns of Calcutta, Madras, and Bombay) assessments are directed to be made on the owners or occupiers of houses, buildings and grounds, "according to the true and real annual values thereof." Upon a rate made in pursuance of this Statute, the Quarter Sessions at Bombay assessed the annual value of a cotton pressing factory, having fixed machinery upon the gross receipts, after making an allowance of ten per cent. for tenant's profits. *Held*, by the Judicial Committee, reversing the order of confirmation of the Sessions by the Supreme Court, and quashing the rate, that the principle of the assessment was erroneous, the proper measure of rateable value of the building being the rent (subject to the deductions required by the Statute 6 & 7 Wm. IV, c. 96) that the building might reasonably be expected to be let for, to a yearly tenant. *FAWCETT v. THE JUSTICES OF BOMBAY*, 3 M. I. A. 408 = 5 Moo. P. C. 143 = 1 Sar. 296.

**Hill.**

(1)—*Suit for—Within a certain village—Village handed over by Government to plaintiff's ancestor—Possession by plaintiff—Necessity to prove adverse possession against Government.*—This was a claim for possession of certain hills against Government. The plaintiff, a Jaghirdar, alleged the hills to be within the limits of his village. It appeared that, about fifty years before suit, the uncontrolled management of the village was made over to the plaintiff's ancestor. Prior to such handing over, the Government had been in possession on behalf of the jaghirdar. It was not alleged that, when such possession was handed over, the hills were excepted. It was an undisputed fact that the hills were within the immemorial boundaries of the village. There was evidence to show that, since the handing over, the jaghirdar was in possession of the hills. The lower Court had dismissed the claim on the ground that the plaintiff had not proved adverse possession as against the Government. *Held*, that, apart from the question of adverse possession, the plaintiff was entitled to the hills, the evidence as to enjoyment being *prima facie* proof of the plaintiff's title, which was supported by evidence to the effect that the hills were treated by Government as part of the village and that it was not necessary for the plaintiff to prove adverse possession against Government. *NAWAB AJAJUDDIN ALLI KHAN v. SECRETARY OF STATE FOR INDIA*, 28 M. 69.

Zemindar's right to a tract of—and forest, proof of—Construction of istemrar sanad of 1803 as to lands granted—See OWNERSHIP, 15 M. 101 = 18 I. A. 149, P. C.

**Hills Act, Garo.**

See ACT XXII OF 1869.

**Hill Tracts.**

(1)—*Confiscation of Parlakimidi Zemindari including—for rebellion—Re-grant except "lands held by the Bisoyees"—Savaras inhabitants of Maliahs—Bisoyees, Control of over Savaras—Whether re-grant passed ownership of, to Zemindar—Management of Zemindari by Court of Wards—Acquiescence and acts of Government officials under mistake—Estoppel—Title by adverse possession.*—The Maliahs are certain hill-tracts to the north of the Parlakimidi Zemindari, and originally formed part of the Zemindari. The inhabitants of the country are known as Savaras, as indigenous hill race, once a turbulent people and dangerous neighbours to those dwelling in the plains. The Maliahs are divided into eleven *nuttas*, each of which is controlled by a local Chief or *Bisoyee*. Each *Bisoyee* has his fort and his staff of officers and pikes. The *Bisoyees* were formerly responsible for controlling the Savaras within their jurisdiction, maintaining peace and good order and defending the passes to the plains. In return for these duties, they held lands on service tenure. They were formerly appointed by the Zemindars of Parlakimidi, they were subject to their control and they paid their *Kattubadi* or quit-rent to them. About the close of the 18th century, a rebellion took place in the District of Ganjam, in which the then zemindar and some of the *Bisoyees* took part. In consequence, the Government confiscated the Zemindari, including the Maliahs. After the death of the incriminated Zemindar, the Zemindari was restored to his family, with the exception of "lands held by the *Bisoyees*." The Government received, direct from the *Bisoyees*, the quit-rent due by them. Finding that the attempt, to keep the *Bisoyees* under the immediate control of the Collector and to recover their quit-rents directly, had proved a failure, the Government in 1823, transferred against the *Bisoyees* and their dependent peons to the Rajah and required them to pay their quit-rent through him. Under this arrangement, the Zemindar was only to account for what he succeeded in collection and incurred no other liability. In 1825, the responsibility for the collection of Revenue due by the *Bisoyees* was imposed on the Zemindar. In consideration of this increased responsibility, the Zemindar received the grant of certain villages outside the Maliahs. From 1830 to 1890, the Zemindari was under the management of the Court of Wards, in consequence of the disability or incapacity of successive Zemindars. During the whole or part of the time, the view prevailed that the Maliah forests belonged to the Zemindari. The Collector worked these forests for the benefit of the Zemindari and no one, on behalf of Government, disputed the propriety of what was being done. Further, during this period, the Zemindari funds were utilized for the making of roads in the Maliahs, partly to increase the profits derived from the working of the forests and partly for objects of a general nature. When the management of the Zemindari by the Court of Wards ceased and the Zemindar



**Hill Tracts—concluded.**

put forth distinctly a claim of ownership to the *Maliahs*, the claim was repudiated by Government. Hence the present suit by the Zemindar for declaration of his title. It was contended on behalf of the plaintiff that the re-grant after confiscation comprised the whole of the *Maliahs*, that the Government was estopped by its own conduct from disputing the plaintiff's title and that the Zemindar had acquired a title against the Crown by 60 years' adverse possession. *Held*, the contention that the exception in the re-grant applied only to such lands as were actually occupied and cultivated by the *Bisoyees* themselves, and that the *Maliahs* generally passed as part of the Zemindari is not correct. The mischief that led to the change of arrangement was a combination of the Zemindar and *Bisoyees* hostile to the Government. The object of the change was to separate the *Bisoyees* entirely from the Zemindar and make them mere servants and under the complete control of the Government, and as one of the means to that end to make them entirely dependent upon Government for their remuneration. The *Maliahs*, therefore, did not pass under the re-grant. Also the transaction of 1823 and 1825 did not confer the right of ownership in the *Maliahs*. For, the transactions of 1823 did not impose upon the Zemindar any responsibility for the collection of quit-rent and for the responsibility imposed in 1825, the Zemindar received compensation by way of grant of certain villages. *Held*, also, that there was no acquisition of title against the Crown by adverse possession, the concurrent findings of the Courts below to that effect being one of fact. *Held*, further, that there was no estoppel in the case. The Court of Wards on behalf of the Zemindar was in possession of the *Maliah* forests under the mistaken idea that they belonged to the Zemindari. The Government officials, under the same mistake, acquiesced in that possession, and, while that state of things continued, they encouraged such an expenditure of the Zemindari funds upon the *Maliahs* as seemed good in the public interest. There was no such representation in this case as could give rise to estoppel contended for by the plaintiff. The decree of the High Court upheld and suit dismissed. *GOURA CHANDRA GAJAPATI v. THE SECRETARY OF STATE FOR INDIA*, 9 C.W.N. 553, P.C. = 28 M. 130 = 1 C. L.J. 460 = 32 I.A. 53 = 8 Sar. 749.

**Hindu.**

(1)—*Brahmos, whether Hindus—Unorthodox practice—Effect—Act V of 1881.*—A Sikh or Hindu by becoming a Brahmo does not necessarily cease to belong to the community in which he was born. Lapses from orthodox practice in matters of diet and ceremonial observances cannot have the effect of excluding from the category of "Hindu" in Act V of 1881, one who was born within it, and who never became otherwise separated from the religious communion in which he was born. *BHAGWAN KOER v. BOSE*, 31 C. 11, P.C. = 30 I.A. 249 = 7 C.W.N. 895 = 5 Bom. L.R. 845 = 13 M.L.J. 381 = 84 P.R. 1903 = 135 P.L.R. 1903.

**Hindu—concluded.**

Pre-emption founded on Mahomedan Law not claimable when vendor is a Hindu—*See MAHOMEDAN LAW — PRE-EMPTION—NATURE AND EXTENT OF RIGHT*, 1 A. 564, F.B.

Hindu dedicating for mosque—Legality—Agreement to do so—Legality—*See MAHOMEDAN LAW—WAKF*, 11 Ind. Cas. 436.

Meaning of the term, as used in the Probate and Administration Act—*See PROBATE AND ADMINISTRATION ACT*, 1881, 5 Bom. L.R. 845.

*See PRORATE AND ADMINISTRATION ACT*, 1881, s. 2, 31 C. 11, P.O. = 30 I.A. 249 = 7 C.W. N. 895 = 5 Bom. L.R. 845 = 13 M.L.J. 381 = 84 P.R. 1903 = 135 P.L.R. 1903.

*See WILL—EXECUTION*, P.L.R. 1900, p. 251.

**Hindu Heirs Relief Act, Bombay.**

*See BOM. ACT VII OF 1866.*

**Hindu Law.**

- 1.—GENERAL.
- 2.—ADOPTION.
- 3.—ALIENATION.
- 4.—ANCESTRAL PROPERTY.
- 5.—AUTHORITIES.
- 6.—CEREMONIES.
- 7.—CONTRACT.
- 8.—CONVERSION.
- 9.—CUSTOM.
- 10.—DEBTS.
- 11.—ENDOWMENT.
- 12.—EXCLUSION FROM INHERITANCE.
- 13.—FACTUM VALET.
- 14.—FAMILY DWELLING HOUSE,
- 15.—GIFT.
- 16.—GUARDIANSHIP.
- 17.—HUSBAND AND WIFE.
- 18.—ILLEGITIMATE SON.
- 19.—IMPARTIBLE ESTATE.
- 20.—INHERITANCE.
- 21.—INTERPRETATION.
- 22.—JOINT FAMILY.
- 23.—LEGITIMACY.
- 24.—MAINTENANCE.
- 25.—MARRIAGE.
- 26.—MINOR.
- 27.—MINORITY.
- 28.—PARTITION.
- 29.—PRESUMPTION OF DEATH.
- 30.—RECOVERED PROPERTY.
- 31.—RELIGIOUS ENDOWMENT.
- 32.—RESIDENCE.



**Hindu Law—continued.**

33.—RESTITUTION OF CONJUGAL RIGHTS.

34.—REUNION.

35.—REVERSIONERS.

36.—SELF ACQUISITION.

37.—STRIDHANAM.

38.—SUCCESSION.

39.—TEXTS.

40.—UNCHASTITY.

41.—USURY.

42.—WIDOW.

43.—WILL.

44.—MISCELLANEOUS.

**—1.—General.**

(1)—*Hindu and Mahomedan law—Test of religion—Convert—Act VI of 1871 (Bengal Civil Courts), s. 24—“Justice, equity and good conscience.”*—The Hindu or Mahomedan law can be applied to a person under the first para of s. 24 of Act VI of 1871, only when he is an orthodox believer in the Hindu or Mahomedan religion. The mere circumstance that he may call himself or be termed by others a Hindu or a Mahomedan, as the case may be, is not enough. His only claim to have a special kind of law applied to him is that he follows and observes a particular religion that of itself creates a law for him. If he fails to establish his religion, his privilege to the application of its law fails also, and he must be relegated to that class of persons whose cases have to be dealt with under the latter para of s. 24 of Act VI of 1871 according to the principles of justice, equity and good conscience. *Held* accordingly, where a family was found to be neither Hindu nor Mahomedan, but to have followed the Hindu Law of inheritance, that it was justice, equity and good conscience to apply that law to its members. *RAJ BAHADUR v. BISHEN DAYAL*, 4 A. 343 = A.W.N. 1882, 74. (9 M.I. A. 199, R.) [F., A.W.N. 1891, 65; R., 13 A. 290, 20 B. 53, 20 B. 181, U.B.R. 1897—1901, Vol. II, 488, 31 C. 11, P.C., 52 P.W.R. 1907.]

(2)—*Law administered by British Courts when parties are natives.*—It cannot be said that when this country was brought under English rule, the English law became the territorial law of the country. Such was not the case even as regards what may be called Indo-English law, i.e., that modified form of English law which is usually administered in Indian Courts, when it is at all administered. In fact, in all matters of inheritance and of contract used in the widest sense of the term, it was the native laws and usages that were administered by the British Courts in India in suits between natives, the general Mahomedan law being administered as the personal law of the Mahomedans, and the general Hindu law as the personal law of the Hindus. This privilege of the natives to have their own personal laws administered to them, was recognized by St. 21, G. III, c. 70, s. 17; and

**Hindu law—continued.****—1.—General—continued.**

although the section only provided against specific mischiefs which had arisen in the exercise of the Supreme Court's jurisdiction, yet it must be interpreted not as exhausting by enumeration the classes of rights which it specifically guards, but rather as recognizing the larger general principles on which these rights stand, by forbidding any such encroachments on them for the future as actual experience had in the past shown to be possible. This rule is also in accordance with the general principle that the private law of a community is not to be affected by a change of rulers, although there may be points to which, while it comes into contract with the public law, it has to yield. But the establishment of a Court to administer the law “according to justice and right” does not of itself imply any change in the law to be thus administered. Therefore, amongst Hindus within the Island of Bombay, all private relations must in their whole range be taken to rest still on the basis of the Hindu law except where the public law or the direct commands of the legislature have abolished or modified it. *In re KAHANDAS NARRANDAS*, 5 B. 154.

(3)—*Malabar law—Connection between.*—If Malabar law is a branch of Hindu law, it is one put out or separated from the parent stem before the present form of Hindu law existed. *KANDILE CHIRUTHAI v. PYDEL KURUP*, 6 M. H.C. 194. [R., 32 M. 351, F.B. = 6 M.L.T. 106 = 2 Ind. Cas. 183 = 19 M.L.J. 350.]

(4)—*Alienation of ancestral property—Bharas of Rawalpindi city.*—*Held*, that the Bharas of Rawalpindi city in matters of alienation are governed by the ordinary Hindu Law. *SOHNASHAH v. DIP SHAH*, 15 P.R. 1902. [R., 102 P.R. 1907, 35 P.R. 1907.]

(5)—*Family adopting Hindu religion governed by Hindu law in force in the place of residence.*—Where the parties are Hindus, *held*, in the absence of any custom to the contrary, or of any satisfactory evidence for showing what form of Hindu Law they have adopted, that it must be taken that they have adopted in its entirety one form or other of the Hindu Law, and that it being uncertain which form they adopted, it is not unreasonable to infer that they adopted the form which prevails in the locality in which they reside. *RAMDAS v. CHUNDRA DASSIA*, 20 C. 409. (11 C. 463, P.C., R.) [R., 6 A.L.J. 591 = 31 A. 477.]

(6)—*Migration — Custom — Tenacity.*—The tenacity of custom regulating succession, even under the strain of migration, is repeatedly recognised by the law. *PARBATI v. JAGADIS*, 4 Bom. L.R. 365.

(7)—*Migrating family—Law applicable to, is the law obtaining in the original home—Family migrating from Guzerat is governed by Mayukha in the absence of proof of abandonment—Barden of proof as to such abandonment—Evidence.*—Where a family migrates



**Hindu Law—continued.****—1.—General—continued.**

from Guzerat where the *Mayukha* prevails, it must be assumed that that law still applies to the family, unless it is shown that the family has abandoned it, and adopted the law of the country where it has settled. The burden of proof of such abandonment and adoption lies on the party setting it up, and the burden can be discharged by showing that, in the matter of devolution of property, the rules obtaining in the country of adoption have been accepted as rules governing the family. But it is impossible to hold that the adoption of customs or rites of the country in which people settle when that adoption is not made in substitution for, but in addition to, customs prevailing in the country from which they originate, evidences any intention to abandon their personal law. *MURLE DOS v. MANICKA CHETTY*, 5 M.L.T. 181.

(8)—*Migrating family, law applicable to—Presumption that migrating family is governed by the law of its original home—Burden of proof as to the family being governed by a different law lies on him who asserts it—Stridhan—Proper and improper—Succession.*—Where a family migrated from Guzerat, where the *Mayukha* law prevails, to Madras, the presumption is that it still continues to be bound by the *Mayukha* law, and the burden of proving that the family is governed, not by that law, but by the *Mitakshara* as administered in Madras, lies on them who assert it. (Marsh 232, 2 M.I.A. 133, 4 M.I.A. 259, 292, 12 M.I.A. 81, 2 W.R. 197, 6 W.R. 295, 8 W.R. 261, *Appl.*) The presumption can be rebutted by showing either that the family has acquiesced in a course of devolution of property according to the common course of descent in Madras, or that it has conformed in its religious or social usages to the Madras usages. The presumption is weak where the changes set up is from *Mayukha* to *Mitakshara*, as there are very few points of difference between the two. The law governing a migrating family is the law obtaining in the original country, except such modifications as are made through customs which have arisen after the migration. Judicial decisions on points of law, unless they are expressly based on new customs, must be held to be the law as it existed always, and the burden of proving that the original law was different, and that the subsequently accepted law was based on new customs, lies on him who asserts it. (11 M. 162, *D.*) The heirs to *stridhanum* proper and improper are identical, save that, as between male and female offspring, the latter have a preferential right as regards *stridhanum* proper, while the former have a similar right to *stridhanum* improper. (17 B. 758, *F.*) Neither in *Mayukha* nor in *Mitakshara* is there a general rule of inheritance by which succession to non-technical *stridhanum* could be regulated in default of "sons and the rest," and the ordinary rule for succession to a male does not govern the devolution of non-technical *stridhanum*. It is more probable that *Nilakanta* intended that the devolution of non-technical

**Hindu Law—continued.****—1.—General—continued.**

*stridhanum* should be according to the ordinary rules laid down by him for succession to women's separate property than that he intended that it should be according to the ordinary rules for succession to a man's property. As, under the *Mitakshara*, there is only one rule for the succession to woman's separate property of all kinds, it is very unlikely that *Nilakanta* would have made so important a deviation from the *Mitakshara* Law except in express terms. The deviation introduces an entirely new principle into Hindu Law, *viz.*, the succession to a deceased woman as to a male, and as the new principle could only be made compatible with the compact series of heirs by removing several of the enumerated heirs from the list, *Telong, J.'s* view in 17 B. 758 is correct. *KESANDOS MURLEDOS v. VENKAT ROW*, 5 M.L.T. 169.

(9)—*Customary law—Migration of family—Mayukha.*—Where a Hindu family migrated from Gujrat to Oudh, before the *Mayukha* was written, it was held governed by the *Mayukha*, since it might well be that the rule was in force in earlier times and that the *Mayukha* only embodied and defined a pre-existing custom. *CHANDIKA BAKSH v. MUNNA KUAR*, 4 Bom. L.R. 376.

(10)—*Construction of wajib-ul-arz.*—Where a construction can be put upon a *wajib-ul-arz* which is compatible with the rules of the Hindu Law, that is the proper construction to be placed on the *wajib-ul-arz*. *DHONDHE SINGH v. SANT BAKHSH SINGH*, 3 O.C. 181.

(11)—*"Malik," meaning of, in relation to a Hindu female.*—Held, that, where property is given or devised to a Hindu female, the use of the word "*malik*" imports full proprietary rights, unless there is something in the context to qualify it. *TIKARAM SINGH v. MUSSAMMAT CHET KUNWAR*, 12 O.C. 157 B=2 Ind. Cas. 924. (29 A. 217, 35 I.A. 17, 2 O.C. 226, *R.*; 9 O.C. (119, *Overruled.*)

(12)—*Rule as to accumulations.*—In the absence of any direction to the contrary, it is the rule of Hindu Law that accumulations go with the corpus. *BISSONAUTH CHUNDER v. SREEMUTTY BAMASOONDERY DOSSEE*, 12 M.I.A. 41.

(13)—*Hindu Law—Bairagi's rights—Civil Courts.*—A Hindu, becoming a bairagi, if he chooses to retain possession of, or to assert his right to, property to which he is entitled, does an act which may be *morally* wrong, but in which he will not be restrained by the Courts. *JAGANNATH PAL v. BIDYANAND*, 1 B.L.R.A. C. 114=10 W.R. 172.

(14)—*Majority—Hindus.*—A Hindu does not come of age till eighteen. *KAMIKHA PRASAD ROY v. SRIMATI JAGADAMBA DAS*, 3 B.L.R. 508.

(15)—*Age of majority.*—The age of majority of a Hindu was sixteen years according to the Hindu Law. *MOTHOORMOHUN ROY v. SURENDRO NARAIN DEB*, 1 C. 108. F.B.=24 W.R. 464. [*R.*, 31 B. 348=9 Bom. L.R. 143.]



**Hindu Law—continued.****—1.—General—continued.**

(16)—*Servitudes—Their recognition in Hindu and Mahomedan Law—Per Norman, J.*—The laws of every country must necessarily recognize servitudes. It has been well said that the origin of servitudes is as ancient as that of property, of which they are a modification. It seems clear that servitudes were known and recognised both by Hindu and Mahomedan Law. *JOHN GEORGE BAGRAM v. KHETTRA-NATH KARFORMAH*, 3 B.L.R.O.C. 18.

(17)—*Divorce among Hindus—Indian Divorce Act.*—Divorce is not absolutely forbidden by Hindu Law as to shut out evidence of custom, and if the custom of the caste allows divorce, the law does not forbid it among the lower castes. (6 B.L.R. 252, R.) The Civil Courts may entertain suits for divorce other than those provided for by the Indian Divorce Act, where the divorce is sanctioned by law or custom having the force of law. *POUNIAH v. POUNIAH*, L.B.R. 1872—1892, 78. (6 Ben. L.R. 243, 1 Borr. Rep. 387, 1 Borr. Rep. 410, 6 Moo. I.A. 348, 1 Borr. Rep. 14, S.W.R. Vol. III, 3, 6 Moo. I.A. 390, R.) [R., L.B.R. 1893—1900, 85, 461.]

(18)—*Act XIV of 1840—Applicability to Hindus.*—Act XIV of 1840 had no application as between Hindus. The law and usage of Hindus regulated all matters of contract between Hindus. Under Hindu Law, a written contract was not necessary. *ALVAR CHETTY v. VAIDILINGA CHETTI*, 1 M.H.C. 9.

(19)—*'Yajman vritti'—'Nibandha'—Creation of the office by caste—The officiator cannot be removed by caste except on valid ground—Caste—Caste question—Civil Court—Jurisdiction—Bombay Regulation II of 1827, s. 21.*—Under Hindu Law, *Yajman vritti* is a *nibandha* and is ranked amongst the hereditary rights of immovable property. The office of hereditary priest (*yajman vritti*), where it is held in relation to a family, owes its origin, continuance and binding character, to custom, not to a grant from the king or an agreement between the parties. Where the office is one of hereditary family priest, the mere fact that, in any individual case, it has been created originally by caste for the purposes of families belonging to it, cannot affect it, because the office carries with it a hereditary right in the nature of property, and the incumbent cannot be deprived of it by any one, unless he has become a *patila* (outcaste) or has declined to officiate. The caste in such a case makes the selection for the families; and when any family accepts the officiator as its hereditary family priest, custom annexes to the office certain incidents in the nature of civil rights as against the family, which neither the family nor the caste has power to annul except on the ground of some offence under the Hindu Law committed by the officiator, or of refusal by the officiator to discharge his duty as family priest. Where a caste has appointed a man to a mere priestly office, there is no right of property conferred, and his continuance or removal is

**Hindu Law—continued.****—1.—General—continued.**

exclusively within the competence of the caste and it is a caste question. But it is different where the office of hereditary priest is created for the performance of religious ceremonies in certain families, provided, according to Hindu Law, either the caste or the families, have power to create such an office and give it the character of immovable property. *GHELA-BHAI v. HARGOVAN*, 13 Bom. L.R. 1171.

(20)—*"Immovable property," what it includes—Principles of Hindu law when applicable in construction of term.*—*Per Sargent, J.*—The Privy Council has laid down in 10 B.H.C.R. 281, in a case under the Limitation Act, XIV of 1859 that inasmuch as the term "immovable property" was not defined by the Act, it must, when the question concerned the rights of Hindus, be taken to include whatever the Hindu law classes as immovable, although not such in the ordinary acceptation of the word. Where the question is whether the subject of the suit is in the nature of immovable property, if its nature and quality can be only determined by Hindu law and usage, the Hindu law may be properly invoked for that purpose. The intention of the Privy Council in laying down the above rule was not to confine the application of the Hindu law to those cases in which "the quality and nature of the subject of the suit can only be determined by Hindu law." Their Lordships, in using the expression "subject of the suit" intended to include in it all the facts which determine the nature of the plaintiff's claim, and not merely of the allowance itself, and to confine the application of the Hindu law to those cases in which the "subject of the suit" has such a distinctive Hindu character as that only Hindu law and usage can be legitimately invoked to determine its quality and nature. In the present case, the claim was by a Hindu temple based upon a formal grant or *sanad* from a Hindu sovereign whose obligations the E. I. Company assumed, to which obligations the English Crown subsequently succeeded. The claim was therefore, by its very nature, one which can only be preferred by Hindus, and was, according to the ruling of the Privy Council, to be governed by the Hindu law. Under the Hindu law, it is the fixed and permanent character of the allowance, from whatever source derived, which entitles it to rank with immovables. In the present case, the grant was by a Hindu king, and it must, from the object it had in view, be deemed to be one in perpetuity; and the fund out of which this perpetual allowance was to be paid was derived from a permanent source. It had therefore, all the characteristics of permanency and durability which are essential to bring it, according to Hindu law, within the term "immovable property." *Per Melvill, J.*—The correct statement of the rule laid down by the Privy Council in 10 B.H.C. 281, was this, viz., that whenever it is possible to do so, the terms "immovable property" and "interest in immovable property" in Act XIV of 1859



**Hindu Law—continued.****—1.—General—continued.**

must be interpreted, on general principles of construction, with reference to the nature of the thing sued for, and not to the status, race, character, or religion, of the parties to the suit; but that in exceptional cases, in which the thing sued for is of such a special and peculiar character that its nature cannot be determined without reference to the special and peculiar law of a particular sect or class, in such cases, and in such cases only, the law of such sect or class may properly be referred to as furnishing a guide to the determination of the question. Thus the Privy Council has laid down a rule and an exception and the question in every case must be whether the case is governed by the rule or the exception. The rule is that the terms "immoveable property" and "interest in immoveable property" are to be held to include not only land and houses, and such other things as are physically incapable of being moved, but also such incorporeal hereditaments as issue out of, or are connected with, immoveable property so called, and which therefore, "savour of the reality." Incorporeal hereditaments which are of a purely personal nature, and do not "savour of the reality," are moveable property. Therefore, rights of common, rights of way, and other profits *in alieno solo*, rents, pensions and annuities secured upon land,—all these clearly constitute immoveable property. But pensions and annuities not secured upon land, houses, or the like do not constitute such an interest. When a classification can thus be made, it ought to be so made, without reference to the character of the party claiming the right. But, there may be cases in which the test prescribed by the rule fails or is very difficult of application, and then will come in the operation of the exception to the rule, and it may become the duty of a Court to seek for guidance in some arbitrary definition contained in the religious law of the claimant. As an instance of this may be cited the case of an hereditary office in a Hindu community incapable of being held by any person not a Hindu. The claim in the present case was an annuity granted by a Hindu sovereign to a Hindu temple. The annuity was not made a charge upon land; and it is not, therefore, according to general principles of construction, immoveable property. **THE COLLECTOR OF THANA v. KRISHNA NATH GOVIND**, 5 B. 322.

Absence of agreement as to payment of interest and of demand in writing to bring case under Interest Act—Applicability of Hindu law in such matters—See ACT XXXII OF 1839, 3 M.L.T. 278 = 18 M.L.J. 245 = 31 M. 250.

Unregistered mortgage with possession—Earlier mortgage without possession subsequently registered—Priority—Validity under Hindu Law—Notice—See ACT XIX OF 1843, 18 B. 332.

Applicability of, to devolution of agricultural tenancy—See C.P. ACT IX OF 1883, 4 N.L.R. 9.

**Hindu Law—continued.****—1.—General—concluded.**

Purchase in name of son by Hindu or Muhammadan father—Presumption of benami purchase—Onus of proof to the contrary—See BENAMI TRANSACTION—GENERAL, 6 B. 717.

See CUSTOMS—PUNJAB—GENERAL, 20 P. R. 1867.

Applicability of, to Jains—See CUSTOMS—PUNJAB—ADOPTION, 95 P.R. 1909 = 212 P.L. R. 1910 = 168 P.W.R. 1909.

See CUSTOMS—PUNJAB—ALIENATION, 103 P.R. 1902.

Unchastity of widow—Effect of, in regard to estate vested in her—See CUSTOMS—PUNJAB—INHERITANCE, 76 P.R. 1901.

See CUSTOMS—PUNJAB—INHERITANCE, 78 P.R. 1869.

Application of, to agricultural communities in the Punjab who are of Hindu origin—See CUSTOMS—PUNJAB—WILLS, 11 P.R. 1908 = 13 P.W.R. 1908 = 92 P.L.R. 1908.

Kutchi Memons governed by—Succession—Right of sons—See CUTCHI MEMONS, 30 B. 270.

Inapplicability of Mitakshara Law and family custom—See GHATWALI TENURE, 10 C. 677.

Migration—Effect — Law applicable — See HINDU LAW—JOINT FAMILY, 6 A.L.J. 591 = 31 A. 477 = 3 Ind. Cas. 563.

Right to levy toll on exports from foreign State—Immoveable property — Jurisdiction — See JURISDICTION—CAUSES OF JURISDICTION, 11 Bom. L.R. 352 = 33 B. 373 = 2 Ind. Cas. 489.

Khoja Mahomedans—Presumptions and rules of Hindu Law applicable—Son entitled to sue father for partition—Burden of proving custom to contrary—See KHOJA MAHOMEDANS, 12 B. 280.

Applicability of—to Khoja Mahomedans—See KHOJA MAHOMEDANS, 29 B. 85.

Suit for redemption by father dismissed—Second suit by sons—Only son's share redeemable—See MORTGAGE—REDEMPTION, 4 A.L.J. 17 = 29 A. 215 = A.W.N. 1907, 25.

See BEN. REG. IV OF 1793, 2 M.I.A. 441.

See RESTITUTION OF CONJUGAL RIGHTS, 5 C. 500 = 5 C.L.R. 65.

Trusts in—English Law how far applicable—See TRUST, 5 B. 154.

**—2.—Adoption.**

See CUSTOMS—PUNJAB—ADOPTION.

See LIMITATION ACT, 1908, ART. 118.

(1)—Permission to Hindu widow to adopt—Widow not a trustee.—It is impossible to hold that, when there is a permission to adopt a son, a Hindu widow can be said to hold her



**Hindu Law—continued.****—2.—Adoption—continued.**

husband's property only in trust for the son to be adopted. *GOBIND CHANDRA SARMA MAZOOMDAR v. ANAND MOHAN SARMA MAZOOMDAR*, 2 B.L.R. A.C., 313. (7 W.R. 134, 9 M.I.A. 534, Rel. cn.) [R., 2 C. 295.]

(2)—*Deed of permission to adopt, not invalid by reason of absence of stamp and registration.*—This was a suit to set aside a deed of permission to adopt. The Principal Sudder Ameen passed judgment broadly stating that the deed of permission was invalid, because it was not engrossed on stamped paper. The High Court, however, held that a deed of permission could not be regarded as invalid for the above reason alone. Moreover, under the Hindoo Law, a verbal permission to adopt, if supported by reliable evidence, would be perfectly valid. The High Court also observed that neither under the old nor the new Registration Act it is compulsory to register such documents. The absence, therefore, of registry and stamped paper, though it might give rise to inferences against the genuineness of the deed, but was by no means conclusive. *PRITIMA SOONDUREE CHOWDHRAIN v. ANUND COOMAR CHOWDHRY*, 6 W.R. 733.

(3)—*Formal adoption without sanction of ruling power—Absence of sanction will not prejudice adoptee's rights of succession.*—A formal adoption is not invalid, because it has not received the sanction of the ruling power, and (where the ruling power does not interfere) an adoption without such sanction entitles the adopted son to succeed to property of the nature of a service waton. *RAMCHANDRA VASUDEV v. NANAJI TIMAJI*, 7 B.H.C. A.C., 26. [R., 1 B. 607, 24 B. 367, F.B.; F., 27 B. 75.]

(4)—*Authority to adopt—Anoomatee Pattra—Adoption by a minor under the Court of Wards without consent of the Court of Wards.*—In a suit to establish a deed of *Anoomatee Pattra*, although the answer may not traverse the deed and the adoption made in pursuance thereof, yet the plaintiff must establish his case by evidence. *Quere.*—Whether, under s. 33 of Ben. Reg. X of 1793, an adoption, by a minor and Ward of Court, of a son, without the consent of the Court of Wards, is wholly void. *MUSSUMAUTH ANUNDMOYEE CHOWDHOORAYAN v. SHEEB CHUNDER ROY*, 2 W.R. 19, P.C. = 9 M.I.A. 287 = Marsh 455.

(5)—*Prohibition by Government—Kulkarni vatan.*—The sanction of Government to an adoption by a *kulkarni* or his widow, or by a coparcener in a *kulkarniship* or his widow, is not necessary to give it validity, nor has Government any right to prohibit or otherwise intervene in such an adoption. *NARHAR GOVIND KULKARNI v. NARAYAN VITHAL*, 1 B. 607. [R., 27 B. 75.]

(6)—*Hindu Law—Verbal authority to adopt—Widow of divided member of Hindu family, right of, to life interest.*—In this case one S claimed as the widow of H and as the mother of R, the

**Hindu Law—continued.****—2.—Adoption—continued.**

minor whom she had adopted, as she alleged, with the permission of her late husband. The validity of the instruments under which her right to adopt was claimed, and more especially, of the *Unoomuttee Pottro* on which the claim to the property was founded, failing the adoption, had to be considered. The Judicial Committee ruled that a power to adopt may, under the Hindu law, be given even verbally, and consequently the documents in the case, if authentic, must be taken to have given it or, at all events, to prove that it had been given. And there was no sufficient reason to doubt their authenticity. Also, when a member of a divided Hindu family dies childless and his widow adopts a minor but such adopted son happens to die before attaining majority, the widow is entitled to a life-interest in the estate of her deceased husband. In this case, a second adoption of one G was alleged to have been made, and their Lordships held that the said G could not, under any circumstances, have any right to the property in suit during the lifetime of the widow. But this order was made without prejudice to any question as to the rights of G (if any) after the death of S, and without prejudice also to the rights (if any) of any person not then before the Court, either in lifetime or after the death of the said S. *SOONDUR KOOMARREE DEBEA v. GUDADHUR PERSHAD TEWAREE*, 4 W.R. P.C., 116 = 7 M.I.A. 54.

(7)—*Adoption by widow—Authority to adopt, interpretation of—General authority to adopt one son on death of another, not limited to adoption of two only—Widow if may question validity of adoption—Estoppel.*—R, a Hindu and the owner of a Raj, died leaving a widow (the appellant) who was then *enceinte*. According to the widow's own admission, R before his death gave her authority to adopt in the following terms: "If, God forbid, you give birth to a daughter or if a son be born but die after his birth, I strictly order you to adopt some boy to me, so that he might perform my *shradh* ceremony and yours and perpetuate my name and after your death become the absolute owner and possessor of the whole of my estate. If, God forbid, the son who might be adopted under this authority should die in your lifetime, you will have power to adopt another boy." A son was born but died shortly afterwards, and three boys adopted one after the death of the other having also died, she adopted a fourth boy, the respondent, who was the son of a cultivator. Until her quarrel with the respondent, the appellant and her advisers invariably regarded the words ascribed by her, according to her recollection, to her husband as giving her a general authority to adopt not limited to or exhausted by two adoptions. *Held*, that, even assuming that she remembered the exact words used by her husband, they expressed a general intention that, if one boy died, another boy was to be adopted, and the widow had



**Hindu Law—continued.****—2.—Adoption—continued.**

power under that authority to adopt the respondent. That, so far as she herself was concerned, she was, on the evidence, clearly estopped from questioning the validity of the adoption, and her suit to declare the adoption invalid failed on this ground, as also on the ground that the adoption of the respondent was in fact a valid adoption, being covered by the authority given to her by R. RANI DHARAM KUNWAR v. BALWANT SINGH, 16 C.W.N. 675, P.C.=9 A.L.J. 730=14 Bom. L.R. 485=M.W.N. 1912, 641=12 M.L.T. 93=16 C.L.J. 61=23 M.L.J. 200=34 A. 398.

(8)—*Adoption by widow—Authority from husband.*—An adoption by a widow after husband's death, without any authority from him, is invalid in the Zillah of Etawa, in provinces ceded by the Nabob of Oudh, in 1801. During the pendency of a suit instituted by a person claiming as an adopted son against a widow, the widow dies, and proclamation is made for her heirs to come in and defend the suit, and the claimant is put in possession of the property in dispute by the Collector. The Court of Sudder Dewanny Adawlut decide that the claimant has not made out his title, and direct the Collector to put in possession of the property another person who had come in under the proclamation, but produced no evidence of his title. *Held*, that the latter part of the decree must be reversed. RAJA HAIMUN CHULL SINGH v. KOOMER GUNSHEAM SINGH, 2 Knapp 203.

(9)—*Hindu Law—Widow—Authority to adopt given to widow, in question.*—Where the authority to adopt given to his widow by a deceased Hindu was in question, *held*, on evidence, that such authority had not been sufficiently proved. HARANAND CHETLANGIA v. RAM GOPAL CHETLANGIA, 27 C. 639, P.C.=27 I.A. 1=4 C.W.N. 429=2 Bom. L.R. 562=7 Sar. 648. [R., 34 C. 576=11 C.W.N. 622=6 C.L.J. 30.]

(10 & 11)—*Adoption by widow—Anoomatee patra or deed conferring power to adopt.*—An adoption, said to have been made by a Hindu widow in compliance with a power given her by an Anoomatee Patra (alleged to have been executed by her deceased husband), which adoption did not take place until seventeen years after his death, decreed by the Courts in India as unfounded in fact, and the deed a forgery. Such finding sustained on appeal by the Privy Council. CHUNDERMONEE DEBIA CHOWDHORAYAN v. MONMOHEENEE DEBIA, 8 M.I.A. 477.

(12)—*Direction to adopt from a family—After born sons—Validity of.*—According to all schools of Hindu Law, a widow may adopt with the assent of her husband. The assent may be given either orally or in writing. When it is given it must be strictly pursued. She cannot be compelled to act upon it until, she chooses to do so, and, in the absence of any direction to the contrary, there is no limit to the time

**Hindu Law—continued.****—2.—Adoption—continued.**

within which she may exercise the power conferred upon her. One B directed his widow to adopt a boy from a certain family. There were four boys in the family at the time when the authority was given but the widow adopted a boy born in that family some time after the death of her husband. *Held*, that the direction was sufficiently complied with by the adoption of the boy, who was of more suitable age for affiliation than his brothers. MUTSADDI LAL v. KUNDAN LAL, 3 A.L.J. 246, P.C.=1 M.L.T. 93=8 Bom. L.R. 371=16 M.L.J. 174=28 A. 377=33 I.A. 53.

(13)—*Adoption by widow under husband's authority—Second adoption, validity of—Restrictions to widow's power—Intention—Spiritual benefit, how accrued—Continuation of line—Law in Madras, Bombay and Bengal.*—A Madras Brahmin died intestate and without issue, giving his widow authority to adopt. He placed no specific limitation on the power to adopt, his object being to secure spiritual benefit to himself, and to continue his line. The first child adopted by the widow having died when little more than two years of age. *Held*, that the widow's authority to adopt was not exhausted by the first adoption and the adoption of a second boy after the first died was valid. The main factor for consideration in these cases is the intention of the husband. Any special instructions which he may give for the guidance of his widow must be strictly followed. Where no such instructions have been given, but a general intention has been expressed to be represented by a son, effect should if possible be given to that intention. The Ramnad case as (12 M.I.A. 397, R.) indicating limitations to the application of the above rule. Surendra Nandan v. Sailaja Kant Das Mahapatra (18 C. 385, Appr.) and the judgment of Mitter, J. KANNEPALLI SURYA-NARAYANA v. PUCHA VENKATRAMANA, 10 C.W.N. 921, P.C.=4 C.L.J. 171=16 M.L.J. 276=1 M.L.T. 260=8 Bom. L.R. 700=3 A.L.J. 702=29 M. 382=33 I.A. 145. (22 W.R. 127, Appr.) [R., 33 C. 1306=11 C.W.N. 12=4 C.L.J. 357.]

(14)—*Adoption by a senior widow, who lived separately from her husband—Widow's power of adoption—Question of fact and law—Implied prohibition is not a question of fact, but of legal inference from the facts found.*—Where there is no express prohibition, nor are there circumstances from which prohibition can be implied, the mere fact that a widow and her husband did not live together does not render the adoption made by her invalid. A widow's power to adopt does not rest on any delegation from her deceased husband, but is her own inherent right. The husband's right to forbid and the widow's consequent inability to adopt are referable rather to the paramount duty incumbent on a Hindu wife to obey her husband's command than to a delegation of power from him. The husband's consent is, in the absence of prohibition, always to be implied.



*Hindu Law—continued.**—2.—Adoption—continued.*

The determination of the question whether an incapacity to adopt on the part of a senior co-widow results from the facts found by the lower Courts, under the circumstances of a particular case, involves matter of legal inference and is consequently open to inquiry on second appeal. *LAXMIBAI v. SARASWATIBAI*, 1 Bom. L.R. 420 = 23 B. 789.

(15)—*Husband—Widow adopting under a power from her husband.*—When a widow adopts with the full authority of her husband, the adoption even into a joint family is valid and the adopted son takes an interest in the property of the family. *BACHOO v. KHUSHAL-DAS*, 4 Bom. L.R. 883.

(16)—*Nidadavole estate, whether partible.—Authority to adopt given jointly to two widows of last male owner—Whether survivor of the two could make the adoption—Effect of adoption in divesting estate—Adoption made under coercion; whether void or voidable.*—The last male owner of estate N, died leaving as his only heirs, two widows, and leaving a will authorizing them (the widows) to adopt a son to him. One of the widows since dying, the surviving widow adopted a boy who was then the sole owner of estate M; and the adoptee and the adoptive mother, also having died since, a reversioner, laying a claim to estate M, brought a suit questioning the validity of the adoption and urging that, even if it was valid, the adoptee was divested of all interest in M and that he (plaintiff) was therefore, entitled to a portion of the estate M. The questions for decision were (1) whether the estate N was impartible, (2) whether the will and the authority to adopt were genuine and valid and (3) whether the adoption was invalid on the ground of the widows being coerced into making it by a threat of criminal prosecution. *Held*, (1) on evidence that neither the family nor the Government regarded the estate as impartible. In re-granting the estate to its proprietor after a forfeiture, the Government did not express any intention to interfere with the quality of the estate in regard to its partibility or descendibility. In accordance with the principle laid down in the *Hansapur* case (12 M.I.A. 33, R.) and the *Sivaganga* case (3 M. 290, R.) if the estate was all along partible, forfeiture and re-grant could not affect that quality of the estate (14 I.A. 134, 24 M. 606 R.) and that, therefore, the Nidadavole estate is partible. (2) *Held*, also, that the will was genuine; that the authority to adopt, even though granted to the two widows jointly, was valid (23 M. 1, R.) that such authority, having been given without restrictions, was tantamount to a grant to each of them; that the same was not exhausted on the death of one of them and that, consequently, the adoption by the survivor was valid. In reply to the objection that the adoption was void as having been made under threat, it was held that, where no felony had been actually committed, the

*Hindu Law—continued.**—2.—Adoption—continued.*

threat of a criminal prosecution for the same could not amount to the stifling of a criminal prosecution and that, though the coercion to which the widow was subjected might have justified her in repudiating the adoption, yet, as she did not repudiate it, but, always maintained its validity, the coercion could not invalidate it. *Held*, also on a consideration of the texts that the adoption of the adoptee into the Nidadavole family did not operate in law to divest him of his rights in the Mestate, there being nothing in the texts which necessarily carried with it the idea, that the adopted son might be divested of property which was his own absolutely at the time of adoption. (10 C.W.N. 121, 5 C. 776, R.) *Semble*:—Evidence of experts on matters of Hindu Law (not being foreign law) is inadmissible. *NARASIMA APPA ROW v. RANGAYYA APPA ROW*, 16 M.L.J. 178 = 22 M. 437.

(17)—*A document giving the wife authority to adopt and authorising her to put the adopted son into possession of all the immoveable properties of the person—No devise—Act V of 1881, s. 3—Authority to adopt being in writing and not contained in a will—Registration compulsory—Registration Act, 1877, ss. 17, 49.*—A document executed by a person at the time of his death, authorising his wife to adopt and to put into the possession of the son adopted all the properties which he (the executant of the document) got under a certain decree and all his immoveable properties, is in no sense a will, i.e., a testamentary disposition of property (*vide* s. 3, Act V of 1881). It is an authority to adopt and nothing else, and the direction therein given to put the adopted son in possession of the property cannot be construed as a devise of the property. It is simply a statement of the consequences that should legally follow on the adoption. An authority to adopt given to a widow by her husband, if it is in writing and not contained in a will, must be compulsorily registered, and, unless registered, is inoperative to confer such authority. *SOMASUNDARA MUDALY v. DURAISAMY MUDALY*, 27 M. 80.

(18)—*Benares school—Widow's power of adoption—Husband's permission—'Viramirodaya'—'Dattaka Mimamsa'—Alienation and adoption, distinction between—Adoption, View as to, in Hindu law—Factum valet, doctrine of—Applicability to adoption.*—An adoption made by a Hindu widow governed by the Benares school, without her husband's express authority, is illegal and void; the principle of *factum valet* does not apply to such an adoption. [*F.*, 1 O.C. 30; *R.*, 14 A. 67, F.B.] Although the *Viramirodaya* must be regarded as a work of high authority in the Benares school of Hindu law, still the *Dattaka Mimamsa* is also a very high authority in that school, especially upon questions of adoption, which it treats more comprehensively than any other work of that school of law. (12 M.I.A. 397, 448, 7 I.A. 5, 9 A. 322, R.) So far as the indispensability of the husband's permission to enable a valid



*Hindu Law—continued.**—2.—Adoption—continued.*

adoption by a widow is concerned, the doctrine of the *Dattaka Mimamsa* is consistent, though not wholly co-incident, with the *Mithila* and *Bengal* schools of Hindu law, and even with that of the *Dravida* or *Madras* school, where the only distinction is that the consent of the *sapindas* is taken as a substitute for the consent of the husband. The only sub-division of the *Mitakshara* school which adopts the contrary doctrine of the *Viramitrodaya*—viz., dispensing with the necessity of the husband's permission—is the *Maharashtra* school which shows a preference for the doctrines of the *Mayukha* prevailing in the *Bombay Presidency*. [R., 17 A. 294.] There is a broad distinction between the case of alienations by a widow and the case of an adoption by her, for, whilst in the former the personal status of no one is altered, in the latter the personal status of a human being, viz., the adopted son, is altered. There can be no analogy between adoption and *legal necessity*, justifying a widow to alienate her husband's estate, because adoption may be made without the existence of any property to be inherited by the adopted son, whilst *ex necessitate rei* the existence of the husband's property is a condition precedent to the exercise of the power of alienation by a Hindu widow. Adoption under the Hindu law is not a temporal transaction but a sacrament or religious rite, which cannot be performed by a woman irrespective of her husband, for without him she has no spiritual benefits to expect. So a *maid* cannot adopt because she has no husband, whilst a *bachelor* may adopt though he has no wife. So also, a *husband* may adopt though his wife does not consent, whereas a wife cannot, if her husband does not give his permission; and again a *widower* may adopt without permission from his deceased wife. It is only proper and sound that the same difference between the adoptive powers of a man and those of a woman be maintained in the case of a *widow*. Adoption under the Hindu law being in the nature of gift, three main matters constitute its elements, apart from questions of form. The capacity to give, the capacity to take, and the capacity to be the subject of adoption, are essential to the validity of the transaction, and as such, are beyond the province of the doctrine of *factum valet*. TULSHI RAM v. BEHARI LAL, 12 A. 328.

(19)—*Person taken as an adopted child with the intention that he or she should inherit from adoptive parents, whether constitutes valid adoption.*—The taking of a person as an adopted son or daughter with the intention that he or she should inherit from the adoptive parents would constitute a valid adoption of the child as a *keittima* child. MA GYI v. MA SEIK, 14 Bur. L.R. 133.

(20)—*Failure of adoption, issue as to—Conflict of evidence—Practice—Adoption of only nephew—Effect of Dwayamushyayana adoption on inheritance—Costs—Appealable value—Objection.*—Observations on the presumption of

*Hindu Law—continued.**—2.—Adoption—continued.*

adoption arising from the religious duty of a childless Hindu to adopt a son, and of the circumstances which rebut such presumption. On the issue as to the failure of an adoption as to which there was a conflict of evidence, the Privy Council, in the absence of strong documentary evidence confirmatory of the adoption, and on a consideration of the probabilities of the case, reversed the judgment of the High Court which had upheld the adoption, and confirmed that of the Judge of the original Court who saw and heard the witnesses, and who considered the witnesses in support of the adoption to be unworthy of credit. An alleged adoption by an uncle, of his nephew who, at the time of such adoption, was his brother's only son, was not, as a fact, proved to have taken place. Such adoption, if made, was invalid by Hindu law. The effect by the Hindu law of an adoption of *Dwayamushyayana* (son of two fathers) is not to extinguish the lineage of the adopted son to his natural father, or to bar him of his right of inheritance to his father's estate. In a case of an alleged adoption by gift, in which the deed of gift stated that the son was taken by the person adopting as *palluck putra*, for securing future oblations of water and funeral cake; that he would be brought up like a son; that the ceremonies of *sungskar* have been performed, and he had been constituted the representative of the person adopting; it was held that the terms did not import the adoption of a son by gift, and that it was only by reason of the gift that the filial relation to the natural father was extinguished, or the right of the son in the estate of the giver ceased. [Rel. on, 12 B.H.C. 364; R., 14 A. 67, F.B., 19 B. 428.] *Quære*: whether, in estimating the appealable value of Rs. 10,000, the costs of suit can be added to the principal and interest decreed? An objection to an appeal, on the ground that the amount in dispute is below the appealable amount, comes too late, when made to the Privy Council at the hearing of the appeal. NILMADEB DAS v. BISWAMBHAR DAS, 3 B.L.R. 27, P.C.=12 W.R.P.C. 29=13 M.I.A. 85=2 Suther. 257=2 Sar. 489. [R., 19 M. 350.]

(21)—*Power to adopt—Presumption of authority—Proof of power to adopt—Adoption on contingency.*—Circumstances under which a Court will require strict proof of power to adopt, and under which it will assume the power to have been given. The acquiescence of parties interested in opposing an adoption is not *prima facie* evidence of its validity. The precise contingency contemplated by the donor of the power must happen to make an adoption valid. MOHINDROLAL MOOKERJEE v. ROOKINEY DEBEE, Cor. 42.

(22)—*Adoption—Acquiescence for a lengthened period—Presumption.*—Where an adoption has been acquiesced in for a period of 33 years, it was presumed that the necessary consent of some person competent to give away the



**Hindu Law—continued.****—2.—Adoption—continued.**

adopted son had been obtained. **ANANDRAV SIVAJI et al v. GANESH ESHVANT BOKIL**, 7 B.H.C. App. 33.

(23)—*Proof of authority to adopt—Ceremonies—Presumption.*—The Court, when it is satisfied that permission to adopt exists, will exact slight proof of the performance of ceremonies; but it cannot conversely, from the observance of ritual forms, infer that the husband's authority, which is essential in cases of adoption by a Hindu widow, has been really obtained. **RADHAMADHUB GOSSAIN v. RADHABULLUB GOSSIAN**, 2 Ind. Jur. O.S 5=1 Hay 311.

(24)—*Evidence of adoption.*—Where a Hindu lady adopted a son and carried on a law suit during her husband's lifetime, calling herself his wife and the mother of the adopted son, and the adoption was never denied, *held*, that this was strong corroborative evidence that the adoption was made with the consent of the husband and that the ceremonies usual on the occasion of an adoption were done in his actual presence. **TINCOWRIE CHATTERJEE v. DEENONATH BANERJEE**, W.R. 1864, 155.

(25)—*Hindu Law—Adoption by widow—Pleadings.*—An adoption may be made by a Hindu widow under an authority conferred upon her for that purpose by her husband, but such authority must be strictly carried out, as the adoption is for the benefit of the deceased husband and not the widow alone. Adoption by the widow alone does not, by Hindu Law, give the adopted child (even after the widow's death) any right to property inherited by her from her husband. Adoption being a matter of fact, must be strictly proved, and the party who claim as adopted son must establish by evidence (1) the authority given by the husband to the widow to adopt a son to him and (2) his actual adoption by the widow as her husband's son. Under circumstances raising a strong presumption against an alleged adoption such adoption *held* not to have been made. [*R.*, 12 A. 328, F.B., 25 C. 662, 27 A. 417=A.W.N. 1905, 20=2 A.L.J. 36.] Suit by A one of the heirs of H, against B, to recover the whole of H's real and personal estate in B's possession as the alleged adopted son of H. There were other persons entitled with A, to share in the succession to H's estate, who were not made parties to the suit. The Sudder Court at Agra *held*, that B had failed to establish his title as adopted son of H, but declared that A was entitled to succeed, as one of the heirs of H, to a share of his estate and decreed him the whole estate as sought by the plaint. Such decree, on appeal, so far as it declared that B had failed to establish his title as adopted son of H confirmed; but as the decree was manifestly wrong in decreeing to A the entire estate of H, and there were no materials to enable the Judicial Committee to vary the decree, so as to limit it to the share of the estate to which A had established his right by inheritance, the decree was reversed, and the case remitted to

**Hindu Law—continued.****—2.—Adoption—continued.**

India for inquiries as to the amount of his share. **CHOWDHRY PADAN SINGH v. KOER UDAYA SINGH**, 2 B.L.R P.C. 101 = 12 W.R. P.C. 1=12 M.I.A 350=2 Suther. 219=2 Sar. 447. [*D.*, 30 A. 197=5 A.L.J. 200=A.W.N. 1908, 79.]

(26)—*Evidence of—Held* that the identity of a deed of permission to adopt (*Unumate patra*) was sufficiently made out by a distinct reference to it in a subsequent proved deed, if there is nothing calculated to throw doubt. **KISHEN SUNKER DUTT v. MOHA MYA DOSSEE**, W.R. 1864, 210.

(27)—*Hindu Law—Adoption—Adoption by widow—Effect on property inherited by her—Act XL of 1858, s. 3—Adoption by widow during pendency of suit—Substitution of adopted boy on record.*—An adoption by a widow divests her of the right of inheritance to her husband's property, and vests it in the adopted son. Where an adoption takes place while a suit is pending on the part of the widow and the adopted son is a minor, it is necessary that he should be substituted for his adopting mother as the party preferring the appeal and duly represented in conformity with provisions of s. 3, Act XL of 1858. **THE COLLECTOR OF BAREILLY v. MUSST. NURAEN DAY**, 3 Agra 349.

(28)—*Failure by the widow to prove authority to adopt—Validity of the adoption of an only son.*—The senior widow of the Zemindar of Madgole adopted an only surviving son on the strength of an authority given in an alleged will. The junior widow disputed the authority—the will also—and the legality of the adoption. The Courts in India differed on both the questions. *Held*, upon evidence, that no authority was given to adopt, and the question of legality was left open. **SRI AMMI DEVI v. SRI VIKRAMA DEVU**, 11 M. 486=15 I.A. 176, P.C.=3 Sar. 190. [*R.*, 14 B. 249, F.B., 14 A. 67, F.B., 18 M. 53, 24 B. 367, F.B.]

(29)—*Hindu Law—Adoption given by widow—Only son adoptee.*—A widow is competent to give in adoption whenever the husband is legally competent to give, and when there is no express prohibition from him. Three principles appear to regulate the power to give:—(1) A son is the joint property of the father and the mother for the purposes of a gift in adoption; (2) when there is a competition between the father and the mother, the former has a predominant interest or a potential voice; and (3) after the father's death, the property survives to the mother. [*R.*, 16 M. 384, 19 M. 497=6 M.L.J. 90, 1 Bom. L.R. 144.] The adoption of an only son, if actually made, is valid, however sinful the act may be on strict religious considerations. **NARAYANASAMI v. KUPPU-SAMI**, 11 M. 43. (1 M.H.C. 54. F.) [*R.*, 19 M. 497=6 M.L.J. 90, 19 B. 428; *Not F.*, 14 B. 249 F.B., 5 C.P.L.R. 26; *F.*, 18 M. 53; *Appr.*, 41 A. 67, F.B.]



**Hindu Law—continued.****—2.—Adoption—continued.**

(30)—*Hindu Law—Bengal school—Power to adopt given to widow and executors—Validity.*—Under Hindu Law, it is to the widow alone that the power of adopting a son can be delegated by the husband; and she has no capacity to adopt, save under the express permission of the husband given in his lifetime. A power to adopt to the wife alone, and only associated with another person as a fetter on her choice of a son, would be valid. A power to adopt, given by a testator to his widow, being also the executrix of his will, and to two other executors conjointly, is bad. *AMRITO LALL DUTT v. SURNOMONI DASI*, 25 C. 662=2 C.W.N. 389. [Affirmed, 27 C. 996, P.C.=27 I.A. 128; R., 9 C.W.N. 1033; D., 150 P.R. 1908.]

(31)—*Who can adopt—Power to adopt given to widow and executors conjointly—Will, Construction of.*—No one can adopt a son to a dead man, except his widow, authorised for the purpose by him. The power is exercisable by the widow alone, though the widow's choice of a boy may be restricted in various ways, and among them, by requiring the consent of persons named by the husband. A power to adopt, given by a testator to his widow conjointly with his executors and trustees, is invalid. *AMRITO LAL DUTT v. SURNOMOYE DASI*, 27 C. 996, P.C.=27 I.A. 128=4 C.W.N. 549=2 Bom. L.R. 446=7 Sar. 633. [R., 9 C.W.N. 1033.]

(32)—*Adoption by widow—Absence of authority from husband—Consent of nearest sapindas.*—In the absence of her husband's authority to adopt a son, a widow cannot make an adoption under Hindu Law obtaining in Southern India, without the consent of her nearest as well as near other sapindas. *PALANISWAMY GOWNDEN v. VANJIAMMAL*, 4 Ind. Cas. 36. (26 M. 627, 30 M. 50, 4 A.L.J. 150, 9 Bom. L.R. 89, 5 C.L.J. 140, 11 C.W.N. 345, 17 M.L.J. 114, 2 M.L.T. 91, F.)

(33)—*Adoption by a widow—Authority from her husband—Joint family.*—The widow of a deceased co-parcener in a joint Hindu family is, under an authority given to her by her husband competent to adopt a son, although the effect of the adoption may be to divest the estate of a son of the other co-parcener. *BACHOO v. MANKORBAI*, 6 Bom. L.R. 268=29 B. 51.

(34 & 35)—*Mitakshara—Adoption by widow—Authority to adopt—Joint family.*—Where, under an authority to adopt given by her husband's will to the widow of one of the two deceased co-parceners in a joint Hindu family governed by the Mitakshara law, prior to the adoption of a son by her (the widow) a posthumous son was born to the other co-parcener. Held, that the adoption was valid. *BACHOO v. MANKOREBAI*, 9 Bom. L.R. 646, P.C.=11 C.W.N. 769=6 C.L.J. 1=31 B. 373=17 M.L.J. 343=2 M.L.T. 298=34 I.A. 107.

(36)—*Sufficiency of assent of one of several sapindas.*—The assent of any single sapinda among several sapindas is not sufficient to vali-

**Hindu Law—continued.****—2.—Adoption—continued.**

date an adoption by a widow. *PAULIEM VALOO CHETTY v. PAULIEM SOORYAH CHETTY*, 1 M. 252=4 I.A. 109, P.C.=3 Sar. 698.

(37)—*Widow adopting with the consent of one kinsman—Consent given on misrepresentation of her husband's authority nullifies the transaction.*—Where the consent of one of the two nearest kinsmen to an adoption made by a widow was absent, but the widow had obtained the consent of the other on the representation that she had received her husband's authority, to adopt and it was found that no such authority was given. Held, the adoption was invalid. *VENKAMMA v. SUBRAMANIAM*, 9 Bom. L.R. 89=30 M. 50=4 A.L.J. 150=5 C.L.J. 140=11 C.W.N. 345=17 M.L.J. 114=2 M.L.T. 91=34 I.A. 22.

(38)—*Requisites for adoption—Sanction—Consent of bhaubandhs—Vatandars—Consent of kinsmen—Consent of Government.*—The consent of the Government or of the bhaubandhs is not essential to the validity of an adoption among vatandars. *Per Batty, J.*—So far as lands held *pro servitus impendendis* or *pro servitus impensis et impendendis* are concerned, Government can determine the conditions on which they should be continuable or determinable. But while reserving this power to Government the legislature seems to have left the devolution of interests among the members to whom they are continuable, to be determined by the ordinary law governing the community to which these members belong. If that ordinary law recognises an unrestricted right of adoption, the power given to Government of deciding, as to the conditions of continuance, has no operation on that right so long as those conditions of continuance remain satisfied. *BALAJI v. DATTO*, 4 Bom. L.R. 762 27 B. 75.

(39)—*Authority—Father-in-law—Daughter-in-law—Father-in-law—Assent of father-in-law—Daughters—Divesting of estate which has already vested.*—A Hindu who died leaving behind him a widowed daughter-in-law and two daughters, made a will whereby he authorised the daughter-in-law to adopt a son to her husband. In accordance with this, the daughter-in-law adopted the plaintiff after the death of her father-in-law: Held, that the assent of the father-in-law could not survive beyond his lifetime, so as to enable his son's widow to divest an estate that had devolved by inheritance on heirs, who did not derive title through the son; that, therefore, the estate which had already devolved upon the daughters cannot be divested by the adoption, subsequently made by the daughter-in-law. *LAKSHMIBAI v. VISHNU*, 7 Bom. L.R. 436=29 B. 410.

(40)—*Consent of reversioners—Semble.*—In *Payappa v. Appanna* (I.L.R. 23 Bom. 331) it has been laid down that when the adoption by the widow, who is not the widow of the last full owner, takes place with the full assent of



*Hindu Law—continued.**—2.—Adoption—continued.*

the party in whom the estate is vested by inheritance, the adoption is validated by such consent. But the earlier authorities on which that proposition is based, had reference to undivided families, where the estate is vested by succession and not by inheritance, or are based on the dictum of the Privy Council in the *Ramnad case*, that in an undivided family if there be no father, the consent of all the brothers, who would, in default of adoption, take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new co-parcener against their will. *BHARMAWA v. SANGAPPA*, 2 Bom. L. R. 628.

(41)—*Hindu Law—Adoption by Hindu widow—Permission of husband—Consent of kinsmen—Duty of Judge administering Hindu Law—Usage—Opinions of Pandits—Maintenance of widow—Pleadings—Power of childless Hindu widow to adopt a son to her husband with or without his permission under the various schools of Hindu Law considered.* All the schools accept as authoritative the text of *Vasishta*, which says;—Nor let a woman give or accept a son unless with the assent of her lord." But the *Mithila* school apparently takes this to mean that the assent of the husband must be given at the time of the adoption and, therefore, that a widow cannot receive a son in adoption according to the *Dattaka* form at all. The *Bengal* school interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death; whilst the *Mayukha* and *Kaustuba* treatises which govern the *Mahratta* school explain the text away by saying that it applies only to an adoption made in the husband's life-time and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. Thus it appears that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, than to the authority to adopt being independent of the husband. According to the Hindu law prevalent in the *Dravida* country in the Madras Presidency, a Hindu widow, not having her husband's authority, may, if authorised by the assent of his kinsmen, adopt a son to him. What constitutes consent of the kinsmen must depend on the circumstances of the family. In a joint family, where by the Hindu Law of the district, the widow has only a right to a maintenance, if she adopts a son, without her husband's authority, it is necessary, if her husband's father is alive, to obtain his permission, or if he is dead, the consent of all her husband's surviving brothers; but where the widow takes by inheritance, the separate estate of her husband, then, the consent of her husband's nearest kinsmen is sufficient. (The ruling in 1 *Strange's Madras cases*, p. 121 examined and questioned) [*F.*, 10 W.R. 31, P.O.=1 B.L.R. P.C. 14=12 M.I.A. 448, 19 W.R. 367, 11 B.H.C. 249, 1 M.

*Hindu Law—continued.**—2.—Adoption—continued.*

69=3 I.A. 154, 11 M.L.J. 20. 33 C. 371=10 C.W.N. 236=3 C.L.J. 98, 8 C.L.J. 369; *Appr.*, 26 W.R. 21, 29 M. 382=16 M.L.J. 276=1 M.L.T. 260=10 C.W.N. 921=4 C.L.J. 171, 8 Bom. L.R. 700=33 I.A. 145=3 A.L.J. 702; *Expl.*, 1 M. 174; *Commented on*, 7 B.H.C. 153, 8 B.H.C. A.C., 114; *R.*, 25 W.R. 291, 1 M. 174=4 I.A. 1, 2 C. 295, 6 B. 498, F.B., 2 M. 202, 12 C. 375, 11 B. 609, 14 C. 401, 12 A. 328, F.B., 16 C. 367, 15 B. 110, 15 B. 565, 18 C. 69, 14 A. 67, F.B., 17 A. 294, F.B.=A. W.N. 1895, 167, 22 B. 199, 22 B. 206, 22 B. 558, F.B., 22 B. 973, 23 B. 327, 23 M. 486, 11 M.L.J. 29, 26 M. 627=13 M.L.J. 239, 29 B. 410=7 Bom. L.R. 436, 28 M. 315=15 M.L.J. 148, 33 C. 1119=10 C.W.N. 765, 5 Ind. Cas. 135; *Cited*, 3 O.C. 129 (B); *D.*, 5 B.H.C. A.C. 181, 35 C. 631=12 C.W.N. 458=7 C.L.J. 555.] The duty of a European Judge in administering Hindu law is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal and has there been sanctioned by the Court. Under the Hindu system of law, clear proof of usage will outweigh the written text of the law. [*F.*, 4 B. 104, 7 M. 3, F.B.; *Observed on*, 9 A. 253, 21 A. 412, P.C.=3 C.W.N. 454=26 I.A. 153=1 Bom. L.R. 311; *R.*, 10 B. 528, 11 B. 285, 14 B. 605, 13 M. 293, 14 M. 153, 14 M. 459, 16 B. 29.] Extent of authority to be given to the opinions of pandits laid down. [*R.*, 12 B.H.C. 65.] The *quantum* of maintenance to be allowed to a Hindu widow is a question with which the Courts in India are best able to deal, and the Judicial Committee will not interfere with the discretion exercised in this respect, unless on strong grounds. In the Court below, sworn translations of Sanskrit works little known, embodying Hindu law as to the customs in different schools in respect to the law of adoption, were admitted and acted on by the Courts in India. On special application, the Judicial Committee ordered such translation to be sent by the Registrar of the High Court in India, and to form part of the record, to be used on the hearing of the appeal. *COLLECTOR OF MADURA v. MUTHU RAMALINGA SATHUPATHY*. 1 B.L.R. 1, P.C.=12 M.I.A. 397=10 W.R. 17, P.C.=2 Sar. 361=2 Suther. 135.

(42)—*Hindu Law—Adoption—Consent of sapinda to adoption on representation by widow that she had her husband's authority—No authority given by husband—Consent of sapinda of equal degree not obtained—Validity of adoption—Plaintiff and the third defendant were divided brothers. Plaintiff sued to obtain a declaration that the adoption of the second defendant by the first defendant, the widow of the last owner, was invalid on the grounds that the first defendant had no authority from her husband and that the alleged assent of the third defendant alone to the adoption was invalid and insufficient in law. Plaintiff and*



*Hindu Law—continued.*

## —2.—Adoption—continued.

the third defendant were the nearest *sapindas* and the second defendant the son of a remote *gnati* of the deceased owner. The widow purported to adopt the second defendant in pursuance of her husband's oral authority and of the assent of the third defendant and some other *gnatis*. It was found that the husband had not given authority to his wife. *Held*, that the assent of a *sapinda* to an adoption to be made by the widow of a deceased kinsman should be one given by him in the exercise of his discretion as to whether the adoption ought or ought not to be made by a widow not having her husband's authority to make the adoption, and that, therefore, *sapinda's* consent obtained by the widow upon a representation that she had received authority to adopt from her husband, when no such authority has, in fact, been given, is inefficacious in law. Applying this principle to the present case, the assent of such of those kinsmen, who gave their assent influenced by the representation of widow that she had authority from her husband, was invalid in law. *Held*, also, that the assent of third defendant, though senior in age, was not sufficient. In an undivided family, the senior in age having the status of managing member of the family, it might be that his assent alone, if given *bona fide*, would be sufficient and be equivalent to the assent of a family. As plaintiff was divided from the third defendant, the consent of the latter alone was not sufficient. The widow could not be excused for not having sought the advice of plaintiff. If it was her duty to seek the assent not only of the third defendant but also of his brother (the plaintiff), she could not be regarded as having discharged her duty, because, in her opinion, she would have made an application to the plaintiff but in vain. The very object of enjoining a widow to seek and act under the advice of her husband's *sapindas* would be defeated if she did not give an opportunity to the *sapindas* concerned to advise her against making an adoption or against adopting a particular boy. If the widow had applied to plaintiff for his assent and he had withheld the same, with or without assigning reasons, and she had nevertheless made the adoption relying on the assent of the third defendant alone, the Court might have been in a position to decide whether the plaintiff had withheld his assent properly or improperly and capriciously. But the action of the widow clearly indicated that she was determined to ignore him and not care for his advice or even give him an opportunity to advise her. As there is nothing improper in a *sapinda* proposing to give his assent to the widow adopting his own son, if such son be the nearest *sapinda*, and refusing to give his assent to her adopting a stranger or a distant *sapinda*, if there be no reasonable objection to the adoption of his own son, the widow could not be excused for her omission to consult plaintiff on the ground that he had proposed to give one of his sons in adoption and consequently could not be expected to assent to the second

*Hindu law—continued.*

## —2.—Adoption—continued.

defendant's adoption. SUBRAHMANYAM v. VENKAMMA, 26 M. 627=13 M.L.J. 239. [Confirmed, 30 M. 50=17 M.L.J. 114=4 A.L.J. 150=9 Bom. L.R. 89=11 C.W.N. 345=5 C.L.J. 140=34 I.A. 22, P.C.; B., 4 Ind. Cas. 36; R., 31 M. 366=18 M.L.J. 309=3 M.L.T. 309; D., 28 M. 315=15 M.L.J. 143; Aff., 28 M. 500.]

(43)—*Sapinda's consent—Condition—Validity of consent.*—A stipulation, by a *sapinda* assenting to an adoption, that the adopted boy should not share in the joint property of the family into which he was to be adopted, but should be content with the property coming to him from his adoptive mother, would not by itself invalidate an adoption. Such a stipulation by a *sapinda* does not show that he was actuated by corrupt or improper motives in giving his consent or that he did not consider the boy a suitable candidate for adoption, but shows that he only endeavoured to protect himself from loss resulting from the property vesting in the adoptee after the adoption. The Court, however, decided nothing as to the effect of the stipulation. SRINIVASA AIYANGAR v. RANGASAWMI AIYANGAR, 17 M.L.J. 322=2 M.L.T. 364=30 M. 450. (11 M.L.J. 20, D.)

(44)—*Adoption—Husband's authority and consent of sapinda—Validity—Assent given for consideration—Adoption invalid.*—Where an adoption by a Hindu widow is founded both on an authority alleged to have been given to the widow by her husband just before his death and also on the assent of a *sapinda*, and the authority of the husband is disproved, the adoption will hold good only if it appears that the *sapinda* gave his assent in the exercise of his discretion and independently of the alleged authority of the husband. Where a *sapinda* gave his assent to an adoption by the widow, and on the day before the deed of consent was executed the widow executed in the *sapinda's* favour a conveyance of certain lands forming part of her husband's estate, and it was found that the consideration for the sale expressed in the document was fictitious *held* that, in the absence of any explanation by the *sapinda*, the inference was that the real consideration for the conveyance was his assent to the adoption and that therefore the assent was an invalid assent as it was purchased in the manner described above RAMI REDDI v. RANGAMMA, 11 M.L.J. 20. (12 M.L.A. 441, 1 M. 174, 2 M. 281, F.) [D., 17 M.L.J. 322=30 M. 450=2 M.L.T. 364.]

(45)—*Hindu Law—Adoption—Consent of sapindas—Conscious exercise of discretion.*—A Hindu widow adopted the son of the only living *sapinda* of her husband, and it appeared that the widow had brought up the adopted son from the time when he was a child aged one year. The adoption was not made till the child was ten years old though the natural father had been urged during all the time the child had been with the widow to give him in



**Hindu Law—continued.****—2.—Adoption—continued.**

adoption; and he gave his assent only on the morning of the day of adoption. It also appeared that the widow did not ask for the boy in consequence of any authority given to her by her late husband, and that the consent was not given in consequence of any misrepresentation of facts or from improper motives. *Held*, that the assent of the *sapinda* was given after a conscious exercise of discretion within the meaning of the ruling of the Privy Council in 2 M. 270 (279) and that therefore the adoption was valid. **VENKAMMAL v. NAMASIVAYA CHETTIAR**, 6 M.L.J. 35.

(46)—*Hindu Law—Adoption not made to last male holder—Divesting of estate already taken on inheritance—Invalidity of adoption—Subsequent assent, of no effect.*—Where, in the lifetime of R, his son S, died leaving a widow and having by will authorized her to adopt a son, and the widow accordingly adopted the plaintiff after R had died leaving brothers who took as his heirs, and some of these subsequently assented to the adoption, *held* that the adoption was invalid, as it was not made to the last male holder and would, if valid, have the effect of divesting the estate taken on inheritance by R's brothers, and that as the adoption was invalid, the subsequent assent of some of the brothers did not validate it. **RATHNA MUDALIAR v. RAGUNADHA BHATTAR**, 8 M.L.J. 173. (10 M.I.A. 279, 8 M.H.C. 108, F.)

(47)—*Adoption by widow in pursuance of authority of husband—Second adoption on death of first adopted boy—Assent of some sapindas obtained for both adoptions—Validity of second adoption.*—A Hindu widow in pursuance of the authority of her husband took a boy in adoption. The adopted boy having died sometime after, the widow took another boy in adoption. On both occasions, she obtained the assent of some of the *sapindas*. The reversioners sued for a declaration that the second adoption was invalid and that a deed of gift in favour of the second adopted boy was null and void. *Held*, that as the object and purpose of the authority to adopt given by the husband was to perpetuate his family as well as to secure his spiritual benefit, it was not so completely worked out by the first adoption as to prevent the widow from acting upon it when necessity arose for a fresh adoption. The estate was still vested in the widow and was liable to be divested by the adoption. The second adoption was valid apart from the assent of the *sapindas* which was also relied on by the defendants. *Seemle*—Where some *sapindas* assented to an adoption by a widow in general terms as "any boy at any time," and the assent was not acted upon for nine years, during which time circumstances had materially changed, the assent was not valid. **SURYANARAYANA v. VENKATRAMANA**, 26 M. 681. [Confirmed. 29 M. 392 = 16 M.L.J. 276 = 1 M.L.T. 260 = 10 C.W.N. 921 = 4 C.L.J. 171 = 8 Bom. L.R. 700 = 3 A.L.J. 702 = 33 I.A. 145, P.C.]

**Hindu Law—continued.****—2.—Adoption—continued.**

(48)—*Hindu Law — Adoption — Widow, whether competent to delegate authority given to her to adopt—Adoption by untonsured widow, whether vitiated.*—Appellants claiming to be the reversionary heirs of the last male holder of the property in suit sought to recover possession of it and to set aside the adoption of the respondent made by the widow of the said last holder. The legal validity of the adoption was questioned first, on the ground that the adoptive mother did not perform the ceremony of receiving the respondent in adoption herself. It was contended that the widow took no part in the adoption ceremony, but delegated it, because of her impurity to a relation of hers into whose hands the respondent was made over by his natural father at the time of the adoption ceremony. *Held*, that, though, under the Hindu law a widow alone can adopt a son to her husband, and she cannot delegate this authority to any other person, there was, in this case, no evidence of any such delegation of authority on the part of the widow in respect of the principal portion of the ceremony, namely, the gift and acceptance, and consequently agreed with the lower Court in its conclusion that, on the evidence, it was made out that the widow herself received the respondent in adoption, and that her having merely requested her relation to complete the religious ceremony did not in any way vitiate the act. The second ground on which the validity of the adoption was questioned had reference to the alleged incompetency created by the fact that the widow had not removed the hair on her head and was thus ceremonially impure. There was admittedly no authoritative Sanskrit text on the point, and whatever the efficacy of ceremonial strictness might be, Courts in India must be guided by what is the received practice and custom of the country or the class to which the parties belonged. Among the Dehastha Brahmins in the Deccan, widows are generally permitted to retain their hair, and among all classes there is no compulsion for removal of hair in the case of young girls before they attain puberty. The Court, was in the result, satisfied that the alleged impurity of the adopting widow in this case, ascribed to her for absence of tonsure, was not, in the case of a young girl like her, such a disqualification as could vitiate the adoption itself. **LAKSHIMIBAI v. RAMACHANDRA**, 22 B. 590.

(49)—*Hindu Law — Adoption — Estate of deceased owner vested in his daughters by inheritance—Subsequent adoption by owner's widowed daughter-in-law — Alleged consent of minor daughter, whether could be ratified on her majority—Invalidity of adoption.*—The two daughters of the last male owner had succeeded to his estate by inheritance. Subsequently W, the widow of a pre-deceased son of the said owner, adopted the plaintiff who claimed to be entitled as such to inherit the property of the last male owner, alleging that the adoption took place with the consent of



**Hindu Law—continued.****—2.—Adoption—continued.**

the daughters. Objection was raised to the adoption mainly on the ground that W had no power to adopt after her father-in-law's death and the consequent vesting of the estate in his daughters by inheritance. It was held that the plaintiff's adoption was invalid because one of the daughters in whom the estate had jointly vested was a minor at its date and so incapable of giving such a consent to it as would operate to divest her of her estate or as a waiver of it in favour of the adopted person. The adoption was invalid for the double reason that W had no power to adopt, as she was not the widow of the last male holder, and that the nearest heirs, the daughters of the deceased owner had not validly consented to the divesting of the estate inherited by them in favour of the plaintiff or his adoptive mother. On the question relating to the consent alleged to have been given by the daughters, it was held that there was no proper consent for the purpose. One of the daughters was only twelve at the time of the adoption and was not competent to give any such assent as by herself taking part in celebrating and proclaiming the adoption. Mere presence at the ceremony and the absence of any objection, might imply an acquiescence, but such a mere acquiescence cannot be deemed to be equivalent to consent. The lower Court had expressed the opinion that though one of the daughters could not, by reason of her minority, have at the time validly consented to the adoption, yet she had ratified it on attaining majority by her subsequent conduct, but the High Court held that no subsequent assent or ratification could give validity to an adoption *ab initio* invalid. *VASUDEO v. RAMACHANDRA*, 22 B. 551, F.B. [*F.*, 23 B. 789; *R.*, 31 M. 446.]

(50)—*Convert to Mahomedanism can authorise the adoption of his Hindu son—Guardianship, right of, preserved to a Hindu father who has renounced his religion.*—The plaintiff (a rajput), whose natural father had become a convert to Mahomedanism and whose natural mother was dead, was given in adoption by his uncle, whom the Mahomedan father had authorised in that behalf. The lower appellate Court held that the adoption was invalid, for the natural father, could not then delegate authority, as he had by becoming a Mahomedan, ceased to be governed by Hindu Law, and that therefore he could not give, and consequently could not authorise the giving. *Held*, that the adoption was valid; for the Mahomedan father could authorise the giving in adoption of his son, as he was not civilly dead but was the guardian of his son under Act II of 1850. Adoption may be regarded as a civil transaction as well as a religious ceremonial. If civilly the father is competent to give he is equally competent to sanction the giving. *Seemle*.—Were the parties Brahmans and the *datta homa* essential, then possibly the father after becoming a Mahomedan could not

**Hindu Law—continued,****—2.—Adoption—continued.**

sanction his brother to be present at the giving during the *datta homa*. *SHAMSING v. SANTA-BAI*, 3 Bom. L.R. 89=25 B. 551.

(51)—*Kritrima adoption—Adoptee's consent essential—Custom—Existence from time immemorial—Duttaka adoption—Ceremonies.*—The consent of the party adopted is essential to the validity of an adoption in the Kritrima form. The *Putrestee jag* must be performed, at least among the three superior castes before making an adoption in the Duttaka form. A custom to have the force of law must be shown to have existed from time immemorial. *LUCHMUN LALL v. MOHUN LALL BHAYA GAYAL*, 16 W. R. 179. [*R.*, 11 C.W.N. 147=4 C.L.J. 537.]

(52)—*Maternal aunt's daughter's son—Gift by father—Subsequent performance of Datta-homam—Gift by brother at the ceremony.*—There is nothing in usage or in law to invalidate an adoption by a Hindu, of his maternal aunt's daughter's son. Where a gift is made by the natural father and accepted by the adoptive father in view to adoption being made at a future time, after the death of the natural father the elder brother of the boy may act in the place of the father at the time of the adoption, and during the performance of the *Datta-homam*, and the adoption is not invalidated thereby. Under the circumstances, the gift may be validly revoked during the interval, that is, before the performance of the religious rite. *Seemle*—*Datta homam* is an essential element in an adoption among the Brahmans. *VENKATA v. SUBHADRA*, 7 M. 548 (4 M.H.C. 165, *R.*) [*F.*, 21 M. 497; *R.*, 18 M. 397, 11 M. 5, F.B.]

(53)—*Brahmans—Adoption, essentials to validity of.*—Proof of the performance of the *datta homam* is not essential to the establishment of a valid adoption in a Brahmin family; the giving and receiving a boy who is a fit subject for adoption is enough to constitute a valid adoption according to Hindu Law. *V. SINGAMMA v. VINJAMURI VENKATACHARLU*, 4 M.H.C. 165. [*F.*, 2 A. 164, F.B., 6 M. 20 6 A. 276, F.B.=A.W.N. 1884, 82; *Appr.*, 11 M. 5, F.B.; *Doubted*, 7 M. 548; *R.*, 21 W.R. 285, 5 C. 770, P.C., 5 M. 358, 9 A. 253, 24 B. 473.]

(54)—*Hindu law—Adoption—Dakhani Brahmans—Brother's son—Ceremonies.*—In the case of an adoption of a brother's son among the Dakhani Brahmans, the giving and taking of the child is sufficient to perfect it. The *datta homam* or any other religious ceremony is not necessary to make it valid. *ATMA RAM v. MADHO RAO*, 6 A. 276, F.B.—A.W.N. 1884, 28. [*Appr.*, 24 B. 218; *R.*, 24 B. 473.]

(55)—*Hindu Law—Adoption—Death of adoptive father before datta homam, adoption not invalidated by.*—There was evidence in this case showing that there was a "*vachadatta*," that is, a gift and acceptance of the adoptee, but unaccompanied with the performance of



**Hindu Law—continued.****—2.—Adoption—continued.**

*datta homam* which was to be performed at his *upanayanam* or thread ceremony. In the circumstances of the case, the direction in the will of the adoptive father that his widow should cause the adopted son's *upatayanam* to be performed, was held to imply that the *datta homam* should precede the *upanayanam* of the boy whom the testator had taken in adoption and had all along regarded as adopted son. The death of the acceptor or the giver in adoption, before the performance of the *datta homam* ceremony, could not by itself invalidate the adoption, so that where the *datta homam* has since been performed, the adoption would become legally complete and valid. **SUBBARAYAR v. SUBBAMMAL, 21 M. 497.**

(56)—*Adoption, proof as to the factum of adoption—Omission to adopt nearer gotra—Sapindas, effect of, on validity of adoption of remoter sapinda—Doctrine of 'factum valet,' extent of the applicability of, to cases of adoption—Limit of time for adoption among Dwijas—Bar to adoption after performance of Upanayana—Age limit for adoption, interpretation of texts prescribing—*The mere fact of the execution of a deed reciting the gift and acceptance of a boy, which were not shown to have been intended by the parties to operate as a complete adoption, would not by itself amount to an adoption, unless accompanied by sufficient evidence, oral or documentary, proving the *factum* of the adoption itself, i.e., that the giving and acceptance and the essential steps had been actually gone through. The defendants, in this case, were nearer sapinda relations to the plaintiff's adoptive father, being the descendants through a brother of such father. On the question arising whether the remoteness of the sapinda relationship of the plaintiff to the adoptive father, in comparison with the defendants, vitiated his adoption, it was held that both parties being *gotraja sapindas* of the adoptive father, the mere comparative remoteness of the plaintiff's relationship would not by itself vitiate his adoption. (13 M.L.A. 373, 5 I.A. 40, R.) The doctrine of '*factum valet*' has been held to be applicable as well in the *Dayabhaga* school, as in the various sub-divisions of the *Mitakshara* school. In cases of adoptions, when questions arise in respect of formalities, ceremonies and similar other points which amount to moral or religious suggestions, and which relate to the *modus operandi* of the adoption, without affecting its essence, the doctrine of *factum valet* could be undoubtedly applied upon general grounds of justice, equity and good conscience, irrespective of the authority of the texts of Hindu Law. In the absence of any such texts expressly to the contrary, the doctrine will apply to adoptions which, having been made in substantial conformity to the law, have infringed only minor matters of form or selection. The capacity to give, the capacity to take, and the fitness to be taken in adoption are the three main elements essential to constitute an adoption, apart from questions of form.

**Hindu Law—continued.****—9.—Adoption—continued.**

These being matters essential to the validity of the transaction are, as such beyond the province of the maxim '*quod fieri non debuit factum valet*.' (5 I.A. 40, 2 A. 164; 4 M.H.C. 164, 10 B. 80, 12 B.H.C. 364, 3 B. 273, R.) According to the Hindu Law of adoption as prevalent in the Benares school, the performance of the *upanayana*, or the ceremony of the investiture of the sacred thread, representing the second birth of the boy, is the ultimate limit when a valid adoption in the regular *Dattaka* form can take place. The age of the boy is only material as determining the term at which *upanayana* may be performed. After the *upanayana* ceremony among the *Dwijas*, an ultimate bar is placed in the way of his being taken in adoption validly, on the ground, that if the second birth, by means of that ceremony, has already taken place in the natural family, it would be a violation of the legal fiction itself, to say that the second birth takes place again, by reason of the adoption, in the adoptive family. **GANGA SAHAI v. LAKHRAJ SINGH, 9 A. 253.** (10 B. 80, Diss.) [R., 10 A. 289, 11 A. 194, 12 A. 328, 17 A. 294, 11 C.P.L.R. 56, 11 C.W.N. 147 = 4 C.L.J. 537.]

(57)—*Adoption of Sagotra—'Datta homam'—Datta Homam* is not an imperative part of a valid adoption among the Brahmans of Southern India, when the adopter and the person adopted belong to the same gotra. **GOVINDAYAR v. DORASAMI, 11 M. 5, F.B.** (4 M.H.C. 165, Appr. & F.; 6 C. 381, Cons.) [Appr., 24 B. 218; R., 13 M. 214, 24 B. 273, 27 M. 538 = 14 M.L.J. 340.]

(58)—*Deed of gift and adoption—Issues—Special appeal—*In this case plaintiff sued defendant for himself and as guardian of his minor son to set aside two deeds relating to the adoption of the minor. One deed was alleged to be an agreement to give, and the other an agreement to take the child, in adoption: Held, (i) that the deeds in form were not mere agreements to give and take, but deeds of gift and adoption, and that interchange was not necessary or important; (ii) that, if the defendant gave, or was willing to give, the child, the plaintiff had no right to sue for a declaratory decree on the ground that the deeds were null and void, because of the non-performance of certain religious ceremonies; (iii) that the most important issue in the cause was whether there was an actual delivery of the child, but that, as the Lower Appellate Court did not try that issue, the High Court was in error in deciding the case in special appeal upon that issue; (iv) that the deeds were not actually necessary to render the adoption valid; and if they were set aside, it might be proved *aliunde*. The breach of an agreement by one of the parties is a ground for an action for damages, or for specific performance, but not a ground for setting aside the contract, or declaring it null and void. A declaratory decree is not a matter of absolute right, but may be



**Hindu Law—continued.****—2.—Adoption—continued.**

granted or not at the discretion of the Court. **NOGGENDRO CHUNDRO MITTRO v. SREEMUTTY KISHEN SOONDORY DASSEE**, 19 W. R. 133.

(59)—*Hindu Law—Adoption—Sudras.*—Those ceremonies, which are necessary to be observed in the case of an adoption among the superior classes of Hindus, are not necessary in the case of an adoption among Sudras. Where the adopted son of a Sudra is a brother's son, a member of the same family, the mere giving and taking may be sufficient to give validity to the adoption. **NITTIANAND GHOSE v. KRISHNA DYAL GHOSE**, 7 B.L.R. 1=15 W.R. 300. (4 B.L.R. A.C., 162, R.) [R., 24 B. 218.]

(60)—*Adoption of Sudra—Ceremonies necessary.*—Besides giving and taking, all the ceremonies enjoined in the shastras for an adoption of the case of a Brahmin are necessary to constitute a valid adoption in the case of a Sudra. **BHAIRABNATH SYE v. MAHES CHANDRA BHADURY**, 4 B.L.R. A.C. 162=13 W.R. 168. [Overruled, 21 W.R. 285, F.B.; F., 5 B.L.R. 362; R., 16 W.R. 112.]

(61)—*Adoption by Sudra—Religious ceremony—Pollution.*—An adoption by a Sudra under pollution is valid as in his case no religious ceremonies are essential. **THANGATHANNI v. RAMU**, 5 M. 358.

(62)—*Adoption (actual and constructive)—Deeds—Declaratory decree.*—The giving and receiving of a child, in order to constitute adoption must be actual, and not only a constructive giving and taking by execution of deeds. Where a father after execution of such deeds refuses to give his child for the purpose of adoption, the other party has a right to come to Court for relief and ask to have the deeds declared. **SRI NARAYAN MITTER v. SRIMATI KRISHNA SUNDARI DAS**, 2 B.L.R. A.C. 279=11 W.R. 196. (2 Ind. Jur. N.S., 22, Appl.) [Reversed, 11 B.L.R. P.C., 171.]

(63)—*Adoption among Sudras.*—Though it has been decided that, among Sudras, no ceremonies are necessary in addition to the giving and taking of the child in adoption, it cannot be said that there can be such a giving and a taking as is necessary to satisfy the law by the mere execution of mutual deeds. It would seem that, according to Hindu usage, which the Courts should accept as governing the law, the giving and taking in adoption ought to take place by the father handing over the child to the adoptive mother and the adoptive mother declaring that she accepts the child in adoption. **SHOSHINATH GHOSE v. KRISHNASUNDERI DAS**, 6 C. 381=7 I.A. 250=7 C.L.R. 313, P.C.=4 Sar. 191. [D., 9 A. 253; Cons., 6 A. 276, F.B., 11 M. 5; R., 5 M. 358, 11 B. 311, 12 A. 328, F.B., 24 B. 473, 13 M. 214.]

(64)—*Adoption among Kshatriyas—Religious ceremony not necessary.*—Among Kshatriyas,

**Hindu Law—continued.****—2.—Adoption—continued.**

an adoption is legally valid, if there is mere giving and receiving, without any religious or other ceremony. **CHANDRA MALA v. MUKTAMALA**, 6 M. 20. (4 M.H.C. 165, F.) [R., 11 M. 5, 24 B. 473.]

(65)—*Adoption of only son by Sudra—Validity.*—Under the Hindu Law, the adoption by a sudra of an only son as a *kurta putro* is valid. **MUSSAMUT TIKDEY alias MOHA RANEE v. LALLA HUREELAL**, W.R. 1864, 133.

(66)—*Hindu Law—Adoption—Proof of adoption—Presumption.*—When there is satisfactory evidence that a party has been given and received in adoption, and the adoption has been recognized for a series of years, and the party adopted is shown to have had possession of property which would devolve upon him by reason of such adoption, a Court may dispense with formal proof of the performance of the ceremonies; and, unless it were distinctly shown, on the part of a person contending against the adoption, that the ceremonies had not been performed, the party adopted would be entitled to enforce all his rights as adopted son. **SABO BEWA v. NAHAGUN MAITI**, 2 B.L.R. App., 51=11 W.R. 380. [F., 18 W. R. 77; R., 24 B. 473.]

(67)—*Evidence of adoption—Presumption.*—In this case the *factum* of adoption was not questioned, and the *status* of the adopted son was long recognized; and the adopted son performed his father's *shraddh* and died possessed of his property: *Held*, that the strongest presumption arose in favour of validity of the adoption. **CHOWDHRY HERASUTOOAH v. BROJO SOONDUR ROY**, 18 W.R. 77.

(68)—*Sudras in Bengal—Subsequent performance of ceremonies of adoption.*—Among Sudras in Bengal no ceremonies are necessary in addition to the giving and taking the child in adoption. (4 M.H.C. 165, R.) *Quære.*—Whether defect of the non-performance of the ceremonies of an adoption can be cured by a subsequent performance. **INDROMONI CHOWDHURI v. BEHARILAL MULLICK**, 5 C. 770, P.C.=6 C.L.R. 183=7 I.A. 24=4 Sar. 120. (On appeal from 13 B.L.R. 401.) [F., 5 M. 358; Appl., 6 M. 20; R., 11 M. 5, 6 A. 276.]

(68 & 70)—*Hindu Law—Adoption by a Sudra leper in Bengal—Religious ceremonies.*—Adoption by a Sudra leper in Bengal is allowed. Such an adoption held valid, if there is nothing to show that the disease of the adoptive father is such as to be inexpiable or that he is in such a state as not to be able to adopt at all. **SUKUMARI BEWA v. ANANTA MALIA**, 28 C. 168. (13 B.L.R. 401, 5 C. 770, P.C., R.)

(71)—*Hindu Law—Adoption among Sudras—Ceremonies—Bengal law.*—Among Sudras in Bengal, in addition to the giving and taking of the child in adoption, no ceremonies are



**Hindu Law—continued.****—2.—Adoption—continued.**

necessary to make a valid adoption. **BEHARI LAL MULLICK v. INDRAMANI CHOWDHRAIN**, 13 B.L.R. 401, F.B.=21 W.R. 285. [F., 28 C. 168; *Affirmed on appeal*, 5 C. 770=6 C.L.R. 183=7 I.A. 24; R., 11 B. 381.]

(72)—*Adoption—Same actra—Religious ceremony not necessary.*—When the adoptive father's gotra is the same as that of the adopted boy's natural father, the religious ceremony of *Datta Homam* is not necessary to the adoption. **VEDAVALLI NARASIAH v. MANGAMMA**, 27 M. 538=14 M.L.J. 340. (11 M. 5, F.) [F., 5 M.L.T. 27=32 M. 140.]

(73)—*Authority of husband—Ceremonies, Performance of—Place for performance of ceremony—Hindu Law—Widow—Resistance to suit in ejectment by adopted son—Ceremonies*—In cases of adoption in the *Dattaka* form, it must be proved that the widow had the authority of her husband to adopt, and that she made the adoption when the boy adopted was under six years of age, and with the prescribed ceremonies. Although, according to the *Dattaka Mimansa*, the ceremony of *homa*, or burnt-offering, is an essential part of adoption, it is not necessary that it should take place in the dwelling of the adopted. Where it was not intended by the widow that her adopted son should succeed her in the management and enjoyment of the property without her consent, she may resist the claim of the adopted son to eject her, on the ground of the invalidity of the adoption under the Hindu law, notwithstanding her previous treatment and recognition of the plaintiff as adopted son, and notwithstanding her acknowledgment having been received and acted upon by the authorities without question. **THAKOOR OOMRO SINGH v. THAKOORANEE MEHTAB KOONWUR**, 3 Agra 103-a. [D., 30 A. 549=5 A.L.J. 568=A.W.N. 1908, 231=4 M.L.T. 385.]

(74)—*Datta Homa—Adoption of brother's son.*—In the Bombay Presidency, the *Datta Homa* ceremony is not essential to the validity of the adoption of a brother's son, even though the parties be members of one of the three regenerate classes. **VALUBAI v. GOVIND**, 1 Bom. L.R. 770=24 B. 218.

(75)—*Chudasama Gameti Garasias—Adoption—Ceremonial competence.*—Among the *Chudasama Gameti Garasias* there exists no custom forbidding adoption. There is no fixed age at which a Hindu child attains ceremonial competence. **VERABHAI v. BAI HIRABA**, 5 Bom. L.R. 534=27 B. 492.

(76)—*Giving and taking—Adoption of a boy in his absence—Execution of a deed without actual giving and taking insufficient to validate such adoption.*—Where there is no actual giving and taking in adoption of a boy owing to his absence, a mere execution of a deed of

**Hindu Law—continued.****—2.—Adoption—continued.**

adoption is not sufficient to validate his adoption. **DHAPABAI v. CHAMPA LAL**, 1 Bom. L.R. 842.

(77)—*Hindu Law—Adoption—Giving and taking—Adoption of half-brother—Validity.*—Where the evidence showed that no ceremony took place other than the distribution of coconuts and that no one gave the boy in adoption, held that the alleged adoption was invalid. The essential act in an adoption is the giving and taking. *Quære.*—Whether, under the Hindu Law, an adoption of a brother of the half-blood would be valid? **PHUNDO v. BHISHWA DAS**, A.W.N. 1883, 246.

(78)—*Necessity of there being a gift and acceptance for the child adopted.*—Although a ceremony of adoption had taken place, if there is in fact no giving and taking of the child, there is no valid adoption. **BIRESWAR MUKERJI v. ARDHA CHANDER ROY**, 19 C. 452, P.C.=19 I.A. 101=6 Sar. 171.

(79)—*Hindu Law—Adoption—Authority to one widow to adopt boy approved of by other widow—Adoption by both widows—Validity.*—Where a testator authorised his junior widow to make the adoption of a boy approved of by the senior widow, and both the widows received a boy in adoption, the senior widow's act in also accepting the boy was a work of supererogation, which did not render the adoption invalid. *Unile per inutile non vitiator*. **CHENNAPPA NAYINIVARU v. RAMAPPA NAYINIVARU**, 10 M L.J. 131.

(80)—*Consent of co-widows—Adoption by a senior widow—Consent of the co-widow.*—J, a Hindu, died leaving two widows L and K. By L (the senior widow) he left a daughter, and by K (the junior widow) he left a son. The son then died and K thereupon succeeded to the estate. Subsequently L adopted the plaintiff as son to her deceased husband; to this adoption no consent of K was taken. Held, that the adoption by L was not valid, since an adoption could not be made without the consent of the co-widow in whom the whole estate had vested by inheritance from her son. **ANANDIBAI v. KASHIBAI**, 6 Bom. L.R. 464=28 B. 461.

(81)—*Adoption by senior widow with the consent of all sapindas—Junior widow not consulted—Validity of adoption.*—A senior widow adopted a boy with the consent of all the divided brothers of her husband. The junior took no part in the adoption and did not consent to it. The junior widow had a daughter. The question for decision was as to the validity of the adoption. Held, the general principle that persons cannot be divested by others without their consent, of property already vested in them by law cannot apply to a case like this. If the adoption is regarded as the performance of a religious duty and a meritorious act, the



*Hindu Law—continued.**—2.—Adoption—continued.*

younger widow was bound to give her consent. (5 B.H.C. A.C. 181, R.) The absence of consultation with the younger widow did not render the adoption invalid. *NARAYANASAMY NAICK v. MANGAMMAL*, 28 M. 315=15 M.L.J. 143. (12 M.I.A. 397, R.)

(82)—*Widow—Consent.*—The consent by a widow to an adoption made by her co-widow, may be intimated by conduct as well as by acts: and acquiescence may under certain circumstances be taken to be consent. Mere presence is not necessarily equivalent to consent, for consent in this connection implies an intelligent concurrence on due consideration, and it is for the Court to determine whether the whole circumstances of the case invite the inference that such a consent has been given, bearing into mind that the consent required is a matter, not of form, but of substance. *BHIMAPPA v. BASAWA*, 7 Bom. L.R. 405=29 B. 400.

(83)—*Childless Hindu—Duty to adopt son—Adoptive father a minor.—Validity.*—Adoption, under Hindu Law is imperative, and not an optional; because a childless Hindu is bound to adopt a son, if at all anxious for his own salvation. An adoption is not invalidated by the mere fact of the adoptive father being a minor if he has attained years of discretion. *RAJENDRO NARAIN LAHOREE v. SARADA SOONDUREE DABEE*, 18 W.R. 848. [R., 1 C. 289, 5 C. 363, 18 C. 69, 15 B. 565, 23 B. 250, 14 A. 67.]

(84)—*Hindu Law — Adoption—Evidence—Conflicting probabilities.*—An adoption may be made, either by a man in his lifetime or by one of his wives after his death, under a power conferred upon her for that purpose by her husband. Where there is conflicting evidence upon the fact of an adoption, much will depend upon the probabilities of the case, to be collected from facts as to which both parties are agreed. *HURRADHUN MOOKERJEE v. MOTHORA-NATH MOOKERJEE*, 7 W.R. 71, P.C.=4 M.I.A. 414. [F., 10 M.I.A. 429; R., 7 B.H.C. App. 1.]

(85)—*Adoption by Hindu widow—Effect.*—A widowed mother succeeding as heir to her own son is entitled to exercise the power of adoption, and the son so adopted would obtain the rights of a natural born son. By making the adoption, she would divest only her own estate. *BY-KANT MONEE ROY v. KISTO SOONDAREE ROY*, 7 W.R. 392. (3 W.R. 15, P.C., 41 pl.) [Diss., 17 B. 164, 33 C. 1306=4 C.L.J. 357=11 C.W.N. 12; R., 5 O.W.N. 20.]

(86)—*Essentials of a valid adoption—Death of natural father—Mother to give in adoption—Paternal grandfather.*—A valid adoption must be preceded by a gift and acceptance. On the decease of the natural father the mother, if living is the only person who can give in adoption. The Hindu law does not authorize the paternal grandfather or any other person in his behalf. *THE COLLECTOR OF SURAT v. DHIRSINGJI*, 10 B.H.C. 235. [R., 12 B.H.C. 364, 1 B. 248.]

*Hindu Law—continued.**—2.—Adoption—continued.*

(87)—*Delegation of power of giving in adoption—Gift by adoptee's brother—Adoption of son self-given.*—Amongst the Hindus, in the Presidency of Bombay, a valid gift in adoption can be made only by the natural father or mother of the son given, or by them both conjointly. This authority cannot be jointly or severally delegated to another person so as to validate a gift by him, after the death of both. Therefore, a gift in adoption by the brother of the adoptee after the death of his father and mother, though made with the previous assent of his father would be illegal. Amongst Hindus, in the same Presidency, an adoption of a son self-given, although he may at the time of the gift be an adult, is in the present age (the *Kali Yug*) invalid. *BASHETIAPPA v. SHIVLING-APPA*, 10 B.H.C. 268. [R., 12 B.H.C. 364, 16 M. 384, 2 B. 377.]

(88)—*Delegation of power of receiving—Adoption by brothers of deceased Jain after his widow's death but in conformity with her wishes—Validity—Registration—Custom—Burden of proof.*—A. B., a Jain of Marwadi origin, of Ahmednagar in the Deccan, died without leaving natural born issue, and without adopting anybody. His wife, who survived him, resolved, shortly before her death, to adopt the son of C. D., a brother of A. B., but did not live to carry such intention into effect. After her death, C. D. and E. F. (another brother of A. B.), with the assent of the Panch or senior members of their community, went through a ceremony of giving the boy in adoption to the deceased A. B. and his deceased wife, and an agreement wholly founded upon that adoption, was executed by E. F. to C. D. and professed to deal with the property moveable and immoveable of A. B. Held that the adoption and the agreement were both invalid. *Quere*: whether such an instrument being unregistered, and dealing with immoveable property above the value of Rs. 100, was not, upon that ground alone, invalid. Adoption among the Jains is, in the Presidency of Bombay, regulated by the ordinary Hindu law, as is their succession to property generally, their divergence from the Hindus in matters of religion notwithstanding. The Hindu law does not allow any one but the widow to act vicariously for the man to whom the son is to be affiliated; the widow is a delegate either with express or implied authority, and cannot extend that authority to another person, so as to enable him to adopt a son to her husband after her decease; not only a giving but an acceptance by the man, or his wife, or widow, manifested by some overt act, being necessary to constitute an adoption under the Hindu law. When amongst the Hindus (and the Jains are Hindu dissenters) some custom, different from the normal Hindu law and usage of the country in which the property is located and the parties resident, is alleged to exist, the burden of establishing its antiquity and invariability lies on the party alleging its existence, and it should be proved by clear and



*Hindu Law—continued.**—2.—Adoption—continued.*

unambiguous evidence above suspicion. BHAGVANDAS TEJMAL v. RAJMAL, 10 B.H.C. 241 [Appr., 12 B.H.C. 224; F., 2 C.W.N. 154; R., 6 N.W.P. 382, 11 Bom.L.R. 797, 33 B. 669, 17 C. 518, 27 C. 379, 16 M. 182, 2 B. 67, 388, F. B., 3 B. 273, 11 B. 381, 12 B. 280, 19 B. 428, 21 B. 110, 22 B. 199, 416, 558, F.B., 590, 23 B. 257, 1 Bom.L.R. 144, 1 A. 688, P.C., L.B.R. 1872—1892, 135.]

(89)—*Custom among Bohra Brahmans of adopting sister's son.*—The custom found to exist, among the Bohra Brahmans settled in the northern districts of the N.W.P., permitting the adoption of a sister's son, was held to be a valid custom having the effect of legalising such adoption. CHAIN SUKH RAM v. PARBATI, 14 A. 53=A.W.N. 1891, 222. [R., 19 B. 428, 17 A. 294, F.B., 107 P.L.R. 1901, 110 P.R. 1906=31 P.L.R. 1907=59 P.W.R. 1907.]

(90)—*Hindu Law — Adoption — Spiritual motive not essential.*—Spiritual motive is not essential to render an adoption lawful and, therefore, a member of the Talabda Koli caste can lawfully adopt, although his motive is only the perpetuation of his name and family. BHALA NAHANA v. PARBHU HARI, 2 B. 67. [F., 19 B. 428.]

(91)—*Naikins, adoption of daughter among, whether valid—Suit for partition by alleged adoptive daughter, not maintainable — Usages of class, how far to be given effect to by Courts of law.*—On the allegation that, in accordance with the custom obtaining in the Naikan community, the plaintiff had been adopted by the first defendant in this case and had been recognised and treated by the latter as her adopted daughter, the plaintiff sued for a share of the property in the hands of the defendant. The plaintiff's claim was rejected by the High Court on the ground that an adoption of a daughter among the Naikins cannot confer any legal rights on the adoptee. An adoption by a woman presupposes a husband, to whom she adopts, and a Naikin woman can, as such, have no husband. Even assuming that the legal right of inheritance could result from such adoption, such a right is distinct from a right to call for partition, and even ordinary daughters succeeding to their natural mother's property cannot call for a partition during the mother's life. It is not competent to the Courts to recognise an adoption of a girl made by a Naikin on the ground of the usage to that effect obtaining among the Naikins as a class. The practices of an abandoned class are, no doubt, a usage in the sense of a tolerably uniform series of acts; but the advancing popular sentiment would not continue to give validity to usages of manifestly evil tendency as that of adopting female children and devoting them to a life of infamy. The majority of the modern Hindu community regard courtesans as a class essentially vicious. The law or rules by which such a class endeavours to make itself and its mis-

*Hindu Law—continued.**—2.—Adoption—continued.*

chievous influence perpetual, would be deemed directly opposed to the divine law, and the usage itself, therefore, not as valid and coercive like a law, but as essentially invalid on account of its contradiction of the law. Where a usage is variable at the will of the community, it should be enforced according to its slowly changing phases. As the mind of the community gets enlightened, its legal convictions will change, and this will constitute a change in its common law as that law must from time to time be recognised and recorded in the Courts. In the result, notwithstanding the fact that classes of prostitutes have been, to some extent, recognised by usage, an essentially immoral class, such as that of the Naikins could no longer be recognised as capable of making any peculiar rules among its members, whether relating to adoption or inheritance. MATHURA NAIKIN v. ESU NAIKIN, 4 B. 545. [Diss., 11 M. 393; R., L.B.R. 1872—1892, 225, 12 B. 280, 11 M. 258, 21 C. 149, P.C.=20 I.A. 193; 19 M. 127, 26 B. 491; D., 14 B. 90.]

(92)—*Dancing girls—Adoption of daughters.*—In the class of dancing girls forming an exceptional sect in the Hindu community, the adoption of a daughter and the resulting of rights of inheritance to such an adoptee have often been recognised by Courts of law, notwithstanding the undesirability of the Courts giving a legal status to the immoral profession of prostitutes, such as dancing girls and courtesans. Having no husbands, adoption cannot be made in that channel. They are, consequently, allowed to make adoptions themselves for transmission of their property, and this must be of a daughter, as a descent from a female is in the female line. To adopt, it is but necessary that the adopting mother must be daughterless. It is immaterial whether she has a son or not. This is the law, and when it becomes necessary to decide the point, the Court would not feel itself justified, by considerations of public policy in allowing the adoption to be legal and, at the same time, not giving its legal effect to such adoption. NANEE TARA NAIKIN v. ALLARAKHIA SOOMAR, 4 B. 573, Note. [R., 4 B. 545.]

(93)—*Adoption by Hindu prostitute—Legality —Right of the adopted son to inherit.*—A Hindu woman cannot, under any circumstances, adopt son to herself; nor can any so-called adoption confer on him any right of inheritance. NARENDRA NATH BAIRAGI v. DINA NATH DAS, 36 C. 824=3 Ind. Cas. 996.

(94)—*Reversioner—Decrees, binding nature of.*—*Quere*:—Whether a decree in a suit by a reversioner in favour of an adoption is binding on any reversioner except the reversioner suing? Whether a decree in such suit against the adoption is binding between the alleged adopted son and any other reversioner than the plaintiff? JAMOONA DASSYA v. BAMASOONDARI DASSYA 1 C. 289, P.C.=3 I.A. 72=25 W.R. 235=3 Sar. 602. [R., 22 A. 33, 382, 8 O.C. 124.]



**Hindu law—continued.****—2.—Adoption—continued.**

(95)—*Indian Majority Act (IX of 1875) — Adoption under Hindu Law — Adoption by a minor widow — Effect of adoption on inheritance — Person dying leaving two widows and authorising either to adopt — Refusal of elder to adopt — Effect of adoption by younger widow.*—The Indian Majority Act (IX of 1875), provides that nothing contained in that Act shall affect the capacity of a person to act in matters relating to adoption. The non-age of the widow being no obstacle to an adoption by her, a minor widow may validly adopt a son. A son adopted to the last male proprietor, who was the full owner of an estate, is entitled to take the whole of that estate, and to divest the interest of any person in that estate, whose title by inheritance is inferior to his, and who could not have inherited if the adoption had taken place before the death of the last full owner, though he is not entitled to claim, as preferential heir, the estate of any other person besides his adoptive father, when such estate has vested before his adoption in some heir other than the widow who adopted him. [*F.*, 18 C. 385 ; *R.*, 22 C. 565 ; *D.*, 1 C.W.N. 121.] When a man authorises an adoption by any of his widows, it is clearly the religious duty of all his widows to co-operate in bringing it about ; and it would be contrary to reason and justice to allow any one of them to gain an advantage by opposing or withholding her consent from that which it is her duty to accomplish. Where a man died leaving two widows and authorising either of them to adopt a son, and the younger widow, subsequent to the refusal of the elder one to adopt, adopted a son, *held*, that the adoption divested the estate in the elder widow, and the adopted son took the whole estate of his adoptive father. *MONDAKINI DASI v. ADINATH DEY*, 18 C. 69. [*R.*, 26 M. 143 = 12 M.L.J. 197.]

(96)—*Adoption by widower, validity of — Hindu Law.*—An adoption by a widower is valid according to Hindu Law. *NAGAPPA UDAPA v. SUBBA SASTRY*, 2 M.H.C. 367. [*F.*, 4 M.H.C. 270 ; *R.*, 23 B. 250.]

(97)—*Hindu Law — Adoption — Unmarried man, competency of, to effect valid adoption.*—The Hindu Law lays down generally that one who is sonless may adopt and, in the absence of any text or judicial decision to the contrary, no restriction could be placed upon the power so generally given. There is nothing in that law prohibiting adoption by an unmarried man, nor is there any authority to support the contention that an adoption is not valid merely because the person adopting was not a married man at the time of the adoption. *GOPAL ANANT v. NARAYAN GANESH*, 12 B. 329.

(98)—*Adoption by widower or bachelor.*—A widower can make a valid adoption according to Hindu law. A man who has not been married is not prohibited by Hindu law from making an adoption. *N. CHANDRASEKHARUDU v. N. BRAAMHANNA*, 4 M.H.C. 270. [*Appr.*, 12 B. 329 ; *R.*, 23 B. 250.]

**Hindu Law—continued.****—2.—Adoption—continued.**

(99)—*Knowledge of wife's pregnancy.*—An adoption, by a Hindu, who knew of his wife's pregnancy, at the time, is not invalid. *NAGABHUSHANAM v. SESHAMMAGARU*, 3 M. 180. [*F.*, 29 A. 310 = A.W.N. 1907, 57 ; *Appr.*, 12 B. 105 ; *R.*, 19 B. 658.]

(100)—*Hindu Law — Adoption made while wife of adopter was pregnant, not invalid — Posthumous son, rights of, not alterable by Will in favour of adopted son.*—This was a suit by the posthumous son of one R, a Hindu, to recover possession of some of the family properties from the defendant B, who claimed to have been adopted by R two days before his death, and to be entitled, under his Will, to share equally with the minor plaintiff. The adoption was challenged as invalid because of the wife of the adoptive father R having been pregnant at the time of the adoption ; but the lower Court had rightly decided that, under the Hindu Law, the defendant's adoption was valid notwithstanding the circumstance of the said pregnancy of his adoptive mother. When the wife of the adopter is in a state of pregnancy, there may be a son in the womb at the time of adoption ; but there is also the possibility of the child *in utero* being a female and such possibility would, if the power to adopt were to be deemed suspended by the mere fact of the mother's pregnancy, imperil the acquisition of those spiritual benefits supposed to be supplied by adoption in default of a legitimate son. It was also contended for the plaintiff that the Will left by the defendant's adoptive father R was invalid so far as it purported to dispose of his property to the prejudice of the plaintiff's right to three-fourths of R's property, and the High Court upheld the contention, deciding that the Will was inoperative in so far as it reduced the plaintiff's share to a moiety. A father can no more interfere by his will with the right of a posthumous son to his share in his family property as fixed by law, than in the case of a son *in esse* at the time of his death, and if this be so between the posthumous and other natural born sons, the case must be the same between the posthumous son and an adopted son who stands in the position of a natural son, subject to having his share reduced to one-fourth in the event of a natural son being subsequently born. *HANMANT RAMACHANDRA v. BHIMACHARYA*, 12 B. 105. [*F.*, 29 A. 310 = A.W.N. 1907, 57 ; *R.*, 19 B. 658.]

(101)—*Succession — Adopted son of one daughter and natural son of another.*—The adopted son of one daughter shares the maternal grandfather's estate equally with the natural son of another daughter. *SURJOKANT NUNDI v. MOHESH CHUNDER DUTT*, 9 C. 70. (6 C. 256, *F.*)

(102)—*Adoption of only married son among Sudras — Adoption after husband's death and without his authority — Vaishya having undergone vibhut vida — Capacity of such person to adopt son — Custom — Proof.*—An adoption amongst



**Hindu Law—continued.****—2.—Adoption—continued.**

Sudras is not necessarily invalid, because the person adopted is an only son and is married, and has been given in adoption by his mother after her husband's death and without his authority. There is nothing in the books of authority amongst Hindus to show that a Vaishya who has undergone the ceremony of *vibhut vida* is incapable of adopting a son. If a custom to that effect exists, it should be proved by satisfactory evidence. *MHALSIBAI v. VITHOBA KHANDAPPA GULVE*, 7 B.H.C. App 26. [Not F., 12 B.H.C. 364; Cons., 19 B. 790; Rel. on, 30 C. 965=7 C.W.N. 871; R., 3 B. 273, 14 B. 249, F.B., 19 B. 428, 23 B. 250, 1 Bom. L.R. 144.]

(103)—*Leper giving his son in adoption.*—Under the Hindu Law, a leper can validly give his son in adoption to another. *ANUND MOHUN MOZOOMDAR v. GOBIND CHUNDER MOZOOMDAR*, W.R. 1864, 173.

(104)—*Hindu Law—Adoption of sister's son—Pollution, Period of—Sufficient evidence of fact.*—Adoption by a childless Hindu of the Sudra caste of his sister's son, upheld. [R., 11 B. 381, 2 M.H.C. 462, 3 B. 353, 3 B. 273, 5 M. 358, 17 A. 294=A.W.N. 1895, 167; F., 5 B. L.R. O.C. 362.] The period of pollution according to Hindu law, is 16 days. [F., 5 B. L.R. O.C. 362; R., 11 B. 381.] Where there is sufficient evidence of a fact, it is no objection to the proof of it that more evidence might have been adduced. *RAMALINGA PILLAI v. SADASIVA PILLAI*, 1 W.R. 25, P.C.=9 M.I.A. 506.

(105)—*Vaisya—Pollution—Adoption—Datta homam—Gift and acceptance in adoption.*—An adoption made by a widow of the Vaisya caste, while she is in pollution and without the performance of the *datta homam*, is invalid. The corporeal delivery of a boy with a cocoanut and fruits placed in his hands, by his natural father to the adoptive mother, constitutes a valid gift and acceptance. *RANGANA YAKA MMA v. ALWARSETTI*, 13 M. 214. (7 I.A. 250, R.) [R., 24 B. 473, 24 B. 218.]

(106)—*Adoption under pollution—Absence of natural father at datta homam—Estoppel—Adoption among sagotra members.*—A Hindu widow of the Saraswata Brahman caste in South Canara adopted a son with her deceased husband's permission. At the time of the adoption, she was in a state of pollution. But when the *datta homam* was performed, the pollution had ceased. The natural father, however, did not attend the *datta homam*, but his wife took part in the ceremony with his consent. Held, that the giving and taking, not being a religious act, could be effected, though in a state of pollution. The *datta homam* was not bad in consequence of the absence of the natural father of the adoptee. Held, on the evidence, that the parties impugning the adoption in this case were estopped by their conduct from questioning it. *Quære*:—Whether an adoption can be valid where the adoptive mother is of the same

**Hindu Law—continued.****—2.—Adoption—continued.**

gotra as the adoptee's natural father. *SANTAPPAYYA v. RANGAPPAYYA*, 18 M. 397=5 M. L.J. 66. [R., 150 P.R. 1908, 30 A. 549=5 A. L.J. 568=A.W.N. 1908, 231=4 M.L.J. 385.]

(107)—*Hindu Law—Unchaste widow—Adoption.*—An unchaste Hindu widow, living in concubinage, and being in a state of pregnancy resulting from such concubinage, is incompetent to receive a son in adoption. *SAYAMALAL DUTT v. SAUDAMANI DASI*, 5 B L.R. 362=2 Ind. Jur. N S., 24=Bourke 189. (4 B.L. R. A.C. 169, R.; 9 M.I.A. 506, F.) [R., 12 B.H.C. 364, 9 C. 50, 11 B. 381; D., 12 C. 686, 19 C. 513, P.C.=19 I.A. 108]

(108)—*Hindu Law—Estate vested in daughter-in-law—Son adopted by mother-in-law, suit not maintainable by, to set aside subsequent adoption by daughter-in-law—Subsequent unchastity of daughter-in-law, whether annuls her power to adopt.*—The plaintiff in this case was adopted by the widow of the deceased, without the consent of his daughter-in-law in whom the inheritance had vested after the death of her husband. The adoption of the plaintiff was therefore, *ab initio* void and he had therefore no *locus standi* to question the adoption of the defendant subsequently made by the daughter-in-law. The adoption of a son by the widow of Hindu is not only invalid for the purpose of divesting the estate of widow of a deceased son of his, but the existence of the daughter-in-law and the vesting in her of her husband's estate, has the effect of making the power of adoption incapable of execution by the mother-in-law, the elder widow. Also, the estate once vested in the son's widow cannot be divested by her subsequent unchastity, the enquiry into which would, therefore, be irrelevant in such a case. *KESHAV RAMKRISHNA v. GOVIND GANESH*, 9 B. 94. [F., 32 C. 891=1 C.L.J. 270; R., 20 B. 250, 22 B. 551, 22 B. 206, 22 B. 416, 23 B. 327, 28 B. 461.]

(109)—*Adoption by mother after the death of son and son's widow, if valid—Adoption, Power of, when comes to an end and becomes incapable of execution.*—An adoption by a Hindu widow, who has succeeded by heirship in her character as mother to her son, after his death and the death of his widow, is invalid according to Hindu Law. A left a widow and an adopted son, and gave authority to the widow to take three sons successively in adoption, one after the death of another. The adopted son married and died leaving a childless widow, who succeeded to the estate. Upon the death of the widow of the adopted son, the widow of the original owner succeeded to the estate and took a second son in adoption: Held, that the second adoption was invalid inasmuch as the power of adoption came to an end and became incapable of execution when the estate vested in the widow of the first-adopted son, and that such vesting was a proper limit to the exercise of the power. The power was not revived upon



**Hindu Law—continued.****—2.—Adoption—continued.**

the death of the widow of the first adopted son. **MANIKYAMALA BOSE v. NANDA KUMAR BOSE** 4 C.L.J. 337=11 C.W.N. 12=33 C. 1306. (10 M.I.A. 279, 8 I.A. 229, 14 I.A. 67, 16 I.A. 166, *Appl.*; 17 B. 164, 26 B. 526. *Appr.*; 7 W.R. 392, *Diss.*; 17 C. 518, *D.*; 22 W.R. 121, 4 C.L.J. 171=10 C.W.N. 921, *Expl. & D.*) [*R.*, 4 Ind. Cas. 386=7 M.L.T. 236.]

(110)—*Power to adopt conferred on a testator's widow, ended on estate vesting in a son's widow.*—Where the testator's son after attaining full age dies leaving a widow, the testator's widow, although empowered by the will to adopt, if the testator's son should die, without son or daughter (which he did), could not exercise that power after the estate had, consequently on the son's death, vested in his widow, for her widow's estate. **TARACHURN CHATTERJI v. SURESH CHUNDER MUKERJEE**, 17 C. 122=16 I.A. 166, P.C.=5 Sar. 379. (10 M. 205, *R. & F.*) [*F.*, 32 C. 861=1 C.L.J. 270, 33 C. 1306=4 C.L.J. 357=11 C.W.N. 12; *R.*, 23 B. 327, 14 B. 463.]

(111)—*Mother—Adoption by a mother when her son has died without leaving a widow or issue—Mother.*—A mother who succeeds as heir to her married son, who died without leaving a widow or issue, is competent to make a valid adoption. The real limitation on the mother's right to adopt when she succeeds as heir to her son really does not depend upon either investiture or marriage, or competency of the son to whom she succeeds as heir. Where the mother divests by her act of adoption no other estate but her own, her power cannot properly be questioned. **VENKAPPA v. JIVAJI**, 2 Bom. L.R. 1101=25 B. 306.

(112)—*Hindu Law — Adoption—Mother's right to give son in adoption without authority from deceased husband.*—Even in the absence of any authority from her deceased husband, it is competent for a mother, after the death of her husband, according to Hindu Law, to give one of her sons in adoption. **JOGESH CHANDRA BANERJEE v. NRITYA KALI DEBI**, 30 C. 965=7 C.W.N. 871. (7 B.H.C. *App.* 26, 11 W.R. 468, 22 M. 338, P.C., *R.*; 2 B. 377, *D.*)

(113)—*Widow succeeding as gotraja sapinda—Adoption by the widow—Widow succeeding to the property as gotraja sapinda.*—A Hindu widow who succeeds to an estate not her husband's but as a *gotraja sapinda* of the last male holder, under the rule established by **Lallubhai v. Mankuvarbai** and in consequence of the absence of nearer heirs, cannot make a valid adoption. **DATTO GOVIND KULKARNI v. PANDURANG VINAYAK**, 10 Bom. L.R. 692=32 B. 499.

(114)—*Grandmother—Succession to grandson—Adoption*—A Hindu grandmother succeeding as heir to her grandson, who dies unmarried, has no power to make an adoption. **RAM-KRISHNA v. SHAMRAO**, 4 Bom. L.R. 315=26 B. 526.

**Hindu Law—continued.****—2.—Adoption—continued.**

(115)—*Remarried Hindu widow—Son by her first husband—Her power to give such a son in adoption.*—A Hindu widow contracting a re-marriage has no power to give in adoption her son by her first husband. **PANCHAPPA v. SANGANBASAWA**, 1 Bom. L.R. 543=24 B. 89.

(116)—*According to Hindu law, a mother who has contracted a re-marriage does not forfeit her rights to give in adoption her son by her first husband, and the Hindu Widow Re-marriage Act, 1855, does not afford any indication that the legislature intended to deprive her of the right.* **PUTLABAI v. MAHADU**, 10 Bom. L.R. 1134=33 B. 107.

(117)—*Eldest son—Mother giving in adoption her eldest son after the death of her husband—Castes, different, of the adopted boy and the adopting woman—Tilari Lingayat—Kulwadi—Widow—Kulwadi son and Tilari mother.*—Where an eldest son was given in adoption, after his father's death, by his mother and there was neither express assent nor prohibition by her husband. *Held*, that the adoption was valid. An adoption by a woman who was a Tilari (i.e., an inferior Lingayat), of a boy who was a Kulwadi or Mabratta is not invalid. **TUKARAM v. BABAJI**, 1 Bom. L.R. 144.

(118)—*Adoption during wife's pregnancy.*—The fact that, at the time of making an adoption, the wife of the adopting father is pregnant, does not affect the validity of the adoption. **DAULAT RAM v. RAM LAL**, A.W.N. 1907, 57=29 A. 310. (3 M. 180, 12 B. 105, *F.*)

(119)—*Mother allowing son to be adopted—Absence at ceremony of adoption—Uncle giving the boy away—Validity of adoption.*—Where a mother, in pursuance of the promise of her deceased husband, allowed her son to be adopted but did not herself attend at the adoption ceremonies to give her son in adoption, but commissioned her uncle to give the boy on her behalf, it was held that the adoption was not on that account invalid. **VIJIARANGAM v. LAKSHUMAN**, 8 B.H.C. O.C. 244.

(120)—*Adoption in husband's lifetime—Husband's sanction necessary—Weight of legal authorities on the subject.*—According to the highest authorities in repute in the Maratha country, the express sanction of the husband is indispensable to render valid an adoption made by the wife in his lifetime. Comparative weight, as legal authorities on this side of India on the question of adoption, of the Mitakshara, Mayukha, Dattaka, Mimamsa, Dattaka Chandrika, Smriti Chandrika, Viramirodaya, Dharmasindhu, and the Nirnaya-sindhu, pointed out. *Dictum* in the case of **The Collector of Madura v. M. Ramalinga Sethupati**, that the opinion of Devenda Bhatta must have been that the assent of the husband stood upon precisely the same footing, and was of the same scope in the cases of giving and receiving" (by the wife in adoption), questioned. **NARAYAN BABAJI v. NANA MANOHAR**



*Hindu Law—continued.**—2.—Adoption—continued.*

*et al.*, 7 B.H.C. A.C. 153. [Appr., 11 B.H.C. 69, 12 B.H.C. 65, 364, 2 B. 377, 388, F.B., 2 B. 273, 10 B. 80, 14 B. 612, 15 B. 110, 17 B. 100, 22 B. 199, 558, F.B., A.W.N. 1907, 220, 4 A.L.J. 528.]

(121)—*Hindu Law—Adoption by widow.*—A widow cannot make a valid adoption without either the authority of her husband or the assent of his sapindas. ARUNDADI AMMAL v. KUPPAMMAL, 3 M.H.C. 283. [R., 2 M. 202, 23 M. 486, 26 M. 627.]

(122)—*Adoption in District of Bareilly—Authority of husband—Long possession prima facie evidence of title—Long possession referable to adoption—Invalidity of adoption—Undisputed possession, possession for a long time—Validity of act “presumption”—Onus of proof—Title of third person not to cause—Jurisdiction.*—Under the law prevailing in the District of Bareilly, the authority of the husband is essential to the validity of an adoption by his widow. [F., 2 C.P.L.R. 18; Expl., 10 W.R., P.C., 17 = 12 M.I.A. 397 = 1 B.L.R., P.C., 1; R., 7 B.H.C. App. 1, 3 Agra., 103-A. 12 A. 328, 17 A. 294 = A.W.N. 1895, 167.] Uninterrupted and undisputed possession for a long period of time constitutes sufficient *prima facie* evidence of title. [R., 8 W.R. 386] Long and undisputed possession does not avail if such possession is referable to a title by adoption which is found to be invalid. [R., 9 A. 253; Not. F., 12 M.L.J. 387, 13 M.L.J. 302.] On proof of undisputed possession for a long space of time, every presumption of fact should be made in favour of the validity of the act by virtue of which it took place; and the *onus* of proving those circumstances which render it invalid in point of law, if the nature of the case require such proof, lies on the other side. [Not. F., 12 M.L.J. 387, 13 M.L.J. 302.] A Court has no right at all to determine the question of title of a third person which is not the question in the cause. RAJAH HAIMUN CHULL SINGH v. KOOMER GUNSHEAM SINGH, 5 W.R., P.C., 69 = 2 Knapp 203 = 1 Suth. P.C. 5.

(123)—*Adoption by widow—Prohibition by husband in his lifetime—Necessity of authority to adopt after husband's death—Refusal to adopt at time of death—Authority not to be implied—Adoption by young widow when upheld.*—A Hindu widow has no power to adopt a son to her deceased husband, if she have been expressly prohibited from doing so by her husband in his lifetime. *Quære*:—Whether, according to the Maratha school, she can adopt without the authority of her husband given prior to his decease. Where a Hindu childless husband, when at the point of death, positively refused to adopt a son, and died without retracting that refusal, it was held that a subsequent adoption by his widow was null and void, as authority from a husband to adopt could not in such a case be implied (*Per Westropp, J.*) *Dictum* of the High Court of Madras, “that the opinion of Devanda Bhatta must have been that the assent of the husband stood upon the

*Hindu Law—continued.**—2.—Adoption—continued.*

same footing, and was of the same scope, in the cases of giving and receiving” (a son in adoption by the wife), questioned. Where an adoption by a young Hindu widow is set up against her, and to defeat her rights, the Court will expect clear evidence that at the time she adopted she was fully informed of those rights, and of the effect of the act of adoption upon them; and if it find that fraud or cajolery was practised upon the widow to induce her to adopt or that there has been suppression or concealment of facts from her, it will refuse to uphold the adoption. BAYOBAL v. BALA URF VENKATESH RAMAKANT, 7 B.H.C. App. 1. [Appr., 7 B.H.C. 153; R., 10 B.H.C. 241, 12 B.H.C. 364, 2 A. 388, F.B., 4 B. 126, F.B., 6 B. 498, F.B., 524, 15 B. 110, 565, 1 Bom. L.R. 144.]

(124)—*Competency of widow to adopt without husband's authority—Necessity for assent of sapindas.*—Under the Hindu law, a widow is competent to adopt a son without her husband's authority therefor, provided she obtains the assent of the majority of her husband's kindred. The assent of any one of the kindred would suffice if the necessity to obtain the consent of the sapindas were a moral precept. THE COLLECTOR OF MADURA v. MUTTU RAMALINGA SETHUPATI, 2 M.H.C. 206. [Diss., 7 B.H.C.A.C. 153; Affirmed, 1 B.L.R., P.C., 1 = 12 M.I.A. 397; Appl., 2 M.H.C. 365; Appr., 1 M. 69, 3 M.H.C. 283; R., 7 M.H.C. App. 1, 25 W.R. 291, 9 A. 253.]

(125)—*Hindu Law—Mithila school—Kritrima adoption*—Under the Law current in Mithila, the widow has power to adopt a son in *kritrima* form with or without her husband's consent; but such son would not, by virtue of such adoption, lose his position in his own family; nor would he succeed to the property left by the husband of his adoptive mother, but would be considered her son and entitled to succeed to her property only. THE COLLECTOR OF TIRHOOT v. HURO PARSHAD MOHUNT, 7 W.R. 500. [R., 8 W.R. 155, 10 B.H.C. 268.]

(126)—*Adoption by Hindu widow without husband's permission—Power of elder widow to adopt without consent of younger widow.*—In the Maratha country, a Hindu widow may, without the permission of her husband, and without the consent of his kindred, adopt a son to him if the act is done by her in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. An elder Hindu widow has the power to adopt a son to her deceased husband without the consent of a younger widow. RAKHMABAI v. RADHABAI, 5 B.H.C. A.C. 181. [Appr., 9 M. 64, F.B.; F., 13 C. 69, 15 B. 565, 6 Bom. L.R. 464 (Cons., 8 B.H.C., A.C. 114; R., 7 B.H.C.A.C. 26, 153, 7 B.H.C., O.C. 113, 8 B.H.C.A.C., 67, 10 B.H.C., A.C. 228, 241, 2 B. 388, F.B., 13 B. 160, 15 B. 110, 22 B. 199, 22 B. 206, 416, 558, 23 B. 327, 25 B. 306, 1 Bom. L.R. 144, 28 M. 315 = 15 M.L.J. 143; D., 28 B. 461; Cited, 11 C.P.L.R. 43.]



**Hindu Law—continued.****—2.—Adoption—continued.**

(127)—*Hindu Law — Adoption — Gujarat — Widow's power of adoption, rule as to—Husband's permission — Implied authority to adopt of husband—Minority of husband—Adoption from improper or corrupt motives—Ous of proof.*—In the Maratha country, a Hindu widow may, without the permission of her husband and without the consent of her kindred, adopt a son to him, if the act is done by her in the proper and *bona fide* performance of a religious duty, and neither capriciously, nor from a corrupt motive. But this is subject to the qualification that the adoption must not have been expressly forbidden by the husband, and would not have the effect of diverting an estate already vested in a third person. (5 B. H.C. 181, 191, 7 B.H.C., App., 1, 8 B.H.C. 114, R.) There is no reason for drawing any distinction, as regards the general law, between Gujarat and the Maratha country properly so called, and in the absence of proof of local or caste custom, the general law prevails in Gujarat. (12 B.H.C. 65, 2 B. 418, R.) [R., 5 M.L.T. 169, 8 C.W.N. 266, 1 Bom. L.R. 144.] As the assent of the husband is implied, by those schools which hold that no express authority of the husband is required for the adoption by the widow, from its being a meritorious act "beneficial to her husband's soul," it is difficult to understand why the assent should not be implied in the case of a minor husband, as well as of one who has attained his majority. In the present case, an adoption in Gujarat by a widow whose husband died before he completed his sixteenth year was held not to be invalid by reason of the husband's death before attaining majority. [R., 1 Bom. L. R. 144.] Where the assent of *Sapindas* is not required for an adoption by the widow, as in the Bombay Presidency, and where the family is divided, the ordinary presumption is that the widow had performed the adoption from proper motives. If any one seek to invalidate the adoption on the ground of corrupt or improper motive in the widow, the burden of proving such motive lies heavily on such person. In the present case, the facts that the adoption by the widow was about eight years after her husband's death, and during her last illness when she was confined to her bed, and that the adoption was made on an inauspicious day, were held to be circumstances from which it could not be inferred that she made the adoption with corrupt or improper motives. *PATEL VANDRAVAN JEKISAN v. PATEL MANILAL CHUNILAL*, 15 B. 565. [R., 22 B. 199, 22 B. 206, 22 B. 558, F.B., 23 B. 789.]

(128)—*Adoption by Hindu widow with consent of kindred—Alienation by Hindu widow for legal necessity as guardian of adopted son—Reversioner's consent—Adoption found invalid—Liability of estate—Mortgage by widow—Liability of mortgaged parcels to be equally saddled with the mortgage debt—Mitakshara—Validity in Northern India—Recognition by next reversioner—Effect.*—A mortgage executed by a

**Hindu Law—continued.****—2.—Adoption—continued.**

Hindu widow as guardian for her adopted son would, where there is legal necessity for the transaction, be equally binding on her deceased husband's estate even if the alleged adoption is found invalid. The deed, though executed ostensibly as holding the *de facto* title of manager only, will not be the less binding, if she possessed at that time the *de jure* title to the property. (6 M.L.A. 393, R.) The substance and not the form of the transaction is to be looked to. An alienation, by a Hindu widow, of her deceased husband's estate, with the consent of the then reversionary heir, would, even in the absence of any legal necessity for the alienation, be binding upon the reversioner, whoever he might be, when the succession opens out, and would create a valid charge upon the property, (10 C. 1102, R.) Where a Hindu widow mortgaged certain mouzas of her deceased husband's estate for legal necessity, *held*, it being found that it created a valid charge upon the property, that all the mouzas should be proportionately saddled with the mortgage debt, into whatever hands they might have passed. Whether the ruling in 12 M.L.A. 357 is applicable to Mitakshara families in Northern India so as to validate an adoption made by a widow after her husband's death without his consent, but with the consent of his near kindred? Whether the recognition by the next reversioner of an adopted son of a Hindu widow under the Mitakshara law, adopted after her husband's death would render the adoption valid. *LALA PARBHU LAL v. J. MYLNE*, 14 C. 401.

(129)—*Adoption by widow with assent of Sapindas—Estate vested in deceased son's widow.*—An adoption made by a widow, after the estate of her husband has vested in the widow of her deceased son, is not valid, even though it might have been effected with the assent of her husband's sapindas, or in pursuance of her husband's authority and direction. *THAYAMMAL v. VENKATARAMA*, 10 M. 205, P.C. = 14 I A. 67 = 5 Sar. 10. (10 M.L.A. 279, 8 C. 302, F.; 8 I.A. 229, R.) [F., 32 C. 861 = 1 C. L.J. 270, 33 C. 1306 = 11 C.W.N. 12 = 4 C.L.J. 357; R., 17 C. 122, P.C., 17 B. 164, 19 B. 331, 22 B. 551, F.B., 23 B. 327, 25 B. 306, 26 B. 526, F.B., 32 B. 499 = 10 Bom. L.R. 692.]

(130)—*Hindu Law—Adoption by widow—Consent of husband not necessary in Mahratta country—Divesting estate, already vested—Consent of person divested necessary.*—Although, as a general rule, the adoption by a Hindu widow of a son to her deceased husband is in the Maratha country good without the consent of her husband's kinsmen, when the estate of her husband is vested in her or in her and her co-widow jointly, yet when such adoption has the effect of divesting an estate already vested in a third person, e.g., the widow of her husband's deceased brother, the consent of such third person would appear to be necessary to give validity to such an adoption. *Rakhmaoai v. Radhabhai*, and *The Collector of Madura v. Muttu Ramalinga*



**Hindu Law—continued.****—2.—Adoption—continued.**

*Sathupathy commented on and compared.* RUPCHAND HINDUMAL v. RAKHMABAI, 8 B.H. C. A.C. 114. [Apr., 6 B. 498, F.B.; D., 18 O. 69, 385, 14 B. 463; Expl., 12 A. 328, F.B.; R., 10 B. H.C. 241, 15 B. 110, 565, 19 B. 331, 21 B. 319, 22 B. 206, 416, 551, F.B., 558, F.B. 23 B. 327, 1 Bom. L.R. 144, 8 C.W.N. 266, 32 B. 499=10 Bom. L.R. 692.]

(131)—*Adoption—Consent of all relatives of husband whether necessary.*—The doctrine that the consent of all her husband's relatives is requisite to make an adoption by a Hindu widow valid is erroneous. GOPAL SHRIDHAR DIKSHIT v. NARO VINAYAK DIKSHIT, 7 B.H. C. App. 24. [Expl., 6 B. 498, F.B.; R., 10 B. H.C. 241, 15 B. 110.]

(132)—*Inheritance—Agreement not to adopt—Binding character on son already born.*—Two undivided brothers governed by the Mitakshara, one of whom had a son and was in possession of the family estate, which was an impartible Zemindari, entered into an agreement, that the family property should, in the event, of the failure of issue in the line of either of the brothers in possession of the Zemindari, go over to the line of the other brother having *aurasa* issue, and should not be alienated by making adoption and the like. It is clear that the father who was a party to this agreement could not bind his son, who was then in existence, not to adopt, or legally stipulate that, if he should adopt, the son so adopted should not inherit. An agreement that the adopted son should not ever take by descent to his father would be entirely altering the law of descent, and contrary to the principle laid down in the Tagore. SURIYA RAU v. RAJA OF PITTAPUR, 9 M. 499, P.C.=13 I.A. 97=4 Sar. 725. (9 B.L.R. 377, R.)

(133)—*Hindu widow—Authority of kindred to adopt—Undivided family—Practice of raising up issue obsolete.*—According to the law prevalent in the Dravida country, a Hindu widow, not having her husband's express permission, may, if duly authorized by his kindred, adopt a son to him. (12 M.I.A. 379, R. & Appr.) [Appr., 6 B. 498; R., 2 B. 494, 3 B. 44, 12 A. 328, 17 B. 114, 12 M.L.J. 197, 9 C.W.N. 795=2 C.L.J. 87.] In the case of an undivided family, the requisite authority is to be sought first within that family. Authorization implies the exercise of some discretion. [F., 26 M. 627; Appr., 6 M.L.J. 35; R., 6 B. 505, 8 M. 545, 15 B. 110; D., 2 M. 202.] Speculations, based on the obsolete practice of raising up issue to the deceased husband by carnal intercourse with the widow, are inadmissible as a ground for judicial decision. A son adopted by the widow will divest not only the widow but also an undivided co-parcener of the father, on whom the estate had devolved by survivorship. SRI VIRADA PRATAPA DEO v. SRI BROZO KISHORO DATTA DEO, 1 M. 69=3 I.A. 154=25 W.R. 291, P.C.=3 Sar. 583. [F., 29 B. 51=4 Bom. L.R. 883; On appeal, 6 Bom. L.R.

**Hindu Law—continued.****—2.—Adoption—continued.**

268, 31 B. 373, P.C.=9 Bom. L.R. 646=11 C. W.N. 169=6 C.L.J. 1=17 M.L.J. 343=34 I. A. 107; Appr., 9 M. 64; R., 2 C. 295, 5 B. 630, 14 B. 463, 18 C. 69, 18 C. 385, 21 B. 319, 22 B. 206, 22 B. 558, 23 B. 327, 23 B. 789, 25 B. 306, 26 M. 143; D., 7 C. 178.]

(134)—*Adoption—Sapinda—Assent.*—The consent of one of two sapindas is sufficient to render an adoption by a widow valid. It is not necessary that the nearest sapinda should give his consent to the adoption. SHRI PATO DEVU v. SHRI R. A. BHIMA DEVU, 7 M.H.C. 301. [On appeal, 1 M. 69, P.C.]

(135)—*Widow's Power to adopt with the consent of Sapindas—Motives of widow.*—According to Hindu Law, a widow with an express authority from her husband to adopt a son to him in the event of the natural-born son dying under age and unmarried may, on the happening of that event, make a valid adoption. In the Dravida country, a widow, in every case in which she could *validly* adopt under a written authority from her husband can, in the absence of such authority, adopt on the assent of her husband's kindred. In such a case a presumption ought to be made, until the contrary is shown, that she acted from proper motives. VELLANKI VENKATA KRISHNA RAO v. VENKATA RAMA LAKSHMINI, 1 M. 174=4 I.A. 1=26 W.R. 21=3 Sar. 669. (10 M.I.A. 279, D.) [F., 7 B. 225, 5 C.W.N. 20, 11 M.L.J. 20; R., 11 B. 381, 14 B. 463, 23 B. 327, 25 B. 306, 26 B. 526, 33 C. 1306=11 C.W.N. 12=4 C.L.J. 357, 15 B. 110, 15 B. 565, 19 B. 331, 22 B. 199, 22 B. 206, 22 B. 558, 23 M. 486, 26 M. 627, 29 M. 161=16 M.L.J. 22.]

(136)—*Second adoption—Widow.*—Without the express or implied authority of the husband, a second adoption could be made only under the sanction of the nearest sapindas. In a divided Hindu family, an adoption made by the widow of a deceased member, with the assent of some of the sapindas only, when *bona fide* given, is valid, if it be shown that the consent of the others is refused from interested or improper motives or without a fair exercise of discretion. PARASARA v. RANGA RAJA, 2 M. 202. [Appr., 23 M. 486; R., 8 M. 545, 6 C.P.L.R. 87, 26 M. 627, 31 M. 366=3 M.L.T. 355=18 M.L.J. 309.]

(137)—*Assent of sapinda—Nature of.*—The assent given by a sapinda to an adoption of his son by a widow, on the representation made by her that she had authority from her husband and after entering into an arrangement, beneficial to himself, with the widow, is not such as rendered the adoption valid and binding as against the other sapindas. GANESA RATNAM-IYAR v. GOPAL RATNAM-IYAR, 2 M. 270=7 I.A. 173, P.C.=4 Sar. 149. [R., 8 M. 545, 22 B. 558, 11 M.L.J. 20, 25 B. 129, 26 M. 627; D., 6 M.L.J. 35.]

(138)—*Authority—Consent of sapinda.*—Where the alleged permission of the deceased



**Hindu Law—continued.****—2.—Adoption—continued.**

husband of the widow who adopted a son was found against, the implied consent of the near sapinda who gave his son in adoption, and who professed to carry out the directions of the deceased, could not render the adoption valid. **VENKATALAKSMAMMA v. NARASAYYA**, 8 M 545. [Appl., 25 M. 627; D., 6 M.L.J. 35.]

(139) — *Adoption by widow — Authority of husband or consent of kindred, necessity of, in case of adoption in undivided family — Adoption to deceased husband separated from family.* — The widow of a Hindu dying without leaving male issue, may, if her husband was separated from his family in estate, adopt without any express authority from him and without even the consent of his relatives. In other words, the widow, where the husband dies separated from his family, and she herself is the heir or she and a junior co widow are the heirs, may adopt without the sanction of the husband (if he have not expressly, or by implication, indicated his desire that she shall not do so), and without the sanction even of his kindred. In an undivided Hindu family, however, the widow of any of the co parceners cannot adopt without either the authority of her husband or the assent of his co-parceners from whom she obtains her maintenance. It is upon the undivided family, as such, that the widow has her claim for maintenance, and the requisite authority to adopt must be sought from the members of the family wherein alone she must presumably find such counsellors and protectors as the law makes requisite for her. Consequently, for the purpose under consideration, it is not competent to the widow to travel, at her will, out of the undivided family and obtain the authorization required from a separated and remote kinsman of her husband. **RAMJI v. GHAMAU**, 6 B. 498, F.B. [Appl., 6 B. 505; R., 12 A. 328, 14 B. 463, 15 B. 110, 19 B. 331, 21 B. 319, 22 B. 199, 22 B. 416, 22 B. 551, 23 B. 327, 8 C.W.N. 266, 29 B. 51 = 6 Bom. L. R. 268.]

(140) — *Hindu Law — Undivided family — Adoption by widow — Consent of husband or co-parceners necessary.* — In an undivided Hindu family, it is not competent to a widow, not having the estate vested in her, to take a son in adoption to her husband, except with the consent and on the authority of the husband himself, or of any of the co-parceners with whom he was, at the time of his death, united in estate in the family. An adoption purporting to have been made on the authority from a separated kinsman of the husband cannot be held valid, inasmuch as such a divided kinsman is not, in law, qualified to authorise the adoption. **DINKAR SITARAM PRABHU v. GANESH SHIVRAM PRABHU**, 6 B. 505, F.B. [R., 23 B. 327.]

(141) — *Adoption made by widow on assent of sapindas — Assent of majority, Effect of — Degree of relation of consenting sapindas, not material.* — On the question arising in this case

**Hindu Law—continued.****—2.—Adoption—continued.**

as to the validity of the second defendant's adoption by the first defendant, a Hindu widow, the adoption having been made after she had succeeded to the estate of her son, who died unmarried, and with the assent of three out of four of her husband's sapindas who were divided and existing at the date of the adoption, held, where an adoption is made by a widow of a divided man, and the assent to be obtained is that of sapindas divided from him and from each other, the assent of every existing sapinda is not a *sine que non*, but, where a majority of the sapindas give their assent to the adoption, such assent will be sufficient. A mere numerical majority, however, whether in favour of or against an adoption, will not by itself determine the question. Where such majority have given or withheld their consent from improper considerations, such assent or dissent will be of no avail to the party relying on it. Also any distinction based upon the degree of relationship, as to whose assent is or is not essential, would be immaterial. **VENKATAKRISHNANAMMA v. ANNAPURNAMMA**, 23 M. 486 = 10 M. L.J. 73. (12 M.L.A. 397, R.; 2 M. 202, R. & Cons.) [R., 26 M. 627, 31 M. 366 = 18 M.L.J. 309 = 3 M.L.T. 355.]

(142) — *Hindu Law — Adoption — Widow of divided brother, competency of, to adopt without consent of sapindas — Adoption by widow of her brother's son, validity of, in Southern Mahratta country — Express authority to adopt executable after any length of time.* — After the death of the husband of the defendant in this case, an agreement was come to between his brother, the father of the plaintiff, and the defendant, by way of settlement of family disputes, which agreement contained a distinct recognition of the defendant's status as that of a widow of a brother separated in interest. Under the circumstances, as the widow of a separated brother, it was competent to her to adopt a son without the sanction either of such brother or of his son the plaintiff, and the fact that the adoptee was the son of the adoptive mother's brother did not unfit him for adoption under the Hindu law as obtaining in the Southern Mahratta country. Further, although a very long period had elapsed from the husband's death before she adopted, this would not extinguish her power, or rather her duty to adopt under circumstances calling for an adoption. **GIRIOWA v. BHUMAJI RAGHUNATH**, 9 B. 58. [R., 15 B. 565, 22 B. 558, F.B.; R., 22 B. 973; Expl., 12 A. 328.]

(143) — *Hindu joint family — Adoption by widow of deceased co-parcener — Consent of head of family, if sufficient for validity of adoption.* — A and his two sons X and Y formed an undivided Hindu family. A and X lived together from the year 1883 separately from Y, but the estate of the family was not divided. On the death of X without male issue, his widow adopted the plaintiff with the consent of her father-in-law who died subsequently. The present suit was brought by the plaintiff against



**Hindu Law—continued.****—2.—Adoption—continued.**

Y to recover one half of the family property. The defendant denied the plaintiff's adoption and disputed its validity on the ground that the adoptive mother was not competent to adopt without the consent of all the co-parceners. *Held*, that the adoption was valid, the same having been made with the consent of the head of the family, who was also the natural guardian of the widow who made the adoption, and that it was unnecessary to obtain the consent of the other co-parceners. *Held* further, that the adoption would be valid whatever may be the motives of the widow or the effect of the adoption on the undivided kinsmen, provided that no fraud was practised on the head of the family who gave his consent to the adoption. **VITHOBA v. BAPU**, 15 B. 110 [R., 15 B. 565, 22 B. 199, 22 B. 206, 22 B. 558, 23 B. 250, 23 B. 789, 26 M. 113=12 M.L.J. 197, 29 B. 51; D., 29 B. 410=7 Bom. L.R. 438.]

(144)—*Adoption and execution of will by Jain widow—Suit by adopted son—Special custom, onus on plaintiff to prove.*—Plaintiff sued for a declaration of his status as the adopted son of a deceased Jain, the adoption having been made by the widow of the deceased, and of his rights under a will executed in his favour by the widow, his adoptive mother. The widow did not have any authority from her husband or the consent of his kinsmen required under the Hindu law to validate an adoption by a widow. On the ground that, where a custom different from the ordinary Hindu Law is set up as prevailing among the Jains, the burden of proving such custom is on those who allege it, and in the absence of such proof the ordinary law must prevail, it was held to be incumbent on the plaintiff to prove the existence of a special custom as to the widow's independent power of adoption and disposal of her late husband's property. If the widow succeeds to her husband's property absolutely, and has the right to dispose of it as she likes by will or otherwise, the adoption of a son to herself who may succeed to such property would be valid. The evidence adduced was altogether insufficient to prove such special custom, and the suit therefore failed. **PERIA AMMANI v. KRISHNASAMI**, 16 M. 182=3 M.L.J. 109. (9 Mad. Jur. 21, Diss.) [D., 27 C. 379.]

(145)—*Hindu Law—Custom—Sapinda relationship between daughter's son and son's son of first cousins—Adoption without authority by Jain widow of the Oswal caste.*—The sapinda relationship exists between the daughter's son and the son's son of two first cousins. (10 C. 232, 8 C. 302, *Rel. on.*) There is a custom among the Jain Oswals, under which a widow may adopt a son to her husband, even in cases where he has not conferred upon her an express authority to adopt. **MANICK CHAND GOLECHA v. JAGAT SETTARNI PRAN KUMARI BIBI**, 17 C. 318. (10 B.H.C. 241, 5 Sel. Rep. 276, 1 A. 688, R.) [R., 16 M. 182, 17 B. 164, 27 C. 379, 2 N.L.R. 98, 4 C.L.J. 357=11 C.W.N. 12=33 C. 1306.]

**Hindu Law—continued.****—2.—Adoption continued.**

(146)—*Step-mother not competent to give in adoption Adoption of a grown up man, not invalid by reason only of his age.*—Under the Hindu Law, the power to give in adoption is either with the father or *natural mother* of the adoptee, and there is no warrant either in the Smritis or in the decisions for the position that a step-mother is competent to give her step-son in adoption. An adoption of an unmarried man of about forty who had succeeded to the natural family property long before the adoption, was held not to be invalidated by reason of his age. Nor was the fact that he had succeeded to a share in the natural father's estate, prior to the adoption, fatal to its validity. **PAPAMMA v. APPA ROW**, 16 M. 384=3 M.L.J. 80.

(147)—*Mother succeeding to son after death of son's widow—Adoption by mother invalid—Hindu Law.*—T died leaving a widow G and a son S, who subsequently died leaving a widow A. A died childless, and her mother-in-law G, who succeeded as S's heir, adopted the plaintiff for herself and her husband. *Held*, that the adoption of the plaintiff was invalid according to Hindu Law. **KRISHNARAV TRIMBAK HASABNIS v. SHANKARRAV VINAYAK HASABNIS**, 17 B. 164. (14 I.A. 67, 10 M.L.A. 311, R.) [Appr., 26 B. 526, F.B.; R., 20 B. 250, 22 B. 416, 23 B. 327, 25 B. 306, 11 C.W.N. 12=33 C. 1306=4 C.L.J. 357; D., 19 B. 331.]

(148)—*Adoption not in accordance with will—Adoption without consent of trustees—Invalid adoption.*—A Hindu by will bequeathed his estate to a son to be adopted in a certain event by A with the consent of B or B's representatives, with a gift over on failure of adoption with such consent to B or B's representatives. On the happening of the event after B's death, A adopted the plaintiff without the consent of B's representatives, who withheld their consent after a demand by A. *Held*, that this was not such an adoption as would entitle the plaintiff to take under the will, and that consequently the gift over took effect. **BEEMCHURN SEIN v. HEERALALL SEAL**, 2 Ind. Jur. N.S. 225.

(149)—*Will—Bequest—Persona designata—Adoption, Validity of—Adoptee, son of person with whom the adopter could not have intermarried.*—If the language of the testator sufficiently indicates the person who is to be the object of his bounty, the person so indicated will not be prevented from taking because the testator conceived him to possess a character which, in point of law, cannot be sustained. The adoption of the son of a person with whom the adopter could not have intermarried is invalid according to Hindu Law. **JIVANI BHAI v. JIVU BHAI**, 2 M.H.C. 462. [R., 3 B. 273, 17 A. 294, F.B.]

(150)—*Son of wife's brother, Adoption of.*—The adoption of the son of a wife's brother is valid. The rule that declares that legal marriage must have been possible between the adopter and the



**Hindu Law—continued.****—2.—Adoption—continued.**

mother of the adopted boy refers to their relationship prior to marriage. This restriction is prescribed because the person selected should bear the 'reflection of a son.' This phrase means capacity to have sprung from the adopter himself through an appointment to raise up issue on another's wife. Under the ancient law, in the case of an appointment to beget issue on another's wife, the woman's relationship as another's wife, at the date of the appointment, was considered before it was sanctioned. **SRIRAMULU v. RAMAYYA**, 3 M. 15. [F., 27 A. 417=2 A.L.J. 36=A.W.N. 1905, 20; R., 14 M. 459, 20 M. 283, 22 B. 973.]

(151)—*Rule that no adoption allowed where no marriage possible between the natural mother in her maiden state and adopting father—Limitations of the rule—Gotras—Pravaras—Virudha Sambandha.*—Under Hindu Law, the rule that there can be no adoption where there can be no legal marriage between the adopted boy's mother in her maiden state and the adoptive father is strictly confined to the specified cases of a daughter's son, a sister's son and the mother's sister's son. Hence, where the natural mother of the adopted boy and the adoptive father though belonging to different gotras have two out of three pravaras in common, the adoption can be validly made. **RAMCHANDRA v. GOPAL**, 10 Bom. L.R. 948=32 B. 619.

(152)—*Relationship between the natural mother and adopter.*—It is a general rule of Hindu law, that there can be no valid adoption, unless a legal marriage is possible between the person for whom the adoption is made and the mother of the boy who is adopted, in her maiden state. **MINAKSHI v. RAMANADA**, 11 M. 49, F.B. [Not F., 15 M.L.J. 211; F., 32 B. 619=10 Bom. L.R. 948; R., 14 M. 459, 18 M. 397, 17 A. 294, F.B., 20 M. 283, 22 B. 973.]

(153)—*Consanguinity—De facto adoption—Certificate under Act XXVII of 1860—Propinquity and fitness.*—Consanguinity does not invalidate a adoption, when the parties do not belong to any of the three regenerated castes. An adoption *de facto* is valid until set aside, and the adopted party may object to other parties receiving a certificate under Act XXVII of 1860. In granting a certificate under Act XXVII of 1860, a Judge must look to fitness as well as propinquity. **NUNKOO SINGH v. PURM DHUN SINGH**, 12 W.R. 356. [Appr., 15 C. 574; R., 3 B. 273.]

(154)—*'Baqquals' adoption among—Adoption of boy whose mother the adopter could not have married.*—Adoption of a boy whose mother, the adopter could not have legally married, is not prohibited among the *Baqquals*, as these do not belong to the regenerate classes. **PHUNDO v. JANGI NATH**, 18 A. 327=A.W.N. 1898, 110.

(155)—*Hindu Law—Adoption of one whose Upanayanam has been performed. Validity of—The weight of authority is against the validity*

**Hindu Law—continued.****—2.—Adoption—continued.**

of the adoption of one whose Upanayanam has been already performed. In strictness, there is no authority upon the other side. **P. VENKATESAIYA v. M. VENKATA CHARLU**, 3 M.H.C. 28. [Overruled, 9 M. 148, F.B.; R., 10 B. 80.]

(156)—*Hindu Law—Adoption after Upanayanam of sagotra—Custom among Brahmans.*—The adoption of a boy of the same gotra, after the performance of his *upanayanam* ceremony, is valid according to the custom prevailing among the Brahmans of Southern India. **VIRARAGHAVA v. RAMALINGA**, 9 M. 148, F.B. (3 M.H.C. 28, Overruled.) [Cons., 13 M. 128; R., 18 M. 145, 11 C.P.L.R. 56.]

(157)—*Hindu Law—Bombay Presidency—Adoption of married asagotra Brahmin. validity of—Factum valet, application of—In the Bombay Presidency, the adoption of a married asagotra, although not preferable, is not on that account invalid; and this is the case even when there are persons existing who are better qualified than the adoptee.* [R., 22 B. 558, F.B., 23 B. 250, D., 29 A. 495=A.W.N. 1907, 121=4 A.L.J. 407.] Where a rule is *directory* only and not *mandatory*, an adoption contrary to it, however reprehensible, is nevertheless good for all legal purposes. The doctrine of *factum valet* will apply to all such cases. **DHARMA DAGU v. RAMKRISHNA CHIMNAJI**, 10 B. 80. [R., 9 A. 253.]

(158)—*Hindu Law—Adoption of married man among Brahmans—Estoppel.*—The adoption of a Brahman married man is invalid even where the adoptee is of the same gotra and all the ceremonies are duly performed. [R., 11 C.P.L.R. 56] In order to avail himself of the doctrine of estoppel, the plaintiff should prove that the defendant, by a representation which he knew to be unfounded, intentionally misled the plaintiff into a position prejudicial to the interests which he would otherwise have possessed. **PICHUVAYYAN v. SUBBAYYAN**, 13 M. 128.

(159)—*Adoption of suira after marriage—Quere.*—Whether a sudra can be validly adopted after marriage. **VYTHILINGA v. VIJAYATHAMMAL**, 6 M. 43.

(160)—*Sudras—Adoption after marriage.*—An adoption of a Sudra after his marriage is invalid. **T. V. JANAKIRAM PILLAI v. P. VENKIAH CHETTY**, 10 M.L.T. 21=11 Ind. Cas. 383.

(161)—*Sudras—Adoption—Marriage, whether a bar to—Dattaka Chandrika, authority of.*—Amongst the Sudras, marriage is a bar to adoption. Among them a boy can only be adopted up till marriage, but not afterwards. (9 A. 253, R.) The *Dattaka Chandrika* has been accepted as an authority by High Courts in India and is a work of high authority. **DAMODARJI v. THE COLLECTOR OF BANDA**, 7 A.L.J. 927=7 Ind. Cas. 418.



**Hindu Law—continued.****—2.—Adoption—continued.**

(162)—*Adoption by widow—Western India—Adoption of Sudra—Sagotra—Adopted son entitled to set aside gift made before adoption.*—According to the Hindu Law obtaining in Western India, the adoption of a Sudra who is married at the time of his adoption is not invalid if the adopted person be a *sagotra* (of the same family as the person adopting). A son adopted to her husband by a widow is entitled to set aside a gift of ancestral immoveable property made by his adoptive father's widow previous to his adoption. *NATHAJI KRISHNAJI v. HARI JAGOJI*, 8 B.H.C. A.C. 67. [R., 10 B.H.C. 241, 10 B. 80, 11 B. 609, 23 B. 250, 32 C. 165, 29 A. 495=4 A.L.J. 407=A.W.N. 1907, 121; Cons., 12 B.H.C. 364; F., 10 Bom. L.R. 1029.]

(163)—*Hindu Law—Adoption—Sister, whether may adopt a brother's son.*—In this case, the Court of first instance, referring to the ruling that, "a brother's son must not be adopted by a sister" laid down by Nanda Pandita in the *Dattaka Mimamsa*, held that the adoption was illegal, even supposing it had taken place; and that it was further illegal as there was no evidence to prove that authority to adopt was given to the widow by the husband. The lower appellate Court also held that the adoption was opposed to Hindu law. The High Court affirmed the decrees of the lower Courts holding that the doctrine of Nanda Pandita that a woman may not affiliate a brother's son should be accepted as applicable to the case of a woman adopting a son with the sanction, and on behalf, of her husband. The adoption was in the result held to be liable to be avoided on the ground that the adopted person was not legally eligible for adoption by the widow on her husband's behalf, because the Hindu law nowhere contemplates or provides for the adoption by a widow of a son in her own right. *MUSSAMMAT BATTAS KUAR v. LUCHMAN SINGH*, 7 N.W.P. 117. [Diss., 27 A. 417=2 A.L.J. 36=A.W.N. 1905, 20; R., 17 A. 294, F.B.; D., 22 B. 973.]

(164)—*Hindu Law—Adoption—Dwyamushyayana adoption among Lingayats—Adoption of son of divided brother, validity of.*—It was contended in this second appeal, the parties to which were Lingayats, that the plaintiff's adoption made in the *Dwyamushyayana* form, was ineffectual as such adoptions are obsolete and consequently invalid and as a Hindu cannot adopt the son of his divided brother in the *Dwyamushyayana* form. Held that the *Dwyamushyayana* adoption, though rare, is not absolute. It is permitted by the *shastras* and recognised by Hindu treatises, and there can be no legal impediment to its taking place, where in places in which it is not unknown parties resort to it. The second ground urged by the appellant was held to be unsupported by authority. On the other hand, the *Dwyamushyayana* was often allowed as well in the case of divided as of an undivided brother's son. So, the mere fact that the plaintiff

**Hindu Law—continued.****—2.—Adoption—continued.**

was the natural son of the adopter's divided brother could not invalidate the plaintiff's adoption in the above form. *CHENAVA v. BASANGAVDA*, 21 B. 103.

(165)—*Adoption of sister's son—Custom among Numbudris of Malabar—Evidence of custom.* Where it is alleged that by custom, an adoption of a sister's son is valid among the Numbudris of Malabar the evidence of Numbudris of note, who are spiritual teachers and priests of their fellow castemen, admitting the validity of such adoptions, and instancing cases where they have officiated as priests or been present, is sufficient to establish the custom. *VISHNU v. KRISHNAN*, 7 M. 3, F.B. (7 M.H.C. 250, R.) [F., 14 A. 53, 29 M. 24=16 M.L.J. 8; R., 19 B. 374, 15 M. 333, 17 M. 69, 17 A. 294.]

(166)—*Sister's son, Adoption of—Saraswat Brahmins of Kanara.*—The adoption of sister's son is valid by custom among the Saraswat Brahmins of Kanara. *MANJUNATH v. KAVERIBAI*, 4 Bom. L.R. 140.

(167)—*Sister's son—Adoption—Heir.*—A sister's son, who cannot be adopted, can be made an heir only by a deed of gift or by a Will. *LALA NARAIN DAS v. LALA RAMANUJ DAYAL*, 2 C.W.N. 193, P.C.=25 I.A. 46=20 A. 209=7 Sar. 237.

(168)—*Adoption—Sister's son—Custom—Hindu Law—Non-agriculturist Khatriis—Held, that among the parties to the suit, non-agriculturist Khatriis, to whom strict Hindu Law did not apply according to the statements of the parties, adoption of a sister's son was not invalid.* *SOHNA MAL v. NANAK CHAND*, 16 P.L.R. 1911=9 Ind. Cas. 36=4 P.W. R. 1911. (86 P.R. 1904, 79 P.R. 1901=107 P.L.R. 1901, 24 P.R. 1900=P.L.R. 1900, 437, R.)

(169)—*Mother's sister's son, Adoption of—Custom prohibiting adoption of sister's son, etc.—Proof of—Dattaka Chandrica and Dattaka Mimamsa—Authority of—Hindu Law—Mode of ascertaining.*—The adoption of a mother's sister's son is invalid under the Hindu Law. N.B.:—The parties in this case were Kshatriyas, one of the twice-born classes. For 80 or 90 years there has been a steady current of authority in one way, in all parts of India. It has been decided that the precepts condemning the adoption of a mother's sister's son, a sister's son and a daughter's son, are not monitory only, but are positive prohibitions, and that their effect is to make such adoptions wholly void. This has been decided in such a way and for such a length of time as to make it incompetent to a Court of Justice to treat the question now as an open one. The rule of law that the adoption of a mother's sister's son is invalid has been affirmed by Courts of Justice in all parts of India in general terms and not as confined to a particular school. (4 B.H.C. A.C. 130, 3 B. 273, R.) [F., 24



**Hindu Law—continued.****—2.—Adoption—continued.**

A. 195=A.W.N. 1902, 10, 28 A. 488=3 A.L.J. 415=10 C.W.N. 730=3 C.L.J. 594=8 Bom. L.R. 402=1 M.L.T. 171=33 I.A. 97; R., 4 Bom. L.R. 140, 32 B. 619=10 Bom. L.R. 948, 53 P.W.R. 1908=113 P.L.R. 1908, 11 Bom. L.R. 1172, 1 P.L.R. 1909=68 P.R. 1909=58 P.W.R. 1909=2 Ind. Cas. 975, 1 Bom. L.R. 799; D., 107 P.L.R. 1901, 27 A. 417=2 A.L.J. 36=A.W.N. 1905, 20.] Persons impeaching the validity of the adoption of a sister's son, mother's sister's son and daughter's son are not under an obligation to show a custom prohibiting such adoption. In order to bring case under any rule of law laid down by recognized authority for Hindus generally, persons relying on such authority are not bound to give evidence of actual events to show that, in point of fact, the people subject to that general law regulate their lives by it. (12 M.I.A. 397, 437, Disc.) The authority of Dattaka Chandrika and Dattaka Mimamsa has been affirmed as part of the general Hindu law, founded on the Smritis as the source from whence all schools of Hindu law derive their precepts, and both works must be accepted as bearing high authority for so long a time that they have become embedded in the general law. (4 M.I.A. 97, 12 M.I.A. 397, R.) [R., 29 A. 495=4 A.L.J. 407=A.W.N. 1907, 121.] The usual methods of ascertaining the law prevalent among Hindus is by reference to authoritative text-books, to judicial decisions and to the opinion of Pundits. BHAGWAN SINGH v. BHAGWAN SINGH, 21 A 412, P.C. = 3 C.W.N. 454=26 I.A. 153=1 Bom. L.R. 311 =7 Sar. 474.

(170)—*Adoption of brother's daughter's son, validity of—Custom in Southern India—Texts of Hindu Law.*—The adoption of a brother's daughter's son is valid by reason of the general custom prevalent in Southern India, notwithstanding the texts of Hindu Law to the contrary. APPAYYA BHATTAR v. VENGU BHATTAR, 15 M.L.J. 211. (9 M. 44, R.; 11 M. 49, Not Appl.)

(171)—*Hindu Law—Adoption of daughter, if valid.*—The adoption of a daughter by a Brahmin is invalid under Hindu law, such an adoption being opposed to the very purpose of adoption. GANGABAI v. ANANT, 13 B. 690.

(172)—*Adoption of girls.*—Adoption of girls is not known to the general law of Hindus. GHASITI v. UMRAO JAN, 21 C. 149, P.C. = 20 I.A. 193=6 Sar. 370. [R., 26 M. 176=12 M. L.J. 264.]

(173)—*Girl—Adoption of a girl by a prostitute—Object of adoption—Will—Gift—Persona designata.*—Per Candy, J.—The test to determine whether an adoption of a girl by a prostitute is invalid is, can the natural mother of the girl be convicted under S. 372 of the Indian Penal Code of having disposed of the girl, a minor under the age of sixteen years, with intent that the girl should be employed or used for the purpose of prostitution, or knowing it to

**Hindu Law—continued.****—2.—Adoption—continued.**

be likely that such minor would be so employed. Hence, where a woman, though a prostitute by profession, is not a *naikin* and is not attached to any temple, takes a daughter in adoption with the object that she may have some one who after her death could perform her funeral ceremonies and inherit her property, and there is nothing to show that she contemplated the girl following the profession of a prostitute, the adoption is valid. *Per Fulton, J.*—The general rule is that it is not essential to the validity of a devise or bequest that all the particulars of the subject or object of gift should be accurate provided the intention is clearly ascertainable. MANJAMMA v. SHESHAGIRIRAO, 4 Bom. L.R. 116=26 B. 491.

(174)—*Dancing girls—Rights of the adoptee—Plurality of adoptions—Sisters by adoption.*—The adoption of a daughter by a dancing girl can be recognised to confer rights on the adoptee. Plurality of adoptions is not warranted by the analogies of the Hindu Law, and consequently two or more girls adopted cannot be regarded as sisters, and one such adoptee cannot claim the property of the other. VENKU v. MAHALINGA, 11 M. 393. (4 B. 545, Diss.) [R., 14 B. 90, 12 M. 214, 12 M. 273, 15 M. 323 =1 Weir 372, 16 B. 737, 19 M. 127, 13 C.P.L.R. 81.]

(175)—*Hindu Law—Adoption of daughter's son—'Factum valet.'*—Amongst Brahmins, an adoption of a daughter's son is incestuous and invalid, and cannot be supported on the ground of *factum valet quod fieri non debuit*. BHAGIRATHIBAI v. RADHABAI, 3 B. 298, Note. [R., 17 A. 294; D., 22 B. 973.]

(176)—*Hindu Law—Adoption of daughter's or sister's son, validity of, among regenerate classes—Burden of proof—Lingayets—'Factum valet' whether applies to such adoption.*—It is a general rule and fundamental principle amongst Brahmins, Kshatriyas and Vaishyas, that they are absolutely prohibited from and incapable of adopting a daughter's or sister's son, or the son of any woman whom they could not marry, and that the burden of proving a special custom to the contrary amongst any members of these three regenerate classes, prevalent either in their caste or in a particular locality, lies upon him who asserts the existence of such a custom. [On Review, 6 B. 107; R., 4 B. 37, 17 A. 294, 24 B. 473, 30 B. 1=6 Bom. L.R. 948, 19 B. 428, 22 B. 277; D., 22 B. 973.] The Lingayets being members of the Sudra class, any recognition which there may have been of their right to adopt the son of a sister or of a daughter, is no infringement of the general rule that the regenerate classes cannot make such an adoption. [R., 19 B. 428, 22 B. 277, 6 B. 524, 1 Bom. L.R. 144.] The case of the adoption, by a Brahmin, of his daughter's son, does not fall within the proper limits for the application of the maxim *quod fieri non debuit, factum valet*. GOPAL NARHAR SAFRAY v. HANMUNT GANESH SAFRAY, 3 B. 273. [R., 9 A. 253, 13 B. 160; D., 10 B. 80, 22 B. 812.]



*Hindu Law—continued.**—2.—Adoption—continued.*

(177)—*Adoption of daughter's son—Validity—Custom—Estoppel.*—According to Hindu Law, the adoption of a daughter's son is invalid among the three higher classes. Where it was contended that the adoption of a daughter's son was valid by custom among the Kirar Thakurs, as the parties styled themselves, and reference was made to an entry on the subject in the *wajib-ul-arz*, held that the entry was evidence but not conclusive evidence of the custom, that such a custom overriding the law must be established by strong evidence, such for instance, as instances of such adoptions, and that it might be ascertained under what circumstances the entry in the *wajib-ul-arz* came to be made, and that inquiry should be made as to the antiquity of the alleged custom, as also to the class to which the parties belonged. On the question whether the adoptor's daughter was estopped from disputing the adoption by her conduct at the time the mutation of names in the adopted son's favour took place, on the occasion of the alleged adoption, held that it should be ascertained if she had been a party to those proceedings and consented to the entry of the adopted son's name as owner of the property in the revenue records. *JAMNA v. KARAM CHAND*, A W.N. 1887, 29.

(178)—*Adoption of daughter's son—Dattaka and Kritrima forms of adoption—Pleading set up in the Chief Court but not set up in either of the Courts below—Succession to the estate left by an adopted son.*—Held, that the adoption of a daughter's son in the Dattaka form is invalid and impossible under Hindu Law among the twice born classes. Held, also, that in Hindu Law under the Kritrima form of adoption, as also in adoptions under the Punjab Customary Law, there is no change in the adopted son's family and no relationship with the adoptive father's collateral relations, who, therefore, cannot succeed to the property left, by such an adopted son. Held, further, that a party having, without objection, allowed issues to be struck and the case gone into by both the lower Courts on the understanding that the parties are governed by Hindu Law cannot set up the plea in the Chief Court that they are governed by custom. *BAIJ NATH v. SHAMBOO NATH*, 53 P.W.R. 1908=113 P.L.R. 1908. (26 I.A. 153, F.; 147 P.R. 1889, 21 P.R. 1890, R. & D.)

(179)—*'Kritrima' form of adoption—Rights created.—Obiter.*—According to the Kritrima form of adoption, the adopted child is not severed from his natural family and does not lose his rights of inheritance in it. *ANDALE v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL*, 3 M.L.J. 242. (11 M. 174, R.)

(180)—*Payment of money to the natural father in consideration of his giving his son in adoption, effect of, on validity of adoption—Kritrima son.*—The point for determination in this appeal was, whether the plaintiff was, as found by the subordinate Judge, the adopted

*Hindu Law—continued.**—2.—Adoption—continued.*

son of the defendant. The oral evidence established beyond doubt the necessary gift and acceptance accompanied by the usual ceremonies. That the plaintiff ever since the adoption lived away from his natural home and as a member of the defendant's family was equally well established. On behalf of the defendant, it was contended that, in spite of all the above circumstances, it should be held in point of law, there was no valid affiliation on the plaintiff as the defendant's son for the reason that the natural father of the plaintiff was induced to part with him in consideration of the payment of a sum of money by the defendant to the natural father. On the question, whether such payment to the natural father would invalidate the adoption: Held, though the promise to pay or the payment of money for the purpose of inducing a man to part with his son to another cannot but be reprobated, yet, to lay down that the adopted son's status itself is affected thereby would be to confound the legal effect of the gift and acceptance with prohibition of payment of money, (22 B. 199, R.) The view that such payment to the natural father would invalidate adoption would result in visiting with highly injurious consequences on innocent third party, for, persons given in adoption are almost invariably children incapable of protecting themselves in the matter and moreover the view taken by the judicial committee in *Bashba Rabidat Singh v. Indra Kunwar* (16 C. 559, R.) in regard to an improper condition subject to which adoption takes place is in favour of the conclusion that the validity of the adoption is unaffected by the payment in question. *MURUGAPPA CHETTY v. NAGAPPA CHETTI*, 16 M.L.J. 22=29 M. 161.

(181)—*By widow, under husband's authority—Eligibility of the widow's brother's grandson for adoption.*—In this case, the question for decision was whether a widow, authorized by her husband to make an adoption to him, can validly adopt her brother's grandson. The contention that the adoption was invalid was based on the ground that the natural father of the adopted boy must be one whom the widow could, in her maiden state, have legally married. Held, the adoption is valid, on the ground that the widow acts as the agent of her deceased husband for the purpose of carrying out his wishes, and the adoption is made for the husband: "It is difficult to understand how a boy who is admittedly eligible for adoption by a husband can be regarded as ineligible if the adoption is by the widow of that husband with his sanction." *JAI SINGH PAL SINGH v. BIJAY PAL SINGH*, 2 A.L.J. 36=A.W.N. 1203, 20=27 A. 417. (7 N.W.P. 117, 20 M. 383, 22 B. 973, F.; 3 M. 15, R.)

(182)—*Eldest son—Validity of adoption.*—The adoption of an eldest son is, under the proceedings of the Sudder Court, although improper, not illegal. *SEETARAM v. DHUNOOK DHAREE SAHYE*, 1 Hay 260.



**Hindu Law—continued.****—2.—Adoption—continued.**

(183)—*Adoption of eldest son.*—The adoption of an eldest son, where there are several sons, is not invalid. *JANOKEE DEBEA v. GOPAUL ACHARJEA*, 2 C. 363. [F., 7 B. 221; R., 3 C. 443, 17 A. 291, F.B., 22 M. 393=9 M.L.J. 67=21 A. 460=26 I.A. 113, P.C.=1 Bom. L.R. 144.]

(184)—*Hindu Law—Prohibition of adoption of eldest son, not peremptory but only admonitory.*—Many of the texts of Hindu Law, while prohibiting, in express terms, the adoption of an only son, are at the same time silent as to the adoption of an eldest son. Taking into consideration the reason for the prohibition in the two cases, viz., that the prohibition in the former case is based upon the religious duty of continuing the lineage for the obsequies of ancestors, while that in the latter case cannot be regarded as more than the expression of a sentimental preference for the eldest son, there was held to be no sufficient ground for treating the prohibition of the adoption of an eldest son as more than admonitory or as creating any legal restriction. *KASHIBAI v. TATIA*, 7 B. 221. [F., 7 B. 225; R., 19 B. 428, 1 Bom. L.R. 144, 19 M.L.J. 372.]

(185)—*Hindu Law—Presentation in adoption by uncle of an only son, legal validity of—Adoption of eldest son valid—Divesting of widow's estate on adoption made by her—Arrangement for maintenance.*—A widow who adopts a son after the death of her natural born son would divest herself of her estate. The High Court recognising the propriety of not allowing the plaintiff, in this case, who was the adopted son, to recover the whole property from the widow, the defendant, until proper provision had been made for her maintenance, added to the lower Court's decree a declaration that the plaintiff should take the property awarded to him, subject to the obligation to provide a sufficient maintenance for the defendant. The objection taken to the adoption, that the ceremony was invalid because the father of the boy was not himself present but was represented only by the father's brother, was disallowed on the ground that there had been previously a formal consent by the father to the adoption, and it was only the formal presentation that was made by the brother of the plaintiff's natural father who was unwell. The other objection taken to the adoption that the adoptee was the eldest son of his was also disallowed following 7 B. 221, *supra*. *JAMNABAI v. RAYCHAND NAHALCHAND*, 7 B. 225. [R., 11 B. 381, 11 C.P.L.R. 43, 18 B. 452, 1 Bom. L.R. 144, C.W.N. 20.]

(186)—*Adoption of a grand nephew.*—The generally accepted rule is that the adopted son's natural mother must be one with whom the adoptive father might have lawfully intermarried while he was yet unmarried. [R., 22 B. 973] The adoption of a grand nephew is valid under Hindu Law. *HARAN CHUNDER*

**Hindu Law—continued.****—2.—Adoption—continued.**

*BANERJI v. HURRO MOHUN CHUCKERBUTTY*, 6 C. 41=6 C.L.R. 393. (W.R. F.B., 121, F.) [R., 22 B. 973.]

(187)—*Adoption of grand nephew—Right of succession to adoptive maternal grandfather's estate.*—The adoption of a grand nephew is not repugnant to Hindu Law. An adopted son cannot succeed to his adoptive maternal grandfather's estate when there are collateral male heirs. *MORUN MOEE DEBEAH v. BEJOY KISHTO GOSSAMEE*, W.R. F.B. 121.

(188)—*'Niyoga'—Adoption of paternal uncle's son.*—The validity of the adoption of a paternal uncle's son cannot be questioned with reference to the ancient practice of *niyoga*, on the ground that the adoptive father (the nephew) could not be appointed to beget issue on his paternal aunt. The usage being obsolete, Courts are not at liberty to refer to it or to engraft a rule on the Hindu Law, as evidenced by the usage of the people. *VIRAYYA v. HANUMANTA*, 14 M. 459. [R., 17 A. 294, F.B.]

(189)—*Adoption—Mother's sister's son—Sudras.*—Adoption of the mother's sister's son is valid among Sudras. The rule prohibiting the adoption of one, whose mother could not have legally married the adopter, is not binding on the Sudras. *CHINNA NAGAYYA v. PEDDA NAGAYYA*, 1 M. 62. [R., 22 B. 973.]

(190)—*Adoption—Mother's sister's son—Father's brother's son.*—Under Hindu Law, a man cannot adopt his mother's sister's son although he may also happen to be his father's brother's son. *WALBAI v. HEERBAI*, 11 Bom. L.R. 1172=34 B. 491=4 Ind. Cas. 277.

(191) *Hindu Law—Benares School—Adoption—Mother's sister's son—Validity—Dattaka Chandrika and Dattaka Mimamsa, authority of—Rule of stare decisis, applicability to Hindu Law—Held by the F.B. (Banerji and Aikman, JJ., dissenting), that a Hindu of the Benares School belonging to any one of the three regenerate classes is not prohibited from adopting his mother's sister's son. And the same rule holds good in the case of the adoption of a sister's son or a daughter's son. Per Banerji, J.—Such adoptions are absolutely prohibited and the doctrine of, *factum valet* has no application. [Reversed, 21 A. 412, P.C.; R., 24 A. 195=A.W.N. 1902, 10; D., 22 B. 973, 27 A. 417=2 A.L.J. 36=A.W.N. 1905, 20.] Held further (Banerji, J., dissenting) that the authority of the Dattaka Chandrika and Dattaka Mimamsa on questions of adoption is not paramount in the Benares School of Hindu Law. The law of this school differs in some important particulars from the law continued in these treatises; and in such cases these treatises are not followed. The case-law and the Hindu Law texts bearing on the above two points are elaborately discussed in the judgment of Edge, C.J., and the dissenting judgment of Banerji, J. [R., 3 O.C. 130, 29 A. 495=4 A.L.J. 407=A.W.N. 1907, 121.] The rule of stare decisis*



**Hindu Law—continued.****—2.—Adoption—continued.**

should be applied even to questions on Hindu law, unless it can be shown that the consensus of opinion expressed in the decided cases was based on a grossly erroneous interpretation of the law, or on a total misrepresentation of what the law really is—a misconception induced by erroneous translations of original texts inaccessible to the Judges, and misrepresentation as to their true meaning and scope—*Per Banerji, J.* Even if, in some instances, the rulings may have been founded on doubtful authorities, they should not, if they have been uniform, and have covered a long period of time, be departed from even at the risk of perpetuating an error, provided that the error was not so gross and clear as to negative the presumption of acquiescence and usage. **BHAGWAN SINGH v. BHAGWAN SINGH, 17 A. 296, F.B.=A.W.N. 1895, 167.**

(192 & 193)—*Validity of adoption of only son.*—Under the Hindu Law the adoption of an only son is valid. **CHINNA GAUNDAN v. KUMARA GAUNDAN, 1 M.H.C. 54.** [*Disappr.*, 12 B.H.C. 364; *F.*, 2 A. 164, F.B., 11 M. 43, 18 M. 53. *Appr.*, 14 A., 67; *Cons.*, 3 C. 443, 3 C. 587; *R.*, 7 B.H.C. *Appr.* 1; 7 B. 221, 9 A. 253, 5 O.P. L.R. 26, 19 B. 428, 24 B. 367, 1 Bom. L.R. 144, 22 M. 398, P.C.]

(194)—*Adoption of an only son, validity of, according to Mayukha—Prohibition of marriage between the adoptive father and the natural mother of the adoptee.*—However blameable on the part of the giver the adoption of an only son may be yet so far as the *Vyavahara Mayukha*, the paramount authority in Gujarat, is concerned, it is not so absolutely prohibited as to make the adoption duly made invalid *ab initio*. The texts of Manu, Vasietha and Shaunake which formed the basis of Mitakshara on the subject of adoption are also the texts to which Nilakantha, the author of the *Mayukha* himself refers. As these texts have been interpreted by the Privy Council so as not to militate, against the validity of the adoption of an only son, it follows that any other interpretation made by Nilakantha, cannot have much force of its own except such an interpretation was based on local usage and custom prevailing among the community. The right of adoption, though it has its religious efficacy, is chiefly valued for its temporal advantages, and from this point of view, the position taken up by those who interpret the Mitakshara and the *Mayukha* as, while not commending such adoptions yet not condemning them at the same time as prohibited acts, is both reasonable and in accordance with general feeling. *Held*, by *Parsons and R. made, JJ.*—that where there is evidence of a gift and acceptance, and it is further shown that the adoptee has been recognised for a number of years and placed in possession of property, the Court may dispense with the formal proof of the performance of the ceremony. *Held*, further, that where the adoptive father was five degrees removed from the common ancestor and the natural mother of the adopted boy

**Hindu Law—continued****—2. - Adoption—continued.**

seven degrees, the adoption was not invalid on the ground of prohibition of marriage between the adoptive father and the natural mother of the adoptive. **CHIMANLAL v. RAM-CHANDRA, 2 Bom. L.R. 163=24 B. 367 & 473.**

(195)—*Hindu Law—Adoption of only son.*—The adoption of an only son is invalid according to Hindu Law. **RAJA UPENDRA LAL ROY v. SRIMATI RANI PRASANNA MOYI, 1 B.L.R. A. C. 221=10 W.R. 347.** (1 M.H.C. 54. *Not F.*) [*R.*, 18 P.R. 1870, 30 A. 197=5 A.L.J. 200=A.W.N. 1908, 79.]

(196)—*Only son cannot be adopted*—Under the Hindu Law the adoption of an only son is invalid. **JAGANNATH v. MT. SITA, 5 C.P. L.R. 26.** (1 M. 54, 11 W.R. 347, 11 M. 43, *R.*)

(197)—*Adoption of only son, whether valid*—*Held*, by the Full Bench, that the adoption of an only son was, by the general Hindu Law, invalid. It cannot be denied that the texts of Vashistha and Saunaka containing injunctions against the giving and receiving of an only son in adoption have been regarded not as merely recommendatory but as prohibitory in the legal sense by the authors of the *Dattaka Mimamsa* and *Dattaka Chandrika*, the leading authorities in Bombay on the subject of adoption. **WOMAN RAGHUPATI BOVA v. KRISHNAJI KASHIRAJ BOVA, 14 B. 249, F.B.** [*Overruled*, 24 B. 367, *Not F.*, 14 A. 67, F.B.=A.W.N. 1892, 161, 22 M. 398, P.C.=9 M.L.J. 67=21 A. 400=3 C.W.N. 427=26 I.A. 113; *F.*, 19 B. 428; *R.*, 17 A. 294, 1 Bom. L.R. 144.]

(198)—*Adoption of an only son.*—*Held*, by the Full Bench (*Turner, J. dissenting*), that the adoption of an only son is not altogether void, but that, having once been made, it is valid. **HANUMAN TIWARI v. CHIRAI, 2 A. 164 F.B.** [*Not F.*, 14 B. 249, F.B.; *F.*, 14 A. 67, F.B.=A.W.N. 1892, 6; *Cons.*, 12 A. 328; *R.*, 9 A. 253, 1 Bom. L.R. 144, 18 M. 53, 19 B. 428.]

(199)—*Benares School of Hindu Law, adoption of an only son whether invalid under—Applicability of maxim "quod fieri non debuit factum valet."*—Under the Benares School of Hindu Law, the adoption of an only son is regarded as contrary to law only on the ground that it is sinful and blameable. Such restrictions as are indicated in the texts upon the adoption of an only son are only religious and moral as distinguished from legal. They amount only to moral or religious admonitions, and as mere admonitions they could not affect the legal validity of such an adoption. The adoption of an only son being thus not null and void under the Hindu Law, *held*, that where such an adoption has actually taken place, the maxim "*quod fieri non debuit factum valet*" would apply. **BENI PRASAD v. HARDAI BIBI, 14 A. 67, F.B.=A.W.N. 1892, 161.** (2 A. 164. *Appr.*) [*R.*, 17 A. 294, 24 B. 367, 1 Bom. L.R. 144.]



**Hindu Law—continued.****—2.—Adoption—continued.**

(200)—*Adoption of an only son invalid in Bengal.*—Among all classes of Hindus in Bengal, an adoption is invalid where the effect of the adoption, if valid, would be to extinguish the lineage of the natural father and to deprive the ancestors of the natural son of the means of salvation. *MANICK CHUNDER DUTT v. BHUGGOBUTTY DOSSEE*, 3 C. 443. [F., 14 B. 249, 5 C.P.L.R. 26; *Not F.*, 14 A. 67=A.W.N. 1892, 6 F.B.; *Overruled*, 22 M. 398=21 A. 460=26 I.A. 113, P.C.; *R.*, 7 B. 221, 2 Bom. L.R. 163=24 B. 367, F.B.]

(201)—*Adoption of an only son of advanced age—Retrospective effect—Dead of adoption if requires stamp.*—The adoption by a Hindu widow of an only son, if valid in every other respect cannot be set aside by reason of the adopted being an only son of an advanced age. An adoption by a widow has a retrospective effect, and relating back to the death of the deceased husband, entitles the adopted to succeed to his estate. A document purporting to be a deed of adoption does not require to be stamped. *VYANKATRAV ANANDRAV NIMBALKAR v. JAYAVANTRAV bin MALHARRAV RANADIVE*, 4 B.H.C. A.C. 191. [F., 2 A. 164, F.B.; *Cons.*, 3 C. 587, P.C.; *R.*, 8 B.H.C. A.C. 67, 12 B.H.C. 364, 11 M. 43, 10 B. 80, 11 B. 609, 14 B. 249, F.B., 21 B. 319, 22 B. 558, F.B., 24 B. 367, F.B., 1 Bom. L.R. 144, 9 A. 253, 14 A. 67, F.B. 29 A. 495=4 A.L.J. 407=A.W.N. 1907, 121.]

(202)—*Sudras—Widow not competent to give only son in adoption.*—The decree passed by the District Judge, who held the adoption set up by the plaintiff in this case to be invalid was affirmed by the High Court on two grounds, first, the widow, the natural mother, had no authority to give her son, the plaintiff, in adoption, he being, at the time of the alleged adoption, the only existing son of her deceased husband; and, secondly, that the defendant, the adoptive mother, was not, either at the time of the alleged adoption or at the time of her alleged ratification of it a free agent, but was subject to undue influence. *SOMASEKARA RAJA v. SUBHADRAMAJI*, 6 B. 524. [R., 9 A. 253; 11 M. 43, 24 B. 367.]

(203)—*Appointed daughter—Adoption of putriko putra—Validity—Right of succession of Samanodakas.*—Under the Hindu Law, the daughter of a sister cannot become an "appointed daughter," and her son cannot become a "putrika putra." The adoption of such a son is invalid now. The Samanodakas belong to the same gotra as the deceased and can inherit as heirs to the deceased in the absence of persons nearer of kin. *NURSING NARAIN v. BHUTTUN LALL*, W.R. 1864, 194. [R., 3 B. 273.]

(204)—*Adoption of only son—Wife's power—Concurrence of sapindas—Manu, Vasishta, Saunaka authority of—Dattaka Mimamsa. Dattaka Chandrika, authority of—Recent text writers—Interpretation of text—'Factum valet,' doctrine of—Adoption.*—The precepts contained

**Hindu Law—continued.****—2.—Adoption—continued.**

in the Smritis forbidding the adoption of an only son, are directory and not mandatory. The adoption of an only son is valid. Unless there is some express prohibition by the husband, the wife's power to give or take in adoption an only son, at least with the concurrence of sapindas in cases where that is required, is co-extensive with that of the husband. This rule is most consistent with principle. (12 B.H.C. 364, 397, *Commented on.*) [F., 24 B. 367, F.B., 25 B. 537; *R.*, 23 B. 789, 7 C.W.N. 871, 30 C. 965, 31 M. 446, 30 A. 197, 5 A.L.J. 200=A.W.N. 1908, 79] The Smritis of Manu, Vasishta and Saunaka contain precepts whose authority is beyond dispute, but whose meaning is open to various interpretations, and has been and is the subject of much dispute, which must be determined by ordinary processes of reasoning. The authority of Dattaka Mimamsa and Dattaka Chandrika is not open to examination, explanation, criticism, adoption or rejection like any other scientific treatises on European jurisprudence. But caution is required in accepting their glosses where they deviate from or add to the Smritis. (1 M.H.C.R. 54, 2 A. 164, 14 A. 67, *R. & Appr.*; 1 B. L.R. 221, 3 C. 443, 3 Select Rep. 310, 4 Select Rep. 89, S.D.A. 1859, p. 1556, 14 B. 249, *Overruled*; 25 I.A. 54, 69, 12 A. 328, *R.*) There is no legal force in the precepts that an eldest son should not be given in adoption, that a Hindu should adopt the son of his whole brother in preference to any other person, and that the natural father must be in distress. (2 O. 365, 5 I.A. 40, *R.*) The validity of temporal arrangements on which temporal Courts are asked to decide cannot be made subordinate to inquiries into religious beliefs. The mere fact that a transaction is condemned in books like the Smritis does not necessarily prove it to be void; it raises the question what kind of condemnation is meant. [R., 26 M. 291, 32 B. 619=10 Bom. L.R. 948.] If the *factum*, the external act, is void in law, there is no room for the application of the maxim. The truth is that the two halves of the maxim apply to two different departments of life. Many things which ought not to be done in point of morals or religion are valid in point of law. But it is nonsensical to apply the whole maxim to the same class of actions. *SRI BALUSU GURULINGASAWMY v. SRI BALUSU RAMA LAKSHMAMMA*, 22 M. 398, P.C.=3 C.W.N. 427=26 I.A. 113=21 A. 460=9 M.L.J. 67=1 Bom. L.R. 226=7 Sar. 330. (12 B.H.C. 364, *Appr.*)

(205)—*Adoption of orphan, whether valid.*—According to Hindu Law, an orphan could not be adopted. To constitute a valid adoption there must be a giving as well as a receiving. *SUBBALUVAMMAL v. AMMAKUTTI AMMAL*, 2 M.H.C. 129. [F., 6 B.H.C. O.C. 83; *R.*, 10 B.H.C. 235, 10 B.H.C. 268, 12 B.H.C. 364, 1 B. 248, 16 M. 364.]

(206)—*Adoption of orphan.*—According to the Hindu Law prevailing in Western India an



**Hindu Law—continued.****—2.—Adoption—continued.**

orphan cannot be adopted. **BALVANTRAY BHASKAR v. BAYABAI**, 6 B.H.C. O.C. 83. [E., 10 B.H.C. 235, 268, 12 B.H.C. 364, 1 B. 248.]

(207) — *'Paluk putro' adoption not recognised in Hindu Law* — Plaintiff sued to recover possession of land on the ground of purchase from K to whom one G, the alleged heir of H, had sold it. He added that defendants, having obtained a deed of sale from G, kept him out of possession. Defendants admitted the title of H, but alleged that, on his death, his adopted son B obtained the property and was in possession long after the date of the sale-deed to the plaintiff's vendor K, which sale therefore was of no effect, G, the vendor, having had no right to the property. They added that G, having succeeded to the said B as next of kin, sold the land to them. The first Court held the adoption of B proved and finding that defendant had purchased the land from the successor of B, decided in favour of the defendant. The lower appellate Court having found against the defendant on the question of B's adoption, they urged on the second appeal that a *Paluk Putro* was a good and valid adoption amongst Sudras according to Hindu Law. But the High Court held that there is but one form of adoption recognized by Hindu Law books for the Bengal Provinces, and there is, *quoad* that, no distinction made between two different castes. The appellant failed to show any precedent supporting his view of the case or to point out to anything in the Hindu law which allowed such an adoption. **KALEE CHUNDER CHOWDHRY v. SHEEB CHUNDER**, 2 W.R. 231. [Affirmed on appeal, 6 B.L.R. 501, P.C.=15 W.R. 12; R., 13 W.R. 168.]

(208) — *Effect of valid adoption—Legality of adoption of sister's sons among Brahmans.* — The whole theory of an adoption is the complete change of paternity. An adoptive son is to be considered as one actually begotten by the adoptive father. He is so in all respects save an incapacity to contract marriage in the family from which he was taken. The adoption of a sister's son by a Brahman of the Andhra country was held not valid. **NARASAMMAL v. RALARAMACHARLU**, 1 M.H.C. 420. [F., 8 B.H.C. O.C. 196, 3 B. 273; R., 12 B.H.C. 364, 9 A. 253, 17 A. 294.]

(209) — *Adoption of sister's son—Vaishya.* — It is now well settled law that the adoption of a sister's son by a Hindu of the Vaishya caste is valid. **GANAPATRAV VIRESHVAR et al. v. VITHOBA KHANDAPPA et al.**, 4 B.H.C.A.C. 130. [R., 3 B. 273, 22 B. 973, 17 A. 294. F. B.]

(210) — *Sister's son, Adoption of—Customary law—Brahmins—Illegal adoption—Change of situation—Effect.* — No rule of customary law exists affirming the legality of the adoption of a sister's son by a Brahmin. In the case of Brahmins, it is impossible in any case to believe in the existence of a customary law of which no trace appears in any written authority

**Hindu Law—continued.****—2.—Adoption—continued.**

of the place to which they belong. [R., 3 B. 273, 7 M. 3 F.B., 9 M. 44, 17 A. 294, F.B., 1 Ind.Cas. 141.] In a suit by A to set aside the adoption of B, the alleged adopted son of A's undivided brother, on the ground that the adoption was illegal as B was the sister's son of the adoptive father, the mere circumstance that there has been a long course of acquiescence by all the members of the family, A included, in the validity of the sonship asserted, would not be enough to render it inequitable for A to set up the illegality of the adoption as against B, if, through the influence of that course of representation by conduct, B has not altered his situation so that it would be impossible to restore him to that original situation. But where the evidence shows that B has abandoned his rights to the property in his natural family and has long rendered his services in that of his *quasi* adoptive father, it would be manifestly inequitable to permit A to undo partially to his own advantage what cannot be undone so far as it has prejudiced. **B. GOPALAYYAN v. RAGHUPATI AYYAN**, 7 M.H.C. 250. [F., 18 M. 145; R., 7 M. 3, F.B.]

(211) — *Brahmans—Adoption of sister's son.* — According to Hindu Law, a Brahman cannot validly adopt his sister's son. **PARBATI v. SUNDAR**, 8 A. 1=A.W.N. 1885, 315, 357. [R., 17 A. 294, F.B.]

(212) — *Adoption of sister's son, Validity of.* — The adopted son in the case was the adopter's sister's son; and although its validity was not a point to be decided, their Lordships expressed an opinion that, the parties being Brahmans, the adoption of a sister's son was invalid. **SUNDAR v. PARBATI**, 12 A. 51=16 I.A. 186, P.C.=5 Sar. 448. [R., 14 A. 53, 17 A. 294, F.B.]

(213) — *Adoption of sister's son and daughter's son, Validity of—Custom among Brahmans.* — According to the custom prevalent among the Brahmans in Southern India, the adoption of a sister's son or daughter's son is valid. **VAYIDINADA v. APPU**, 9 M. 44, F.B. [F., 15 M.L.J. 211; R., 107 P.L.R. 1901, 4 Bom. L. R. 140.]

(214) — *Jain Law.* — In questions arising between parties of the Jain sect, the custom of the sect should be inquired into and given effect to, although it may be at variance with Hindu Law. (N.W.P., 1874, 382, F.) Under Jain law, the adoption of a sister's son is valid. **HASSAN ALI v. NAGA MAL**, 1 A. 288.

(215) — *Kayasthas adoption among.* — Kayasthas are not Hindus of the three superior classes and may adopt their sister's son. **RAJ COOMAR LALL v. BISSESSUR DYAL**, 10 C. 688. [Doubted, 12 A. 328, F.B.]

(216) — *Hindu Law—Adoption by widow—Son of widow's brother, whether could be validly adopted by her.* — The adoption of the respondent-plaintiff in this case was questioned in the



**Hindu Law—continued.****—2.—Adoption—continued.**

lower Courts on various grounds, but, the only ground on which its validity was disputed on second appeal had reference to the fact that the respondent was the son of the brother of the adoptive mother. It was conceded by the appellant that if the husband of the widow, while he was alive had adopted the respondent, the adoption would have been valid, but it was contended that it was not competent for the widow to validly receive in adoption her own brother's son because of her natural relationship to her brother. On second appeal, the High Court held that the adoption was valid. The prohibitions based on near relationship in the matter of adoption have had their origin chiefly in the Dattaka Mimamsa, and there is no ground for extending such prohibitions to the widow's relations. Further, the positive restrictions laid down by Nanda Pandita have been held to be only directory and not prohibitive. So, even if the extension of the restricting rules to the widow's near relations were permissible, the restriction would be at best directory only, and not mandatory, proper to be observed, but not obligatory and enforceable as positive law. *BAI NANI v. CHUNILAL*, 22 B. 973. [*F.*, 27 A. 417=2 A.L.J. 36=A.W. N. 1905, 20; *R.*, 24 B. 473.]

(217)—*Hindu Law—Adoption by widow—Law in Bombay—Adoption by daughter-in-law (as widow of pre-deceased son) to her husband after vesting of estate in mother-in-law—Permission of father-in-law to adopt—Consent of mother-in-law—Validity of adoption—Adoption, divesting of estate by—General rule in respect of—Exceptions—Adopted son older than adoptive mother.*—According to the law prevailing in the Bombay Presidency, a widow unless prohibited expressly or by implication, has an implied authority to adopt to her deceased husband. A daughter-in-law (who is the widow of a pre-deceased son) must be specially authorised by the father-in-law, to make a valid adoption binding against the heirs of her father-in-law. So, where an adoption was made by a daughter-in-law (as widow of a pre-deceased son) to her husband after the vesting of the estate in her mother-in-law, held that the adoption was invalid, the same having been made without the necessary authority from the father-in-law and without the consent of the mother-in-law in whom the estate had become vested on the death of the father-in-law. [*D.*, 29 B. 410=7 Bom. L.R. 436.] An estate which had become vested in a person can be divested by a subsequent adoption only with his consent. This is the General rule, the two exceptions thereto being (1) an adoption by an elder widow after the vesting of the estate in the younger, and (2) an adoption by the widow of a pre-deceased son, when the adoption is authorised by her father-in-law as head of the family and guardian of the widow. [*D.*, 29 B. 410=7 Bom. L.R. 436.] *Semble*:—The adoption of a son who is older than the adopting mother is not invalid, the rule prescribing a

**Hindu Law—continued.****—2.—Adoption—continued.**

difference of age in favour of the adopting mother being only directory and not a command, the infraction of which invalidates the adoption. *GOPAL v. VISHNU*, 23 B. 250.

(218)—*Hindu Law—Mitaksbara—Adoption of stranger where there is a nephew—Daughters, Succession of.*—In all cases of adoption, and especially in a case where the adoption has been deemed good and apparently acquiesced in for many years by all the parties, the rule which ought to be applied is, that the selection of a boy to be adopted is finally a matter of conscience and discretion with the adopter, not of absolute prescription rendering invalid an adoption of one not being precisely the person who, on spiritual considerations, ought to have been preferred. The adoption of a nephew is no doubt strongly recommended, but if, in spite of such recommendation, a man adopts a stranger, the existence of a brother's son or other near relation who might have been adopted cannot invalidate the adoption so effected. *GOCOLANUND DAS v. WOOMA DAE*, 15 B.L.R. 405. (*On appeal*, 3 C. 587, P.C.=5 I A. 40.)

(219)—*Adoption by religious celebrate of Mutt—Natural father whether could enter into compromise on behalf of adoptee.*—The compromise sought to be set aside by the plaintiff in this case arose out of the rival claims made on behalf of the plaintiff and on behalf of the defendant by their respective fathers to be the heir of a religious celebrate by whom the plaintiff was alleged to have been adopted. The lower Court held that, as the plaintiff had been adopted, his natural father who had not obtained the necessary certificate of guardianship had no authority to enter into the compromise, but the High Court was of opinion that, whoever might be the lawful guardian of a minor who had been adopted by a religious celebrate, in matters relating to the Mutt, the natural father would be his proper guardian to assert his rights as the adopted heir, against his rival claimants, and to enter into a compromise binding on such minor. *NIRVANAYA v. NIRVANAYA*, 9 B. 365. [*F.*, 12 Bom. L.R. 370; *R.*, 31 C. 111=7 C.W.N. 688.]

(220)—*Power of husband to select one wife to participate with him in adoption.*—Just as a man may authorise a single one of several wives to adopt after his death so that she would, on adoption, stand in the place of the natural mother, he has the power of selecting a single wife to join with him in his life time in adopting a boy with the same effect on her relations with that boy. *ANNAPURNI NACHIAR v. FORBES*, 3 C.W.N. 730=26 I A. 246=23 M. 1, P.C.=9 M L.J. 209=1 Bom. L.R. 611=7 Sar. 591. [*R.*, 26 M. 104; *Expl.*, 29 M. 437=16 M.L.J. 178=1 M.L.T. 72.]

(221)—*Hindu Law—Adoption—Prohibited relation.*—An adoption is not invalid because the adoptive mother is the cousin of the natural



**Hindu Law—continued.****—2.—Adoption—continued.**

father of the adopted boy. **RAGAVENDRA RAU v. JAYARAM RAU**, 20 M. 283=7 M L J. 134. [F., 27 A. 417=2 A.L.J. 36=A.W.N. 1905, 20, 32 B. 619=10 Bom. L.R. 948.]

(222)—*Dwyamushyayana, Form of.*—D and B were full brothers. D died, without leaving an issue, and his widow adopted the plaintiff, B's son, as a *dwyamushyayana* son. It was contended that the plaintiff's adoption was invalid, because the decisions validating the adoption of an only son recognized the power of the father to give an only son in adoption, and it did not follow from them that the widow without the express authority from her husband, could give an only son in adoption; that the *dwyamushyayana* form of adoption was only permitted as between the fathers on both sides, and that there could be no such adoption when the fathers were both dead and only the widows remained behind: *Held*, that the decisions which made the gift of an only son valid in the case of the father naturally justified a similar presumption of validity where the gift was made by the widow, and that the power of making the *dwyamushyayana* adoption was not confined to brothers only, but their widows might give and receive in adoption an only son. **KRISHNA v. PARMASHRI**, 3 Bom. L.R. 73=25 B. 537.

(223)—*Validity of second adoption when previously adopted son is alive.*—According to the Hindu Law of adoption, a second adoption during the lifetime, of the first adopted son is illegal. **MOHESH NARAIN MUNSHI v. TARUK NATH MOITRA**, 20 C. 487, P.C.=20 I.A. 30=6 Sar. 261. (14 M I.A. 1, R.) [F., 23 B. 482.]

(224)—*Adoption of eldest or only son or sister's son—Gift in adoption by widow—Assent of husband when implied—Adoption among Brahmans and Sudras—Disqualification for adoption—Marriage—Chudakarana and Upanayana ceremonies A dwyamushyayana son.*—Among western India Sudras, an adoption is not invalid although the person adopted was married before his adoption, nor although he may be a son of the adopter's sister, and, therefore, not a *sagotra* (i.e., of the same family) with the adopter. Even among Brahmans marriage does not invalidate adoption. *Quære*:—Whether the adoption of a *sagotra* married man belonging to any of the three regenerate classes would be invalid. According to Hindu Law, a second adoption, made while the first adopted son lives and retains his character of a son is invalid. Among Brahmans, the adoption of a son for whom the *chudakarana* and *upanayana* ceremonies have been performed in his natural family is not on that ground invalid. He notwithstanding acquires the legal status of an adopted son, the fact of those ceremonies having been already performed only rendering necessary in a religious point of view, their reperformance and the performance of certain additional ceremonies in the adoptive family, the latter, being considered to have the effect of annulling those

**Hindu law—continued.****—2.—Adoption—continued.**

performed in the boy's natural family. A Hindu widow cannot make a gift of her deceased husband's only son in the absence of an express authority conferred upon her by him during his lifetime. Such an adoption is null and void *ab initio* and cannot be supported by the maxim *quod fieri non debuit factum valet*. *Quære*:—Whether a gift in adoption of an only son by his father is void in the Presidency of Bombay. In the Presidency of Bombay, the giving in adoption by a widow of a younger son where her husband has not, by direct prohibition or otherwise, indicated his unwillingness that she should after his death, give such younger son in adoption, is valid, the husband's assent to such a gift being implied. But no such implication will be made in the case of a gift by his widow, after his death, of an eldest and still less of an only son in adoption where he did not expressly indicate such assent in his lifetime. *Semble*—Where a father gives his only son in adoption as a *dwyamushyayana*, he consents to deprive himself of one-half of the spiritual benefits derivable from the performance of religious obsequies. Hence, in the case of such a gift when made by his widow after his death, his consent will not be implied. To such a case the doctrine of *factum valet* principle will not apply, because the adoption would be, as regards her, not *quod fieri non debuit*; but *quod fieri non potuit*. The maxim *quod fieri non debuit factum valet* considered, and its application pointed out. There can be no gift in the absence of authority; an attempted transaction of this kind has nothing in it to be set aside; it should simply be declared null and void *ab initio*. No distinction between Sudras and other classes on the question of the legality of the adoption of an eldest or an only son can be drawn. The Court dissented from the ruling in *Mhalsabai v. Vithoba* (7 Bom. H.C. App. 26, *Diss.*) in so far as it supported the gift in adoption, by a widow, of an only son without the authority of her husband. **LAKSHMAPPA v. RAMAYA**, 12 B.H.C. 364. (7 B.H.C. App., 26, *Diss.*) [*Diss.*, 24 B. 367, F.B., F., 3 B. 273, 6 B. 524, 19 B. 658; *D.*, 25 B. 537; *Cons.*, 14 B. 249, F.B., 14 A. 67, F.B.; *R.*, 11 M. 43, 157, 22 M. 398, P.C., 9 M.L.J. 67, P.C., 7 B. 221, 10 B. 80, 13 B. 160, 19 B. 428, 658, 22 B. 558, F.B., 812, 973, 23 B. 250, 789, 1 Bom. L.R. 144, 9 A. 253, 17 A. 294, F.B., 21 A. 460, P.C., 4 A.L.J. 407, A.W.N. 1907, 121, 29 A. 495.]

(225)—*Consent to subsequent adoption—Liability to deprivation of inheritance by will—Second simultaneous or conditional adoption.*—Where a Hindu has adopted a son, he acquires the right of a son in the hereditary immoveable property of the adoptive father; and he cannot be deprived of these rights by the adoptive father afterwards assuming to adopt a second son and settling the hereditary property upon such second adopted son, coupled with declaration that the first was disinherited. According to Hindu Law, an adoption of a second son during the lifetime of a previously adopted son



**Hindu Law—continued.****—2.—Adoption—continued.**

is inoperative. A childless Hindu adopted A as his son; afterwards he adopted B as his son and made a will, dividing his property ancestral as well as acquired, between A and B. A filed a petition denying the right of his adoptive father to adopt B, and protesting against the will but afterwards he signed a consent to the will. *Held* that, as the father afterwards endeavoured to deprive A of all his rights, as well those under the will as by the adoption, the consent did not bind A, since it was given on the basis of a family arrangement, from which the adoptive father afterwards departed. *Semble*.—That if the consent were given by A in ignorance of his right it would not be binding upon him. Second or simultaneous or conditional adoption is inoperative if made. *SUDANUND MOHAPUTTUR v. BONOMALEE DOSS*, *Marsh* 317=2 *Hay* 205.

(225-a)—*Second adoption invalid—Simultaneous adoption of two persons invalid—Adopted son's position in the natural family—Widow—Alienation—Necessity—Sale of property to get money for child's marriage not likely to take place for years—Future maintenance—Consent of near reversioners—'Locus standi' of remoter reversioners to contest alienation—Estoppel—Evidence Act (I of 1872, s. 115—"Thing"—Mere opinion as to legal effect of adoption—Essentials of estoppel—Division of property by two adopted sons.*—Under Hindu Law, the adoption of a second son during the lifetime of a previously adopted son is invalid. If a person adopts two persons simultaneously, both the adoptions are invalid. A person whose adoption is legally invalid remains in the family of his natural father. It is not open to a widow governed by Hindu Law to sell immoveable property inherited from husband, in order that she may retain a sum of money for the marriage of her child, which marriage is not likely to take place for many years to come. Nor can she alienate property to provide for her future maintenance. (32 B. 577, 10 Bom. L.R. 927, 11 P.R. 1935, *Rel. on.*) Where the nearest reversioners of a widow's husband, acting in good faith and with due regard to the interest of the family, give their consent to an alienation by the widow, a more distant reversioner has no *locus standi* to contest the alienation. (84 P.R. 1900, P.L.R. 1900, p. 536, 7 P.R. 1905, 66 P.L.R. 1905, 97 P.R. 1906, 37 P.R. 1907, 120 P.L.R. 1907, 3 M.I.A. 229, 6 W.R. 43, 30 A. 1, 6 C.L.J. 766, 12 C.W.N. 74, 9 Bom. L.R. 1348, *Rel. on.*) A mere view or opinion on the legal effect of an adoption is not a "thing" within the meaning of s. 115 of the Evidence Act. In order to give rise to an estoppel, it is necessary that the representation should be the actual cause of a new belief in the mind of the other party and of his action following on that belief. Estoppel does not arise where both parties have equal means of knowledge both of the facts and of the law. A first adopted B and subsequently adopted C. After the death of A, B and C divided his property equally as

**Hindu Law—continued.****—2.—Adoption—continued.**

the result of a law suit between them: *Held*, that C or his representatives were not thereby estopped from subsequently denying the validity of the adoption of C, and that s. 115 of the Evidence Act did not apply to the case. *TEK CHAND v. GOPAL DEVI*, 13 *Ind. Cas.* 482=46 P.R. 1912=127 P.L.R. 1912=180 P.W.R. 1912. (19 I.A. 203, 20 C. 296, 7 M. 3, *Expl. & D.*; 10 C.P. 307, 23 W.R. 747, R.)

(226)—*Hindu Law—Adoption—Second adoption—Sudras—Disputed question of adoption—Consent of wife—Acquiescence—Ancestral property—Division—Second adoption while adopted son still living and retaining character of son.*—According to the Hindu Law, a second adoption of a son, the first adopted son, being alive and retaining the character of a son, is illegal and void. Review of the Hindu Law relating to the validity of a second adoption by a Hindu during the lifetime of the first adopted son. [*F.*, 13 C. 406=12 I.A. 198; R, 19 W.R. 12, P.C.=11 B.L.R. 391=I.A. Sup. Vol. 131=3 Sar. 217, 12 B.H.C. 364, 20 C. 487=20 I.A. 30, 18 M. 277, 22 B. 482, 3 C.W. N. 454=21 A. 412, P.C., 4 B.H.C.A.C. 130.] Among the Sudras, a childless Hindu may adopt a son from a *gotra* different from his own. Upon a disputed question of adoption, the Provincial Court and the Sudder Court, on appeal, held that the evidence was not sufficient to establish the fact of adoption. Such decision was reversed by the Judicial Committee. [*F.*, 10 M.I.A. 429] The consent of a wife to the adoption of a son, by her husband, a childless Hindu, is not essential to the validity of the adoption. Adoption is the Act of the husband alone, although the wife may join in it. [*R.*, 7 B.H.C. App. 1, 12 A. 329, F.B., 22 B. 551, F.B.] The acquiescence of the first adopted son, after he came of age, in the division of property made by the adopting father between his two adopted sons, was not equivalent to a previous consent (binding on the first adopted son) to the disposition of the ancestral property by the father, but was binding on the first adopted son with regard to other property of which the father had the power of disposing by an act *inter vivos* without the consent of the adopted son. *RANGAMA v. ATCHAMA*, 7 W.R. 57, P.C.=4 M.I.A. 1=1 *Suther.* 197=1 Sar. 313. [*R.*, 10 W.R. 237, I.A. 395, 4 M. 1, F.B., 9 M. 273, 20 M. 167.]

(227)—*Hindu Law—Adoption—Adopted son relinquishing his rights as adopted son in favour of his adoptive mother—Release—Second adoption—Registration under Dikhan Agriculturists Relief Act (XVII of 1879), ss. 56, 60—Registration Act (III of 1877).*—K the widow of G, adopted the plaintiff in 1880. In June 1885, the plaintiff executed a document which recited that he and K had not been on amicable terms, and that his adoption had consequently been cancelled, and that she had adopted another son (defendant No. 1) to whom she had given all rights of heirship, and



**Hindu Law—continued.****—2.—Adoption—continued.**

declared that in consideration of Rs. 200 paid to him by K he delivered back to her the rights which he had obtained by virtue of his adoption and heirship. This document was registered by a Village Registrar under s. 57 of the Dekkhan Agriculturists Relief Act (XVII of 1879) but was not registered under the General Registration Act (III of 1877). K died in October 1885, and the plaintiff brought this suit, as adopted son, to recover the property of G. The first defendant contended that he had been validly adopted and that he was entitled to the property. He relied *in rer alias* upon the document executed by plaintiff in June 1885. *Held*, (a) that the plaintiff could not renounce his status as adopted son, although he might give up his right of inheritance, and that, whatever estate became vested in K by the release came to the plaintiff on her death, either as the adopted son of G or as heir of K; (b) that the defendant's subsequent adoption was invalid, and that nothing would pass to him by force of such adoption, and, (c) that the document was admissible in evidence though it was not registered under the General Registration Act (III of 1877). It was a conveyance within s. 56 of the Dekkhan Agriculturists' Relief Act (XVII of 1870), and the law in force as to its registration was contained in ss. 56 and 60 of that Act. *MAHADU GANU v. BAYAJI*, 19 B. 239. [D., 3 P.R. 1904=43 P. L.R. 1904.]

(228)—*Hindu Law—Adoption by mother after death of son without heir—Adoption by grandmother without consent of her daughter-in-law.*—Under the Hindu Law, a widow can exercise her authority to adopt when her son, natural or adopted, dies unmarried, or leaves no child or widow behind him *i.e.*, leaves no other heir nearer than herself. A Hindu of the Shudra class died, leaving him surviving his mother and a paternal grandmother. After his death his grandmother adopted the defendant. Subsequent to this adoption, the deceased's mother adopted the plaintiff. Thereupon both plaintiff and defendant claimed the deceased's estate. *Held*, that the plaintiff was entitled to succeed. The deceased's mother having succeeded as heir, to her son, her mother-in-law could not by any adoption divest her of her rights as such heir, unless she consented. The defendant's adoption was, therefore, invalid. *GAVDAPPA v. GIRIMALLAPPA*, 19 B. 331. [R., 23 B. 327, 25 B. 306, 28 B. 461.]

(229)—*Hindu Law—Adoption—Second adoption during first adopted son's lifetime—Misrepresentation—Mis-statement of legal effect of certain facts—Estoppel.*—A man cannot, while he has an adopted son living, adopt another son. It follows on principle that a man cannot delegate to others to be exercised after his death, any greater power than he himself possessed in his lifetime. His widow cannot, after his death, by virtue of any authority delegated from him, adopt a son while an adopted son is living. [R., 22 B. 482.]

**Hindu Law—continued.****—2.—Adoption—continued.**

Defendants, who had represented the fact of an adoption which they had concluded erroneously to be an adoption valid in law, cannot be said to have been guilty of misrepresentation, so far as the fact is concerned, and are not estopped from setting up the true facts of the case or from asserting the law in their favour. *GOPEE LOLL v. MUSSAMMAT SREE CHUNDROBEE BUHOOJEE*, 11 B.L.R. 391=19 W.R. 12=I.A. Sup. Vol. 131. [R., 19 B. 374, 21 A. 285.]

(230)—*Hindu Law—Adoption, of a second son after death of first—Divesting of mother's estate—Successive adoptions*—A Hindu widow adopting a son under the authority of her deceased husband upon the death of a son begotten or adopted whose estate she inherited as mother, divests herself of that estate by the act of adoption in favour of the son last adopted by her, and such son takes the estate immediately on adoption. *RAI JATINDRA NATH CHAUDURI v. AMIRTA LAL BAGCHI*, 5 C.W.N. 20. (10 M.I.A. 279, 1 M. 174, 2 M. 91, 7 W.R. 392, 24 W.R. 183, 5 C. 615, 8 C. 302, 7 B. 225, 11 B. 381, 18 W.R. 359, Cons.)

(231)—*Power given to widow to adopt a second time under certain conditions—Second adoption under the conditions but when the first adopted son had left an heir. Validity of—Clause of defeasance in a will—Gift over, necessity for a—Vesting of estate.*—A Hindu widow was directed by the will of her husband to adopt a son and if the adopted son should die before attaining the age of twenty years without leaving any male issue, she was authorised to adopt another son to take the place of the deceased adopted son. The testator intended that there should be no distribution of the corpus until the events specified in the will took place and the widow was to receive the profits for the benefit of herself and her adopted son and the testator's daughter's sons. The distribution of the corpus was to remain in abeyance. In pursuance of the authority conferred in that behalf the widow adopted a son, who died at the age of seventeen, leaving a widow and a daughter only. Consequently the testator's widow adopted the present plaintiff. On the death of the widow of the testator, his daughter's sons took possession of the estate. Hence the present suit by the plaintiff for a declaration that he was the testator's duly adopted son and for possession of the estate left to him by the will. *Held*, that the adoption of the plaintiff was not valid, the power of the widow to adopt a second son having terminated on the first adopted son dying, leaving a widow and a daughter. (10 M. I.A. 279, F., 8 C. 302, 9 B. 94, 4 I.A. 67, 17 C. 122, R.) Further, the scheme of the will was that the estate should not vest in any person until the death of testator's widow and that being so, the estate vested, by law, in the legal heir, as there was an intestacy as regards the corpus; and as soon as the first adoption was made, the corpus became vested in such adopted son, though he was not entitled to possession,



**Hindu Law—continued.****—2.—Adoption—continued.**

until the death of the widow or until he arrived at the age of twenty years. The corpus of the estate having thus vested in him, his widow became entitled to it on his death. Besides, as the will was executed before the Hindu Wills Act came into operation, the executors and trustees, under the will, had no estate and there was, thus, an intestacy as regards the corpus. (25 C. 103, F.) A clause of defeasance, in order to be operative, must contain express words or words of necessary implication of a gift over to definite person or persons. The implication of a gift over to a second adopted son, who might never have been adopted, would not be sufficient to prevent the widow of the first adopted son from inheriting her deceased husband's share. In the present case, there was no such gift over to the testator's widow. In the view taken by their Lordships, no question of limitation and estoppel arose. Appeal failed and suit dismissed. *AMULYA CHARAN SEAL v. KALIDAS SEN*, 1 C.L.J. 270=32 C. 861.

(232)—*Hindu Law—Successive adoptions—Second adoption during lifetime of first adoptee, invalidity of—Second adopted son jointly enjoying property as trespasser—Prescription—Bona fide family arrangement, binding nature of.*—Plaintiff was first taken in adoption and while he was still living, defendant was also adopted because plaintiff was suffering from rickets and was not expected to live. The District Judge considered that, under the circumstances, the adoption of the defendant was not invalid, and treating him as a member of the family and the whole family as a joint one, held that, on the death of the defendant's son without issue, during the pendency of the appeal, the whole estate survived to plaintiff, defendant's widow becoming entitled to maintenance only. This view of the case was held to be wrong because defendant's adoption in the lifetime of the plaintiff was invalid, and could confer no legal rights at all on the former. On remand of this appeal to the District Judge for a finding on the issue of limitation, he found that though plaintiff had never been in exclusive possession of the property he had never been excluded, and so the suit would not be barred under art. 127 of the Limitation Act. Held per *Parsons, J.*, that the District Judge's finding was based on his erroneous impression that defendant's adoption was valid in law and that the family was joint. The adoption was, however, legally invalid, so that, under the circumstances the plaintiff, a person entitled to the whole of the estate and the defendant not entitled to any part of it, and therefore a trespasser, happened to have been jointly in possession and enjoyment of the estate for long over the statutory period of 12 years. By reason of such adverse possession plaintiff lost and defendant gained by prescription a moiety of the estate which became the absolute self-acquired property of the defendant descendible to his heirs. Plaintiff was consequently held,

**Hindu Law—continued.****—2.—Adoption—continued.**

entitled to a decree awarding him only one moiety of the property in suit. *Per Ranade, J.*—The parties began to live separate only from the time of defendant's death in 1877 and plaintiff's cause of action accrued only when the management of the property was taken away out of his hands. He filed this plaint within 12 years from that time, but in the meantime he became party to an amicable family settlement that the property was to be enjoyed in equal moieties by plaintiff and defendant. Of this family arrangement approved and given effect to by the Collector, plaintiff had for many years enjoyed the benefit. A *bona fide* family arrangement is specially favoured by the Courts and deemed to bind the parties and their representatives, and on this ground, plaintiff respondent was held entitled to claim only a moiety of the property in suit. *RAMABAI v. RAYA*, 22 B. 482. [R., 1 C.L.J. 388, C.L.J. 323]

(233)—*Jains—Second adoption by widow.*—Suit by a Jain for a declaration that he was adopted by the defendant to her deceased husband and that, as such adopted son, he was entitled to possession of all the property left by him. It appeared that, after her husband's death, the defendant had adopted a certain person who died prior to plaintiff's adoption, without leaving a widow or child. Held, (a) though the powers of a Jain widow, in the matter of adoption, are of an exceptional character, namely, that she can make an adoption without the permission of her husband or the consent of his heirs, and that she may adopt a daughter's son, and further, that no forms or ceremonies are necessary—except that in these respects it is not controlled by the Hindu Law—in all the matters, the rules and principles of Hindu Law are applicable, and the *kritima* form of adoption not being recognised in the Jain community, or among the Hindus of the N.W.P., it must be assumed that she had the power to make a second adoption, and that such adoption was to her husband. The plaintiff's adoption, therefore, was valid and effective. (b) The effect of a second adoption being to make the second adopted son the son of her husband, he must be treated as if he had been born, or at all events, conceived, in the lifetime of the husband, and his title relates back to the date of the death of the elder brother, the first adopted son; and as the later left no widow or issue who would succeed him in preference to the plaintiff, the plaintiff was entitled to succeed as his father's heir. *LAKHMI CHAND v. GHATTO BAI*, 8 A. 319=A.W.N. 1886, 118. (5 I.A. 87, R.) [R., 16 M. 182, 27 C. 379, 107 P.L.R. 1901, 31 P.L.R. 1907=110 P.R. 1906=59 P.W.R. 1907, F.B., 29 A. 495=4 A.L.J. 407=A.W.N. 1907, 121, 30 A. 197=A.W.N. 1908, 79=5 A.L.J. 200.]

(234)—*Simultaneous adoption, Validity of.*—As the adoption of one son alone is actually necessary and is in itself wholly sufficient to



**Hindu Law—continued.****—2.—Adoption—continued.**

satisfy the purpose of the law, the adoption of two is not within the scope of a power of adoption; where such a thing is attempted, neither of the children is the legally adopted son of the deceased, though the ceremonies of adoption may have been performed as regards each and also at the same time. *GYANENDRO CHUNDER LAHIRI v. KALLA PAHAR HAJEE*, 9 C. 50 = 11 C.L.R. 297. [R., 8 C.W.N. 774, F.B.]

(235)—*Authority to adopt to two widows—Construction—Simultaneous adoptions by Hindu widows, Validity of.*—An authority by a Hindu to his wives, thus worded “you—the elder widow, may adopt three sons successively, and you—the younger widow, may adopt three sons successively,” might more reasonably be construed as giving the elder widow authority to adopt three sons successively, and then a similar power to the younger, than authorising simultaneous adoptions. Simultaneous adoptions by two Hindu widows to their deceased husband are not, even if the husband had intended to give such an authority to them, allowed by the law. (Macnaughten’s opinion on the subject expressed in his *Hindu Law*, approved.) *AKHOY CHUNDER BAGCHI v. KALAPAHAR HAJI*, 12 C. 406 = 12 I.A. 198, P.C. [R., 8 C.W.N. 266.]

(236)—*Authority to adopt allowing simultaneous adoptions—Authority to adopt delegated to widow to be strictly followed—Gift to a supposed relation as such—Failure of adoption.*—By Hindu Law, there cannot be simultaneous adoptions by two widows of two sons to one father. Such simultaneous adoptions of two or more sons are invalid as to all. [R., 25 C. 662.] The authority delegated to a Hindu widow by her husband to adopt, must be followed strictly and can neither be varied from nor extended to although the act directed may be illegal when done. So, where the power only authorised the simultaneous adoption of two sons, it was impossible to exercise the power otherwise than in strict compliance with its terms, though the result of an attempted adoption in accordance with the power, would be in contravention of the Hindu Law and so without any effective result. [Cons., 24 C. 589.] Where a testator bequeathed all his property to a family Thakur and gave each of his two wives power to adopt son, directing the two adopted sons of both wives to be the *shebait*s of the whole property, *held*, that the adopted sons could not take under the will, either as adopted sons or as *shebait*s. They could not take as adopted sons for their adoption was not valid; and they could not take under the will because there was no gift to them except in the character of *shebait*s, there having been no intention on the part of the testator, a Hindu gentleman, who apparently had no doubt as to the legality of the scheme, to bring in strangers as *shebait*s. *SURENDRO KESHUB ROY v. DOORGA SOONDERY DOSSEE*, 19 C. 513 = 19 I.A. 108, P.C. (2 Ind. Jur. N.S. 24, D.) [R., 9 C.W.N. 309, 4 C.L.J. 537 = 11 C.W.N. 147.]

**Hindu Law—continued.****—2.—Adoption—continued.**

(237)—*Gift to adopted son as such—Adoption invalid—Invalidity of gift—‘Persona designata’*—Where a testator had provided in his will that each of his wives should adopt a son, and gave his property to the sons so to be adopted, but did not provide, nor did he know, who the adopted sons were to be, *held* the adoption being simultaneous by the two widows and therefore invalid, the persons purporting to be adopted did not answer the description in the will of adopted sons, i.e., there was not a sufficient *designatio* of their persons to enable them to take under the will. *DURGA SUNDARI DOSSEE v. SURENDRA KESHAV RAI*, 12 C. 686. (2 Ind. Jur., N.S. 24, 11 C. 463, on the question of *persona designata*.)

(238)—*Power given to two widows to adopt—Right of junior widow to adopt, whether and when exists—Anumatipatra—Giving power to each to adopt successively—Simultaneous or successive adoption—Construction, Principles of.*—Where an *anumatipatra* executed by a deceased Hindu gave a power of adoption to his two wives in the following terms:—“.....I am giving permission in writing that when I shall be no more, each of my two wives shall be at liberty to act according to their own religious tenets by adopting three sons successively, that is, one after another. *Held*, that the *anumatipatra* did not have the effect of sanctioning a simultaneous adoption, and that its effect was to give a power of adoption to the two widows successively, and that, under the terms used, the junior widow had no power to adopt till the senior widow had exhausted her right or refused to use it. The *anumatipatra*, must, if possible, be read as enjoining something in accordance with the law. Apart from the *anumatipatra*, the junior widow had no right to adopt before the senior widow refuse to do so; and on this point, the law seems to be the same in Bengal as it is in Bombay. *BIJOY KRISHNA KARMAKAR v. RANJIT LAL KARMAKAR*, 38 C. 694 = 12 Ind. Cas. 360. (5 B.H.C. App. 181, F.; 18 C. 69, 22 B. 416, R.)

(239)—*Bengal school—Adoption—Preferential right to adopt as between senior and junior widows—Anumatipatra—Construction—Simultaneous or successive adoptions.*—In Bengal, as in Bombay as between co-widows, the senior, that is to say, she whose marriage was earlier, has the preferential right to adopt; the adoption by a junior widow, though earlier in point of time, is void where she adopted without even seeking the senior widow’s consent. Where a Hindu executed an *anumatipatra* as follows:—“In favour of the first wife B S and the second wife S B I am giving permission that, when I shall be no more, each of my two wives shall be at liberty to act according to their own religious tenets by adopting three sons successively, that is, one after another.” *Held*, that the *anumatipatra* did not contemplate simultaneous adoption by the widows but successive adoption in accordance with the rules of law. The proper



*Hindu Law—continued.**—2.—Adoption—continued.*

canon of construction to apply to the instrument is that the Court would consider that the person giving the authority intended his widows to do that which the law allowed, and not to do something which was, if not absolutely illegal, very unusual and not practised among Hindus. *RANJIT LAL KARMAKAR v. BIJOY KRISHNA KARMAKAR*, 16 C.W.N. 440=39 C. 582=14 Ind. Cas. 17. (12 I.A. 198=12 C. 406, F.)

(239-a)—*Adoption by widow subject to agreement that she should be entitled to property during her lifetime—Agreement held binding.*—A Hindu widow agreed to accept a boy in adoption on an express agreement by his natural father that during her lifetime she should be entitled to such property, subject, however, to the boy's maintenance and education, and, upon the faith of such agreement, she adopted the boy. *Held*, that the agreement was binding upon the adopted son, and that the son's proprietary right was subject to the interest thereby created in favour of his adoptive mother. *Held* also that under the Hindu Law the power exercised by a father in giving his son in adoption is not only co-extensive with the power of a guardian, but is more like the power of an absolute proprietor. *CHITKO v. JANAKI*, 11 B. H.C. 199. [F., 15 M. 486, 11 B. 381; R., 2 M. 91, P.C., 4 M. 160, 3 B. 7, 17 B. 503, 22 B. 199, 13 A. 391, 14 M.L.J. 310, 27 M. 577, F.B.]

(240)—*Competency of wife to give in adoption—Conditional adoption—Non-fulfilment of condition—Mistake of fact.*—It is not within the competence of a wife, according to the Hindu Law prevailing in the Bombay Presidency, to give a son in adoption against the will, express or implied, of her husband, the father of that son, or under circumstances from which his dissent can be inferred. [R., 20 B. 699, 1 Bom. L.R. 144; D., 7 C.W.N. 871=30 C. 965.] Where the consent of a Hindu father for the adoption of his son was given on certain conditions, the non-fulfilment of one of the conditions rendered the adoption invalid, in spite of the fact that the condition was unnecessary, and imposed in consequence of a mistake as to the necessity for the assent of Government to the adoption. *RANGUBAI v. BHAGIRTHIBAI*, 2 B. 377. [R., 3 B. 273, 23 B. 250, 25 C. 662; D., 18 C. 385.]

(241)—*Adoption by widow—Agreement by natural father restricting son's interest in the inheritance of his adoptive father.*—An agreement entered into by the natural father of a boy, with the widow of a deceased Hindu, who adopted that boy, by which the boy should inherit only a third of the property of his adoptive father, was not void, but at least capable of ratification when the adopted son became of age. *RAMASAMI AYYAN v. VENKATARAMAIYAN alias CHIDAMBARAIYAN*, 2 M. 91=6 I.A. 196=5 C.L.R. 347, P.C.=4 Sar. 42. (11 B.H.C. 199, R.) [F., 27 M. 577, F.B.=14 M.L.J. 310; Cons., 4 M. 160, 5 C.W.N. 20; R., 26 M. 68, 11 B. 381, 13 A. 391.]

*Hindu Law—continued.**—2.—Adoption—continued.*

(242)—*Widow—Authority to adopt—Agreement—Validity of.*—Where a Hindu widow entered into certain arrangements, which were embodied in an agreement and which were such as would bind the reversioners, and subsequently took a boy in adoption, by virtue of an authority from the husband, the circumstance that the agreement was made in contemplation of an adoption did not render the arrangement invalid. An adoption made by a widow, in pursuance of an authority from the husband, does not relate back to the death of the deceased. *Obiter.*—A minor taken in adoption cannot be bound by the assent of his natural father to terms imposed as a condition of the adoption. *LAKSHMANA RAU v. LAKSHMI AMMAL*, 4 M. 160. [F., 11 B. 609; R., 11 B. 381, 12 M. 490, 27 M. 577=14 M.L.J. 310, 26 M. 143=12 M.L.J. 197; Appr., 9 C.W.N. 795=2 C.L.J. 87.]

(243)—*Hindu Law—Direction, the will of a Hindu testator authorising his widow to adopt—Effect of adoption—Practice—Mitakshara—Undivided brother authorising his widow to adopt—Adoption by widow after the vesting of the estate in her husband's brother.*—Looking at the religious efficacy that ensures from the adoption of a son by a widow to her deceased husband, the Court should not be too astute to defeat an adoption, but should rather do its utmost to support it, unless such adoption is clearly in excess or in breach of the power to make it. Where a Hindu testator made a will appointing a certain person as his manager and directing his widow to adopt a son "with the good advice and opinion of the manager," and the widow, on the manager declining to receive a registered letter sent by her intimating her intention to adopt and asking him to come and see the ceremony performed, made an adoption without the consent of the manager, *held*, that the consent of the manager was not a condition precedent to the validity of the adoption and that the adoption made without consulting him was valid. [Appr., 29 M. 382=16 M.L.J. 276=1 M.L.T. 260=8 Bom. L.R. 700=3 A.L.J. 702=10 C.W.N. 921=4 C.L.J. 171=33 I.A. 145, P.C.; R., 25 C. 662; Diss., 32 B. 499=10 Bom. L.R. 692.] Where, in a joint Hindu family, consisting of two brothers, governed by the Mitakshara Law, one dies issueless, leaving a widow and giving her power to adopt a son, and the surviving brother succeeds to the whole property by survivorship, a son adopted by the deceased's widow, will succeed to his deceased adoptive father's share in the property, although the same might have vested in the surviving brother by right of survivorship. *SURENDRA NANDAN alias GYANENDRA NANDAN DAS v. SAILAJA KANT DAS MAHAPATRA*, 18 C. 385. (18 C. 69, F.) [F., 4 Bom. L.R. 883; R., 26 M. 143=12 M.L.J. 197, 29 B. 51=6 Bom. L.R. 268; D., 22 C. 565, 1 C.W.N. 121.]

(244)—*Conditional adoption—Invalid agreement relating to the adopted son's estate.*—



**Hindu Law—continued.****—2.—Adoption—continued.**

Where the ceremonies of adoption are unimpeached and the deed of adoption is open to no objection, a second deed of adoption subsequently executed by the adoptive mother (widow of the testator) by which she purported to revoke the first deed on the allegation that it ought to have contained a provision postponing the interest of the adopted son until her death, is inoperative and does not render the adoption conditional or affect the rights of the adopted son. Even if it amounted to a condition, the analogy, such as it was, presented by the doctrines of the English Courts of equity, relating to the execution of the powers of appointment, would rather suggest that the adoption would have been valid and the condition void. *BHAIYA RABIDAT SINGH v. INDAR KUNWAR*, 16 C. 556=16 I.A. 53, P.C.=5 Sar. 505. [*F.*, 16 M. 400, 29 M. 161=16 M.L.J. 22; *Expl.*, 14 M.L.J. 310, F.B.; *R.*, 22 B. 199, 27 M. 577, 31 M. 446.]

(245)—*Hindu Law—Adoption—Rights of widow—Maintenance.*—A Hindu widow has no rights beyond those of maintenance in a case where a valid adoption makes the adopted son the legal heir. *MUSSAMUT RATNA DOBAIN v. PURLADH DOBEY*, 7 W.R. 450.

(246)—*Will by adoptive father in favour of his wife, when binding on adopted son.*—The parties to an adoption, that is, the parents on the one side and on the other, can by contract between themselves prescribe the terms on which the adopted boy shall enter the family of the adopting parent, in such manner as to bind the adopted boy, and such a contract can be effectively carried out by a Will executed by the adopting parent. So where, at the time of making an adoption, a Hindu executed a Will containing provisions in favour of his wife, to which the natural father had impliedly assented, the adopted son would be bound by the said provisions in favour of his adoptive mother. *IAKSHMI v. SUBRAMANYA*, 12 M. 490. [*F.*, 21 M. 10; *Expl.*, 16 M. 400; *Cons.*, 14 M. 172; *R.*, 14 M.L.J. 310=27 M. 577.]

(247)—*Adoption made the day after the adoptive father's Will—Natural father's knowledge and consent—Inconsistent pleas.*—An adoption of a boy was made by a Hindu the day after he made his Will. The natural father was aware of the Will. The giving of the son in adoption by the natural father without questioning the Will must be taken to amount to consent on his part to the dispositions made thereby, and the Will and adoption were so closely connected that the revocation of the Will cannot be presumed to have been intended by the testator when he made the adoption. Hence the Will and its dispositions were valid, and the adopted son was not entitled to the ancestral property devised by the Will to the testator's wife. (12 M. 490, *F.*) [*F.*, 27 M. 577=14 M.L.J. 310, F.B.; *R.*, 21 M. 10.] The defendants, as donees from the wife of the testator, first pleaded in their written statement that there was

**Hindu Law—continued.****—2.—Adoption—continued.**

no adoption, and later, on appeal, raised the contention that there was an adoption, but that the adoption and the Will formed one transaction, so that the adopted son could not question the Will. The defendants were held not to be precluded from raising the above pleas. The case in L.R. 15 I.A. 81 was distinguished on the ground that there the matters in both the inconsistent pleas were within the knowledge of the plaintiff who sought to raise them. In this case the matters were not within the personal knowledge of the defendants. Moreover, the plaintiff can under certain circumstances reserve a claim; but a defendant will have to put forward all his claims, since he cannot afterwards raise the omitted pleas in any other action at the suit of the same party. *NARAYANASAMI v. RAMASAMI*, 14 M. 172=1 M.L.J. 38. [*F.*, 8 Bom. L.R. 921; *R.*, 16 M. 121, 1 O.C. 174.]

(248)—*Widow adopting under power from husband—Agreement between natural father and the widow not binding on adoptee.*—An agreement, between a widow making an adoption under an authority derived from her husband and the natural father of the adopted son, would not be binding on the adopted son. Unlike her husband, a widow, with power of adoption derived from her husband, has no power of disposition over the property, and cannot therefore impose any conditions as to the enjoyment of the property by the adopted son. *JAGANNADHA v. PAPAMMA*, 16 M. 400=3 M.L.J. 193. [*R.*, 26 M. 143=12 M.L.J. 197, 27 M. 577=14 M.L.J. 310.]

(249)—*Hindu Law—Adoption of only son—Validity among Lingayats—Custom, Proof of—Conditional adoption Gift by adoptive father at time of adoption if binds adopted son.*—According to the custom of Lingayats in the district of Dharwar and Bijapur, the adoption of an only son is valid. *Quære.*—Whether the *Dwayamushyayana* form of adoption has become obsolete in the southern districts of the Presidency of Bombay? [*R.*, 21 B. 105, 25 B. 537.] More evidence is required to prove a family custom than to prove other facts in issue. The High Court tested very carefully what the witnesses said in their deposition in coming to a conclusion as regards the custom alleged by the parties. [*R.*, 21 B. 110.] Where a Hindu, at the time of taking a son in adoption made a gift of a portion of his ancestral property to his daughters and the deed of gift as well as the adoption deed were executed on the same day, and they mutually referred to each other. *Held* the plaintiff's natural father having been a party to the deed of adoption which referred to the deed of a gift executed along with it, the case fell under the category of conditional adoptions which are allowed by law. *Held*, also, that the deed of gift in favour of the daughters was valid and binding on plaintiff. *BASAVA v. LINGANGAUDA*, 19 B. 428. [*F.*, 3 Ind. Cas. 378; *R.*, 21 M. 10, 14 M.L.J. 310=27 M. 577.]



**Hindu Law—continued.****—2.—Adoption—continued.**

(250)—*Will—Adopted son to take after widow if of good character—Contingent interest—Uncertainty—Implied contract on adoption not to make will.*—A Hindu, by his Will gave his widow a life-interest in a house and provided that, on her death, their adopted son should have the house provided he was of good character and obedient to the widow. *Held*, that the condition, *viz.*, that the adopted son should be of good character and be obedient to the adoptive mother and should survive her, was a condition precedent to the adopted son taking under the will and was not void for vagueness. The adopted son had a contingent reversionary interest in the house during the widow's life-time and this was inalienable. In Hindu adoption there is no implied contract with the natural father that, in consideration of the gift of his son the adopter will not make a will. **SURENDRA NATH GHOSE v. KALA CHAND BANERJEE**, 12 C.W.N. 568. (3 C.W.N. 415 = 26 I.A. 83, *F.*).

(251) — *Conditional adoption—Conditions made by the adopter with the natural parent of the adopted boy—Conditions not valid and binding on the adopted boy.*—An adopted son is not bound by an agreement, made on the occasion of his adoption between natural parent and adoptive mother, whereby the latter is enabled to give away immoveable property that would otherwise have come to him as adopted son. **VENKAPPA v. FAKIR GOWDA**, 8 Bom. L.R. 346.

(252)—*Hindu will, Construction of—Adoption condition precedent—Devolution of property, Effect on.*—Where the intention of a testator was that his properties should go after his death, to a person, who by adoption would become a member of his family and as such, be able not only to make offerings for the testator's spiritual benefit but also to perform the services of the family deity, the adoption would be a condition precedent to the taking of the testator's property by such person, though the testator might have directed that such person should become the owner of the whole of his estate after the death of his widow. **PROBODH LAL KUNDU v. HARISH CHANDRA DEY**, 9 C.W.N. 309. [R., 9 O.C. 119.]

(253)—*Gayawal priests, custom amongst—Agreement between adoptive mother and adopted son, not depending upon the validity of the adoption—Adoption proved invalid—Revocation of agreement—Agreement, if recoverable at will, when parties contemplate revocation on the happening of contingencies—Contract of service—Termination on notice—Civil Court's jurisdiction—Employment of priest.*—Plaintiff, the widow of a Gayawal priest purported to adopt the defendant, a married man, 24 years of age, in accordance with an alleged custom by which it was said, the childless widow of a Gayawal priest is allowed to make such an adoption in order that the adopted son may get his feet worshipped by the clientele of her family for her own immediate benefit and ultimately for

**Hindu Law—continued.****—2.—Adoption—continued.**

the benefit of the adopted son, who takes by inheritance her estate as well as the estate of her husband. The son so adopted was, it was further alleged, liable according to the said custom to be dismissed for misconduct. At the time of the adoption, the plaintiff executed a deed, which recited the fact of the adoption having been made pursuant to the above custom and specified the circumstances, under which the adoption might be cancelled. The alleged custom not having been established; *held*, that the adoption was not valid either as a *dattak* of a *kritrima* adoption, the necessary rites and ceremonies not having been performed and the defendant having already been invested with the sacred thread, married and had a son at the time of adoption. That the transaction was essentially a contract to enable the plaintiff to keep up her connection, spiritual as well as worldly, with her husband's clientele and to enjoy the benefits resulting from such connection, and this contract did not depend for its validity upon the validity of the adoption and was consequently enforceable. That the contract was not determinable at the mere choice of the plaintiff. The contingencies, which, in the contemplation of the parties, was to terminate the contract not having arisen, the plaintiff was not entitled to rescind the contract. The contract in this case was not a contract of service terminable on notice. *Semble*.—The obligation to employ a specified priest is rather a matter of conscience than juristic obligation enforceable in a Court of law. **MUSST. LACHMI DAI MOHUTAIN v. KISSEN LALL PAHARI MAHATON GAYAL**, 11 C.W.N. 147 = 4 C.L.J. 537.

(254)—*Will—Adoption—Power of curtailing right of prospective adopted son—Maintenance of male member, separate, not allowable.*—A Hindu testator has the power to make a will, curtailing the rights of his prospective adopted son. Where a Hindu makes a disposition of property either by will or deed, and, as part of the same transaction, takes in adoption a boy, whose natural father is aware of the dispossession and assents to it, knowing that otherwise the adoption would not be made, such disposition will be good as against the adopted son. (12 M. 490, 21 M. 10, 19 B. 428, *F.*); Therefore, if the parent of the boy, when giving him in adoption agrees with the widow that she shall remain in possession of the property for her life, and the widow adopts the boy on those terms, the agreement will be binding on the adopted son. (11 B.H.C. 199, 11 B. 381, 27 M. 577, *F.*; 16 C. 556, 16 I.A. 53, P.C., *D.*) A male member of a joint Hindu family, who refuses to remain joint in food, is not entitled to separate maintenance out of the family funds. **HARENDRA NATH AVASTI v. SHIBO SUNDARI DEBI CHOWDHURANI**, 3 Ind. Cas. 376.

(255)—*Agreement to constitute heir, effect of—An adopted son not in a higher position than a natural son—Contract not to make a will, whether implied on adoption.*—Where the adopter,



**Hindu Law—continued.****—2.—Adoption—continued.**

at the time of making an adoption, agrees to constitute the adoptee heir to his property, the adopter is not thereby deprived of the right of exercising any power he might have by law of making a will. Saying that he had constituted the adoptee heir to his property means only that he had given him the same right of inheritance as a natural son would have. The agreement cannot imply any contract not to make a will. (The opinion of Sir F. MacNaghten on the point was rejected). In a Hindu adoption, there is no implied contract with the natural father that, in consideration of the gift of his son, the adopter will not make a will. **RAJA RAO VENKATA SURYA MAHIPATI RAMA KRISHNA RAO BAHADUR v. THE COURT OF WARDS**, 22 M. 383 = 3 C.W.N. 415, P.C. = 25 I.A. 83 = 9 M.L.J. Supl. p. 1 = 1 Bom L.R. 277 = 7 Sar. 481. (1 M.H.C. 141, 1 M.H.C. 349, 1 M.H.C. 455, 2 M.H.C. 128, 3 M.H.C. 5, 4 M.H.C. 463, 6 M.H.C. 93, 8 M.H.C. 157, *Disappr.*, 13 M. 197, *Appr.*) [*F.*, 12 C.W.N. 668.]

(256)—*Right of adopted son to succeed to collaterals as well as direct relations.*—An adopted son, according to the Hindu Law, is entitled to succeed to his collateral as well as his direct relations by adoption. **SUMBOOCHUNDER CHOWDRY v. NARAIN DIBEA**, 3 Knapp 55.

(257)—*Illatom custom—Status of son-in-law—Adopted son—Commensality—Survivorship.*—Where a person is taken as illatom son-in-law, and subsequently another is taken as an adopted son, the adoption cannot divest any interest which had already vested in the illatom son-in-law. As the illatom son-in-law and the natural son share equally, the adopted son cannot be put in a better position than the natural son. The right of survivorship is an incident under Hindu law, of co-parcenary which is only possible between the male descendants of a common paternal ancestor, and, in the absence of proof that it is also an incident of the illatom custom, it cannot be treated as such, and an illatom son-in-law and an adopted son who live in commensality cannot thereby be regarded as co-parceners. **CHENCHAMMA v. SUBBAYYA**, 9 M. 114. [*R.*, 17 M. 48, 3 M.L.J. 239.]

(258)—*Affiliation by Illatom—Co-parcenary relation.*—It is unsafe to infer without specific evidence that the affiliation by Illatom is analogous to adoption in any other respect save in the circumstance that the Illatom son-in-law is regarded for purpose of inheritance as a member of the family into which he is admitted. (4 M. 272, *F.*). Ordinarily, under Hindu Law, the relation of which the right of survivorship is an incident is only possible between descendants of a common paternal ancestor. The right of survivorship is not an ordinary incident of illatom custom in Nellore. **MULLA REDDI v. PADMAMMA**, 3 M.L.J. 239.

(259)—*Illatom son-in-law—Custom of the family—Marriage after taking into the family—Valid.*—Where a person was taken into the

**Hindu Law—continued.****—2.—Adoption—continued.**

family with the object of being married to the daughter of the family, and the marriage takes place afterwards, this is sufficient to constitute the person so taken an illatom son-in-law, though the person so taking dies before the celebration of such marriage. **VENKAYALAPATI VENKATACHALAM v. NAGENDLA BUTCHAMMA**, 2 M.W.N. 1911, 193.

(260)—*Adoption—Appointment to perpetuate the illam.*—A Nambudri widow may adopt in view to perpetuate her illam provided her husband has not prohibited the adoption, and by custom she may also authorise a Nambudri Brahman to marry for the illam and raise up an heir to it. **VASUDEVAN v. THE SECRETARY OF STATE FOR INDIA**, 11 M. 157. [*R.*, 3 M.L.J. 242, 19 B. 428, 21 B. 105.]

(261)—*Illatom—Requisites to constitute—Necessity of specific agreement—Death of husband—Widow's power to make person already married, illatom son-in-law.*—The mere fact of son-in-law being allowed to live in his father-in-law's house and the mother-in-law employing the son-in-law to pay kist after her husband's death are not sufficient to constitute him an illatom son-in-law. There must be some specific agreement as to the son-in-law being made an illatom son-in-law, to constitute him as such. It is extremely doubtful that a female could, after her husband's death and when a person had already been married to that husband's daughter (i.e., her step-daughter), constitute him an illatom son-in-law. **GADIYAM NARAYUDU v. MALLAVARAPU VENKAMMA**, 11 M.L.T. 121 = 22 M.L.J. 265 = 13 Ind Cas. 866.

(262)—*Adoption among the Gayawals—Practice.*—Among the Gayawals of Gaya, although adoption of a son may be made so as to give him rights of succession to his adopting father, this will not necessarily sever his connection with his own natural father, or his family. **LACHMAN LAL CHOWDHRI v. KANHAYA LAL MOWAR**, 22 C. 609, P.C. = 22 I.A. 51 = 6 Sar. 558.

(263)—*Custom—Garbhari Gosavis—Adoption of a stranger—Rights of natural born sons inter se and against the adopted stranger.*—According to the custom obtaining among the Garbhari Gosavis, a stranger may be adopted, who would acquire rights of succession superior to a son born; but one son is never adopted to the prejudice of the others and in the absence of an adopted stranger, sons succeed equally. **BALGIR v. DHONDGIR**, 5 Bom. L.R. 114.

(264)—*Inheritance—Right to inherit to person taken out of family by adoption.*—Under the Hindu Law, a member of the natural family cannot succeed to one taken out of the family by adoption. By adoption, the son of one man ceases to be such in the eye of the law and becomes the son of another man, inheriting thenceforth in his adoptive family and having no more rights in his own family. The



**Hindu Law—continued.****—2.—Adoption—continued.**

severance of the person adopted from his natural family is so complete that no mutual rights between them to property exists. *SRINIVASA AYYANGAR v. KUPPAN AYYANGAR*, 1 M.H.C. 180. [F., 25 M. 394.]

(265)—*Adopted son's property—Partition of—Ancestral or self-acquired.*—Adoption is in fact tantamount to the birth of a son to the adopter, and the property which an adopted son takes from the adopter must be considered an ancestral property. An adopted son's son cannot claim partition and possession, during his father's lifetime, nor can he claim that a definite portion of the ancestral property should be declared subject to his right as heir. *HEERA SINGH v. BURYAR SINGH*, 1 Agra. 256.

(266)—*Adopted son — Representation.*—An adopted son represents his adoptive father, to whose share he is entitled, and takes the same share with heirs other than the legitimately-begotten sons of his adoptive father. *TARA MOHUN BHUTACHARJEE v. KRIPA MOYEE DEBIA*, 9 W.R. 423.

(267)—*Adoption—Succession by adopted son with collateral heirs.*—*Dattaka Chandrika* s. V, paras 24, 25.—The position of an adopted son is affected only by the birth of a subsequent legitimately begotten son of the adopting father, and when an adopted son comes to share, with heirs other than the legitimately begotten sons of his adoptive father in the property of kinsmen, he takes the same share that they would have. He represents his adoptive father, and is entitled to the share which his father would have obtained. The true meaning of paragraphs 24 and 25 of s. V of the *Dattaka Chandrika* is that an adopted son and the adopted son of a natural son stand in the same position; and this rule does not extend to distant collateral heirs. *DINONATH MUKERJEE v. GOPAL CHURN MUKERJEE*, 9 C.L.R. 379.

(268)—*Adoption—Rights of adopted son—Inheritance ex parte maternal.*—A, a Hindu, gave authority of his wife C to adopt a son in the event of the death of his natural son, B. B. died childless. C adopted D. Held, that although, as heir to A, D could not displace the widow and full heir of B, and although, as heir to B, he came after B's widow and mother, D might succeed when, on their deaths, he united in himself the capacities of heir to A, and heir to B. The rights of an adopted son are in every respect similar to those of a natural-born son. An adopted son takes by inheritance from the relatives on the maternal side of his adoptive father, in the same manner as a natural born son. There is no difference as regards *sapinda* relationship between the adopted and the natural born son. *JOY KISHORE CHOWDHRY v. PANCHOO BABOO*, 4 C.L.R. 538. [F., 8 C.L.R. 57.]

(269)—*Succession lineally and collaterally.*—An adopted son succeeds not only lineally but

**Hindu Law—continued.****—2.—Adoption—continued.**

also, collaterally, to the relations of his adoptive father. *SUMBHOCHUNDER CHOWDHRY v. NARAINI DEBIA*, 5 W.R. 100, P.C.

(270)—*Termination of authority to adopt—Position of adopted son in the family of adoption—Collateral succession of adopted son.*—An instrument of permission to a Hindu wife to adopt a son should she be left a widow, becomes, on the estate vesting in her son's widow, such son having succeeded to the estate and died childless, incapable of execution, and the power is at an end. (10 M.I.A. 279, P.C., *Cons. & Expl.*) [F., 10 M. 505, P.C.=14 I.A. 67, 32 C. 861=1 C.L.J. 270, 4 C.L.J. 357=33 C. 1306=11 C.W.N. 12; *Appl.*, 17 B. 164; *R.*, 9 B. 94, 11 B. 381, 14 B. 463, 19 B. 331, 22 B. 416, 22 B. 551, F.B., 23 B. 327, 25 B. 306, 7 M. 401, 26 B. 526; *Cons.*, 5 C.W.N. 20; *D.*, 17 C. 518.] An adopted son occupies the same position in the family of the adopter as a natural born son, except in a few instances, which are accurately defined both in the *Dattaka Chandrika* and the *Dattaka Mimamsa*. [F., 10 C. 232=10 I.A. 138, P.C.; *Expl.*, 1 C.L.J. 388.] An adopted son succeeds not only lineally, but collaterally, to the inheritance of his relations by adoption. [R., 17 C. 518.] The adopted son of the maternal grandfather of the deceased was held to be a preferential heir to such maternal grandfather's grandnephew. *PADMAKUMARI DEBI CHOWDHURANI v. THE COURT OF WARDS*, 8 C. 302, P.C.=8 I.A. 229=4 Sar. 285. [R., 32 B. 499=10 Bom. L.R. 692.]

(271)—*Adopted son, Rights of—Succession of adopted son to relatives of adoptive mother.*—The rights of an adopted son, unless curtailed by express texts, are in every respect similar to those of a natural born son. [R., 4 C.L.J. 357=31 C. 1306=11 C.W.N. 12.] The adopted son succeeds to the *sapinda* kinsmen of his father, and as regards the relationship of *sapinda*, there is no difference between the adopted and the natural born son. (3 Knapp's P.C. 55=1 Suth. P.C.C. 25, F.; 10 M.I.A. 279, *Expl.*) [R., 6 C. 256=7 C.L.R. 145, F.B., 6 C. 289=7 C.L.R. 478, 8 C.L.R. 57, 9 C.L.R. 379.] According to the interpretation of the Hindu Law, prevailing in Bengal, an adopted son takes by inheritance from the relatives on the maternal side of his father by adoption, in the same manner as a son begotten would take—*Per Jackson and McDonnell, JJ. Quære.* Whether the adopted son succeeds to the relatives of his adoptive mother? *Per Mitter, J.* *PUDDO KUMAREE DEBEE v. JUGGUT KISHORE ACHARJEE*, 5 C. 615. (On appeal 8 C. 302=8 I.A. 229.) [*Affirmed*, 8 C. 302=8 I.A. 229; *R.*, 11 B. 381, 17 C. 518, 33 C. 947=10 C.W.N. 695=3 C.L.J. 502, 5 C.W.N. 20.]

(272)—*Bengal school—Succession of adopted son on adoptive mother's side.*—An adopted son in Bengal occupies, as regards not only lineal, but collateral succession to his relations by adoption, the same position in the family of



**Hindu Law—continued.****—2.—Adoption—continued.**

adoption as a natural born son, except in a few instances accurately defined both in the *Dattaka Chandrika* and the *Dattaka Mimamsa*. An adopted son, adopted by a Hindu widow under her deceased husband's authority, would therefore be entitled to succeed to the estate of his adoptive mother's father on the death of his widow, the adoptive mother having predeceased her mother. *KALI KOMUL MAZUMDAR v. UMA SANKAR MOITRA*, 10 C. 232, P.C. = 13 C.L.R. 379 = 10 I.A. 138 = 4 Sar. 458. (On appeal 6 C. 256.) (8 C. 302, F.) [F., 3 C.L.J. 502 = 33 C. 947 = 10 C.W.N. 695 ; R., 1 C.L.J. 388, 17 C. 518.]

(273)—*Adopted son's succession to adoptive mother's relatives — Dattaka Chandrika and Dattaka Mimamsa, authority of.*—An adopted son, according to Hindu Law, takes by inheritance from the relatives of his adoptive mother in the same way as a legitimate son (in the case of the maternal uncle by adoption, i.e., the adoptive mother's brother). 22 W.R. 396, W.R., F.B., 121. 7 M.H.C. 245, *Overruled* ) "Both the *Dattaka Chandrika* and the *Dattaka Mimamsa* hold that, according to the general sense of the term *sapinda*, it would include both agnates and cognates related by a common oblation. It is clear therefore, that according to the authority of both these treatises on the law of adoption, which treatises have been always accepted throughout India as conclusive on questions related to it, an adopted son takes by inheritance from the relatives of his adopted mother. *UMA SUNKUR MOITRO v. KALI KOMUL MOZUMDAR*, 6 C. 256 = 7 C.L.R. 145, F.B. [Affirmed on appeal, 10 C. 232 = 13 C.L.R. 379 = 10 I.A. 138, P.C. ; see also, 8 C. 302 = 8 I.A. 229, P.C. ; R., 17 A. 294, F.B.]

(274)—*Kritrima form of adoption in Mithila, husband's consent not essential for—Status of kritrima son and right to succession.*—Initiation into the family of the adopted does not result from the *kritrima* form of adoption obtaining in the Mithila country. The relation of *kritrima* son extends to the contracting parties only and he does not become a member of the adopting family so far as regards collateral heirship. In *Mithila*, the widow is at liberty to make a *kritrima* adoption without special authority for the purpose, the adoptee in such a case succeeding to her exclusive property only and not to that of her deceased husband. Consequently, the *kritrima* adopted son, when adopted by a widow with or without the authority of her husband, cannot in any case succeed to more than his adoptive mother's property, and has no claim to that of collaterals. *MUSAMUT SHIBOO KOEREE v. JOOGUN SINGH*, 8 W.R. 155. [R., 10 B.H.C. 268.]

(275)—*Adoption—Adopted son no better than natural son—Self-acquisition—Right of adopted son to—Will.*—An adopted son does not stand in a better position, with regard to the self-acquired immoveable property of his adoptive father, than a natural-born son would occupy and there is nothing in the Hindu law in this Presi-

**Hindu Law—continued.****—2.—Adoption—continued.**

dency to prevent a father from disposing by will of his self-acquired immoveable property, and so defeating the rights by inheritance of his adopted son. *PURSHOTAM SHAMA SHENVI v. VASUDEV KRISNA SHENVI*, 8 B.H.C. O.C. 196. [R., 10 B. 528.]

(276)—*Adoption by widow—Divesting of property from widow and vesting of it in son—Decree obtained by widow for possession of share in joint property, to be deemed to be for benefit of son—Widow liable to account as guardian for profits of property subject to maintenance.*—After a widow has exercised her power to adopt and executed the act of adoption, which has divested the property from her and vested it in the adopted son, a suit prosecuted by her for an undivided share in the joint property must be considered to have been maintained by her in her name for the benefit of the adopted son, and the decree obtained therein would enure for his benefit, so that she would hold possession obtained under the decree as trustee for the son. The share that the widow might thus be put into possession of, under the decree, she will have to hold subject to her liability to account for the profits of it to her adopted son as his guardian and trustee, being entitled herself only to maintenance out of it. *DHURM DAS PANDEY v. MUSSUMAT SHAMA SOONDREE DIRIAH*, 6 W.R. P.C. 43 = 3 M.I.A. 229. [Appr., 16 A. 40, P.C. = 15 I.A. 195 ; R., 16 B. 119, 26 M. 143, 12 M.L.J. 197, 33 B. 88 = 10 Bom. L.R. 1029 ; D., 12 B.H.C. 17.]

(277)—*Inheritance vested, cannot be divested by adoption*—An inheritance that has once vested cannot be defeated and divested by an adoption. *ANNAMMAH v. MABBU BALI REDDY*, 8 M.H.C. 108. [R., 12 C. 246, 19 B. 331, 22 C. 565, 22 B. 416, 22 B. 551, F.B., 8 M.L.J. 173, 25 E. 306, 7 M.L.T. 236 = 4 Ind. Cas. 386 = 33 M. 228 ; D., 18 C. 69, 18 C. 385.]

(278)—*Adoption by mother after estate vested in widow of son.*—An adoption cannot be made by a mother after the estate has vested in the widow of her son, the power of the mother, if any, given by her husband, having then come to an end, and being incapable of execution. *THAYAMMAL v. VENKATARAMA*, 7 M. 401.

(279)—*Adoption cannot divest property once vested.*—Where a Hindu widow succeeds to the estate of her adopted son, on his death, as his heir, and then alienates the property, a subsequent adoption by her, cannot divest the alienee of his rights under the previous alienation. *GOBINDO NATH ROY v. RAM KANDY CHOWDHRY*, 24 W.R. 183. [F., 2 C. 265 ; D., 4 C. 523, 11 B. 609 ; Cons., 5 C.W.N. 20 ; Doubt., 32 C. 165 ; R., 8 C.L.J. 542.]

(280)—*Divesting an estate once vested—Position of widow clothed with authority to adopt—Vesting and divesting of estates.* A Hindu widow, clothed by her deceased husband with authority to adopt a son, does not hold the



**Hindu Law—continued.****—2.—Adoption—continued.**

property of her deceased husband or that of any other person, to whom the adopted son, if one in existence at the time the succession opens, would be an heir, as the trustee of the future adopted son. An estate once vested in a person by inheritance cannot be divested by the adoption of a son by a widow, after her husband's death, subsequent to the date at which the inheritance opened out. *KALLY PROSONNO GHOSE v. GOCOL CHUNDER MITTER*, 2 C. 295. [D., 11 B. 609, 18 C. 69; R., 7 C. 178 = 8 C.L.R. 401, 12 C. 246, 14 B. 463, 18 C. 385, 19 B. 331, 1 C.W.N. 121, 22 B. 551, F.B., 25 B. 306 = 2 Bom. L.R. 1101, 8 C.L.J. 542.]

(281)—*Adopted son claiming share in property vested in another before adoption—Fraud.*—An adopted son could not claim a share of the property of his adoptive father's brother, which had already vested in another nephew before the adoption, on the ground that, but for the fraud practised by the latter in suppressing a will, the adoption could have taken place, before the estate in question opened out for succession. Such fraud would be too remote to affect the adopted son, where, as in this case he was not in existence at the time the fraud was committed. *NIL COMUL LAHURI v. JOTINDRO MOHUN LAHURI*, 7 C. 178 = 8 C.L.R. 401. [Affirmed, 12 C. 18, P.C.; R., 12 C. 246, 18 C. 385.]

(282)—*Adoption after the death of collateral—Succession to estate of such collateral—Fraud on part of heir in whom estate vested.*—According to Hindu Law, as laid down in the decided cases, an adoption effected after the death of a collateral relation does not entitle the adopted son to come in among the heirs of such collateral, even in the case of proof of fraud on the part of heir, in whom such estate had vested before the adoption, in delaying the adoption. *BHUBANESWARI DEBI v. NILCOMUL LAHIRI*, 12 C. 18, P.C. = 12 I.A. 137 = 4 Sar. 651. (On appeal from 7 C. 178.) [F., 12 C.L.J. 87 = 9 C.W.N. 795; Cons., 14 B. 463, 22 B. 416.]

(283)—*Hindu Law—Divesting of vested estate by subsequent adoption.*—Where property had vested in A's (a Hindu) father's mother on A's dying unmarried, held, the estate could not be divested by the subsequent adoption by A's step-mother to her deceased husband. *DROBOMOYEE CHOWDHRAIN v. SHAMA CHURN CHOWDHRY*, 12 C. 246. [R., 22 C. 565; D., 18 C. 69, 18 C. 385.]

(284)—*Untonsured widow of Daivadnya caste, validity of adoption made by—Necessity of ceremonies on adoption among Brahmins—Divesting of widow's estate on adoption—Rights of adopted son—Estoppel of widow from impeaching validity of adoption—Agreement by adopting widow with adoptee's natural father—Beneficial ownership of estate left with widow for life—Agreement how far valid and binding on adopted son.*—This was a suit brought with the object of obtaining the decision of the Court as to whether the plaintiff, as the son adopted

**Hindu Law—continued.****—2.—Adoption—continued.**

to the defendant's late husband, or to the defendant the widow herself, was entitled to the possession and enjoyment of the family property. The performance of certain ceremonies intended for adopting plaintiff was admitted by the defendant, who, however, pleaded that, she not having undergone tonsure at the time of the adoption or ever since, the adoption was not valid by reason of the custom in the *Daivadnya* caste precluding adoption until she had got her head tonsured. The question had to be decided whether adoption by the widow of an orthodox Brahmin would be invalid if she had not undergone tonsure before adoption. It appeared from the evidence that, in this case, the religious ceremonies requisite for the adoption were performed and before the defendant took part in the ceremonies, *shastris* were consulted as to whether the defendant, while untonsured could properly do so, and on making certain expiatory ceremonies she was pronounced competent for the purpose. It was therefore not competent for the Court to hold otherwise. Even if the *shastris'* opinions differed, the Court could not go on to decide between conflicting opinions upon such a question of ecclesiastical etiquette. [Appr., 15 M. 486 = 2 M.L.J. 114; R., 24 B. 218, 18 M. 145 = 5 M.L.J. 144, 22 B. 590, 30 A. 549 = 5 A.L.J. 568 = A.W.N. 1908, 231 = 4 M.L.T. 385.] The issue raised in this case as to whether the defendant was not estopped from disputing the validity of the adoption made by her was decided in favour of the plaintiff. It was not open to the defendant actively to assert, in a Court of law, that the plaintiff's adoption by her was invalid. She it was who took the plaintiff in adoption and brought him up and got his marriage celebrated as the adopted son of her husband. She could not therefore, at this stage when plaintiff might have lost all right in his natural family, be permitted to plead that she had not adopted him validly. On the question whether, by virtue of the adoption, (if valid), the plaintiff could claim the property to which the defendant has succeeded as heir of her deceased natural son, it was held that the widow's estate was divested on adoption, and the effect of the adoption would be the same, whether she had succeeded to the estate as heir to her son or to her husband. [F., 5 C.W.N. 20; R., 12 B. 638, 11 C.P. L.R. 49, 23 B. 327.] With regard to the agreement entered into at the time of the adoption of the plaintiff in this case between the defendant and the natural father of the plaintiff, on the true construction of it, it was found to have the effect of securing the beneficial ownership of the estate for her life, with the possible discretionary power of management, subject to the duty of maintaining and educating the plaintiff. On the further question whether it was competent for the plaintiff's father on his behalf, to enter into agreement which secured such rights to the adopting mother as against the adopted son, it was held that such an agreement could be



*Hindu Law—continued.**—2.—Adoption—continued.*

validly entered into by the adoptee's father so as to bind him and the adopting widow was, therefore, entitled to the benefits under its provisions. *RAMJI VINAYAKRAV JAGANNATH SHANKERSETT v. LAKSHMIBAI*, 11 B. 381. [F., 27 M. 577, F.B.=14 M.L.J. 310, 3 Ind. Cas. 378; Appl., 8 Bom. L.R. 346; R., 4 Bom. L.R. 963.]

(285)—*Hindu Law—Adoption—Estate vested in younger brother's widow—Subsequent adoption by widow of elder brother cannot divest.*—An adoption made by a Hindu widow under her husband's authority has the effect of divesting an estate vested in any member of the undivided family of which the husband himself was a member. It does not, however, divest the estate of one on whom the inheritance has devolved from a lineal heir of the husband. Also, adoption by a widow, though authorised by the husband, cannot divest the estate which has already vested in a collateral relation of the husband in succession to some other person who had himself become owner in the meantime, and this rule was taken to disentitle the plaintiff alleged to be adopted to a predeceased elder brother of the family by his widow, from claiming to divest the estate which had, previously to the adoption, vested in the defendant, the widow of the younger brother on his death as full owner as the last survivor of the joint family. The subsequent adoption of the plaintiff by the widow of the predeceased elder brother could not have the effect of divesting the defendant of the estate claimed by her as inherited from her husband, and not through his elder brother. *CHANDRA v. GOJARABHAI*, 14 B. 463. [R., 20 B. 250, 22 B. 416, 22 B. 551, 23 B. 327, 23 B. 250, 29 B. 410=7 Bom. L.R. 436. 33 M. 228=7 M.L.T. 236=4 Ind. Cas. 386.]

(286)—*Adoption by one of two co-widows without consent of other widow—Effect of adoption on inheritance—Divesting of vested estate by subsequent adoption.*—An adopted son is not entitled to claim as preferential heir, the estate of any other person besides his adoptive father, when such estate has vested before his adoption in some heir other than the widow who adopts him. (10 M.I.A. 279, 5 B. 48, 8 M.H.C. 108, 12 C. 246, 18 C. 69, 13 C. 385, R.) An adoption by one of two widows cannot divest the other widow of her rights to property to which she has succeeded as heiress of her son. An adoption could not be made without the consent of the co-widow in whom, by inheritance from her son, the whole estate had vested. *FAIZUDDIN ALI KHAN v. TINCOWRI SAHA*, 22 C. 565. [F., 28 B. 461=6 Bom. L.R. 464, 9 C.W.N. 795=2 C.L.J. 87.]

(287)—*Adoption divesting estate already vested in another—Consent of such other.*—Under the Hindu Law, an adoption made to one person will not divest the estate of any one who has taken that estate as heir of another person. In the present case, D, a childless Hindu, died

*Hindu Law—continued.**—2.—Adoption—continued.*

in 1852 leaving him surviving three widows and V a widow of his pre-deceased son. The estate was taken by his widows which ultimately became vested in L, the survivor of them. While L was thus in possession, V adopted the present plaintiff. Sometime after, in execution of a decree against L, a considerable amount of the property was sold in Court auction and was purchased by the present defendant. In 1886 the plaintiff brought the present suit against the defendant, claiming as the adopted son of V, to be entitled to all the estate of his adoptive grand-father D. *Held*, that the plaintiff could not recover, because his adoption by V, which could only be to her husband, could not divest L of the estate which had come to her as heir of her deceased husband, and that, even on D's death, the estate had vested in his widows with remainder to his collateral heirs; and that, therefore, even if L had assented to the adoption of the plaintiff by V, his claim would not stand against the rights of D's collaterals who would succeed on L's death. *SHRI DHARNIDHAR v. CHINTO*, 20 B. 250. [R., 22 B. 416, 551, 23 B. 250, 327, 25 B. 306, 29 B. 410=7 Bom. L.R. 436]

(288)—*Adoption—Succession of divided brother by inheritance—Adoption by widowed daughter-in-law of deceased brother—Divesting of estate.*—A had a son G, who died before his father without issue leaving a widow. A died leaving him surviving his said widow daughter-in-law and a separated brother S. Soon after the death of A, S gave one of his sons in adoption to A's daughter-in-law and the latter duly adopted him. The adopted son was held to have become, on adoption, not only the son of A's son G, but also the grandson and heir of A himself and, having been adopted with the assent of S, divested from S the estate which had vested in him by inheritance to A. The father's line is continued in the person of the boy adopted (with the assent of those capable of giving the validating assent) by his son's widow to her husband, just as though the latter had left a natural son born in his lifetime or a posthumous son. The adoption when made enures for the benefit not of the adoptive father alone. It benefits also the immediate ancestors of the adoptive father. For the purposes of inheritance, the adoption may be considered as relating back to the death of the adoptive father divesting all estate which has, during the intermediate period, become vested as it were conditionally in another. *BABU ANAJI v. RATNOJI*, 21 B. 319. [F., 8 C.W.N. 266; R., 22 B. 416, 22 B. 551, 23 B. 250, 23 B. 327. 26 M. 143=12 M.L.J. 197.]

(289)—*Dayabhaga—Adoption after vesting of inheritance.*—Under the Dayabhaga law, when the property descends upon a male owner, on the death of the last full owner, he takes therein a full and distinct interest, and in no circumstances is there any abeyance of the rights of property, nor can the property, when



**Hindu Law—continued.****—2.—Adoption—continued.**

once so vested, be divested. Therefore, although adoption prior to the vesting of the inheritance entails loss of the right of claiming any share in the estate of the adopted person's natural father or natural relations, yet the interest which is once vested in a son upon the death of a father is not divested by his subsequent adoption into another family. *BEHARI LAL LAHA v. KAILAS CHUNDER LAHA*, 1 C.W.N. 121. (10 M.I.A. 279, 2 B.L.R. 103, F.B., 2 C. 295, 7 C. 178, R.; 18 C. 69, 385, D.) [R., 29 M. 437=16 M.L.J. 178.]

(290)—*Decree against widow representing estate—Liability of minor adopted son—Minor not a party to the decree—Minor's liability—Suit for mesne profits.*—Where a widow, during the pendency of a suit, adopted a minor to her deceased husband and the minor was not made a party to her appeal from the decree made therein against her as representing the estate, *held*, that the liability under the decree so made having devolved upon the minor on his adoption and the widow's estate also being divested by the adoption, the widow could properly continue to defend, but only as guardian of the minor adoptee. *Held*, also that as the above decree had diminished the minor's estate, the widow's appeal thereon was for the minor's benefit and that he was bound by the adverse decree of the appellate Court, though he was not formally made a party thereto. (3 M.I.A. 229, R. & Appl.) [F., 20 C. 11, 20 B. 534, 30 C. 1021=7 C.W.N. 774, P.C., R., 23 C. 374, 3 C.W.N. 843, 5 C.L.J. 491=11 C.W.N. 593=2 M.L.T. 207=34 C. 642, F.B., 9 O.C. 339, 5 C.L.J. 434; D., 31 M. 464=4 M.L.T. 190.] It was also held in the case that the minor, by his adoptive mother as his guardian, was liable in a suit for mesne profits which was brought after the decree upon title, it having been made clear that that suit was substantially brought against the minor. *HARI SARAN MOITRA v. BHUBANESWARI DEBI*, 16 C. 40, P.C.=15 I.A. 195=5 Sar. 198. (14 C. 204, Appr.) [F., 20 C. 11, 20 B. 534, 30 C. 1021=7 C.W.N. 774, P.C.; R., 23 C. 374, 8 C.W.N. 843, 5 C.L.J. 491, 11 C.W.N. 593=2 M.L.T. 207=34 C. 642, F.B.; 9 O.C. 339, 5 C.L.J. 434; D., 31 M. 464=4 M.L.T. 190.]

(291)—*Hindu Law—Dwyamushyayana adoption—Succession by natural mother to adopted son.*—A Dwyamushyayana adoption in the Nitya or absolute form depends upon and has its efficacy in the stipulation entered into at the time of the adoption (e.g.,) "this is the son of us two" between the natural father and the adoptive father, and does not depend upon the performance of any initiatory ceremony by the natural father. If the gift of the son is a qualified gift, as in the absolute Dwyamushyayana form, the son who is so adopted does not cease to have filial relation with his natural parents, nor is his relation generally with the family of his natural parents

**Hindu Law—continued****—2.—Adoption—continued.**

severed. The natural mother of a son who has been adopted into another branch of a family by the Nitya Dwyamushyayana form of adoption, retains her status and rights as natural mother so as to be capable of inheriting the property of her son who has been so adopted, in the absence of nearer heirs. The mother occupies a higher position in regard to succession to her son than that of *bandhus* or *spindas*, her claim being placed on the ground of consanguinity and of the merit she possesses from having conceived and given birth to her son. *BEHARI LAL v. SHIB LAL*, 26 A. 472=1 A.L.J. 137.

(292)—*Power to cancel adoption.*—Where an adoption has been formerly and validly made, the adoptive father cannot disaffirm it, even with the concurrence of the natural father. *CHANDANIA v. SALIG RAM*, 26 A. 40=A.W.N. 1903, 163.

(293)—*Adopted son having a son—The son remains in the family of his birth.*—When a married Hindu, having a son, is given in adoption by his natural father, he alone passes into the family of his adoptive father. His son does not pass and lose his *gotra* and rights of inheritance in the family of his birth. *KALGAUDA TAVANAPPA PATIL v. SOMAPPA TAMMANGAUDA PATIL*, 11 Bom. L.R. 797=3 Ind. Cas. 809=33 B. 669.

(294)—*Mitakshara—Adopted son, position of—Ancestral property*—Under the Mitakshara School of Hindu Law, the position of an adopted son is exactly the same as that of a natural son, and such son acquires a right in the ancestral property of the father, immediately on his adoption. *BAHADUR MIAN v. SHAHEB RAM MARWARI*, 9 C.L.J. 472=4 Ind. Cas. 171.

(295)—*Adoption by widow declared invalid—Continued residence of adoptee with widow—Renunciation of rights in natural family in consideration of widow's reversioners relinquishing their rights to succeed on widow's death—Transfer of Property Act, s. 6 (a)—Limitation Act, art. 127—Adoptee's rights in natural family.*—Where a person was adopted, when a child, by the widow of one S, but, in 1883, his adoption was declared invalid, and he, however, continued to reside with the widow and, in 1896, orally renounced his rights to share in the property of his natural family, in consideration of a relinquishment by the reversionary heirs of S of their rights to succeed to his estate on the death of the widow; *held*, that the oral renunciation, even if valid, was without consideration, inasmuch as the relinquishment by the reversioners was in effect a transfer of an expectancy, which was a nullity by virtue of s. 6 (a) of the Transfer of Property Act. (29 C. 355, R.) Moreover, there is nothing to indicate that he abandoned before 1896, his claims to enjoy the property of his natural family or that



**Hindu Law—continued.****—2.—Adoption—continued.**

he was excluded from such enjoyment, and, therefore, art. 127, Limitation Act, is no bar to a suit by the adopted son for his share of the property of his natural family. *DHOORJETI SUBBAYYA v. DHOORJETI VENKAYYA*, 2 M.L.T. 184=30 M. 201. [F. 7 M.L.T. 174, R., 10 C.L.J. 263=3 Ind. Cas. 178.]

(296)—*Succession—Survivorship.*—Daughter's sons take jointly with benefit of survivorship the separately acquired property of their maternal grandfather. *VENKAYAMMA v. VENKATARAMANAYAMA*, 4 Bom. L.R. 657, 25 M. 678=7 C.W.N. 1=12 M.L.J. 299=29 I. A. 156.

(297—299)—*Effect of adoption—Alienation by the widow before adoption—Right of the adopted son to dispute the alienation.*—Where a Hindu widow, who has inherited her husband's property, adopts a son, the adoption has the effect of divesting her of the property and putting an end to her estate as heir of her husband. The adoption has the same effect as her death with this difference that after the adoption she has a right of maintenance against the adopted son during the rest of her life, whereas such right ceases on her death. But the right of maintenance, so long as it is not a charge on the estate or any portion of it, does not confer on her any right to the estate or entitle her to transfer it by way of sale or mortgage. If the widow, before the adoption, severs a portion of the inheritance therefrom and transfers it to a stranger, without any proper or necessary purpose binding the estate absolutely according to Hindu Law, the transfer logically speaking, must cease to have any effect after the adoption, since it could only operate during the time that the estate was represented by her as heir and the result of the adoption is to terminate that estate. *RAMKRISHNA v. TRIPURABAI*, 10 Bom. L.R. 1029=33 B. 88.

(300)—*Hindu Law—Adoption—Succession—Rights of members of natural family of the adopted person in the property of the adoptive father—Practice—Evidence—Documents not printed.*—Where a person has been removed from his natural family by adoption, his heirs should be sought for among those related to him in his new family and relationship in his natural family is of no account in the matter of succession. The property in suit belonged to one L. D., who adopted M.L. as his son. It was inherited by M.L.'s grandson's widow in the due course of succession. On her death dispute arose between her daughter and a collateral of M.L. to succeed the property left by the widow. Held, that M.L. being affiliated to L.D.'s family by adoption, his collateral in the original family had no right to inherit the property in dispute. Where it was urged by the appellant that the Lower Court had wrongly refused to admit in evidence documents on the file of a previously decided suit, and the appellant when asked to state what documents he required to be printed did not take any notice of the matter, the Chief

**Hindu Law—continued.****—2.—Adoption—continued.**

Court under the rules of practice and on the objection on Counsel for respondent refused to refer at the hearing of the appeal to the file of the suit previously decided. *BHIKHU MAL v. MUSSAMMAT CHANDO*, 79 P.L.R. 1902.

(301)—*Hindu law—Succession to a deceased adopted son, natural father's right of.*—A junior adoptive maternal uncle of a deceased adopted boy, though he may be the boy's natural father is not a preferential reversionary heir after the death of the adoptive mother over the senior uncle when the estate in question is admittedly an impartible estate governed by the law of primogeniture. In determining the degree of propinquity to a deceased adopted son in his adoptive family in which the question of reversionary succession arises, a person should not be regarded as nearer of kin because of his relationship as natural father—a relationship which for purposes of inheritance is entirely immaterial. For mutual rights of succession an adopted son is completely severed from his natural family. (1 M.H.C. 180, F.) *Quære*:—Whether such natural relationship would be efficacious to intercept an escheat to the Crown? *MUTHAYYA RAJAGOPALA DEVAR v. MINAKSHI SUNDARA NACHIAR*, 25 M. 394.

(302)—*Adoption by widow of a deceased co-parcener with the consent of her husband's brother's widow in whom the estate had vested on her husband's decease—Adoption defeating an estate already vested, principle deauctible from the analogy of.*—A and B were undivided co-parceners. A having pre-deceased B, the family properties vested in B by survivorship, and on B's death descended to his widow. After B's death, A's widow adopted the second defendant as a son. The lower Court found that the adoption was made with the implied consent of, and without opposition from, B's widow. Held (Miller, J., doubting) that the consent of B's widow, even if given, could not validate the adoption, as the estate had already vested in her. *ADIVI SURYAPRAKASA ROW v. NIDAMARTY GANGARAJU*, 4 Ind. Cas. 386=7 M.L.T. 236=33 M. 228. (10 M.I.A. 279, 3 W.R. 15, P.C., 1 M. 174, 4 I.A. 1, 26 W. R. 21, 8 C. 302, 8 I.A. 229, 10 M. 205, 17 C. 518, 26 B. 526, 32 C. 1306, 4 C.L.J. 357; 11 C.W.N. 12, 28 B. 461, 8 M.H.C. 108. 1 M. 69, 25 W.R. 291, 3 I.A. 154, 14 B. 463, 22 B. 551, 23 B. 327, R.)

(303)—*Alienation by widow—Subsequent adoption—Right of adopted son to question prior alienation—Adoption—Legitimacy—Judgment—Judgment in rem.*—An adopted son is not precluded from ever questioning acts done by his mother during his minority or before his adoption, just as any other reversioner might question such acts. A sale by a widow, with the consent of all legal heirs at the time existing, would be binding on the reversioners as well as on an adopted son adopted long after the



**Hindu Law—continued.****—2.—Adoption—continued.**

sale. A man cannot be repeatedly put to the proof of his legitimacy, nor could it be consonant to public, morality and to the first principles of justice, that a question of bastardy, legitimacy or the like, which had been decided in the negative by one Court, should again be deemed unsettled and open to question in another Court, unless the opposing party, on whom would lie the burden of setting aside the adoption, were prepared to show, by clear and conclusive evidence, that there had been fraud or collusion. *RAJKRISTO ROY v. KISHOREE MOHUN MOJOOMDAR*, 3 W.R. 14. [D., 19 B. 809; R., 8 W.R. 167, 12 C.W.N. 74=30 A. 1 P.O.=5 A.L.J. 1.]

(304)—*Hindu Law—Adopted son—Rights—Jaghir—Sunnud.*—Under the Hindu law, an adopted son has the same rights as the son born; and if a jaghir were hereditary, the adopted son, unless prevented by local or other custom, might succeed without any confirmation from the Rajah. But when, the adopted son rests his right to succeed to the property upon a confirmatory sunnud from the Rajah, he is bound to prove that sunnud. *MAHARAJAH JUGGERNATH SAHAIE v. MUSTT. MUKHUN KOONWUR*, 3 W.R. 24.

(305)—*Hindu law—Adoption—Widow—Permission to adopt.*—Plaintiff sued to recover possession of property on the ground that her deceased husband had given her permission to adopt. Held that the claim to adopt must be disallowed in the circumstances of this case. The plaintiff took no steps to carry out her husband's permission to adopt so long as any male member of her husband's family remained alive; but no sooner has the last male member deceased and the possession of the property devolved on his widow, than plaintiff suddenly starts up from her long sleep and tries to get possession by an alleged dormant permission to adopt, there being no other possible means by which she or those who are acting in her interests could obtain a share in the plunder. *GOBIND SOONDUREE DEBIA v. JUGGODUMBA DEBIA*, 3 W.R. 66. [Confirmed on appeal. 6 B.L.R. 168=15 W.R. 5, P.C.]

(306)—*Natural son born after adoption—Adopted son's share.*—An adopted son is entitled to one-fourth of the estate of the adoptive father if a natural son is born after the adoption. *RUKHAB v. CHUNILAL AMBUCHET*, 16 B. 347. [R., 23 B. 257, P.L.R. 1900, p. 251, 31 C. 11. P.C.]

(307)—*Hindu Law—Adoption—General rule in respect of adoption by widow—Divesting of estate—Consent of person whose estate is divested.—Exception to general rule.*—As a general rule of strict Hindu Law as settled by judicial decisions, it is only the widow of the last full owner who has the right to take a son in adoption to such owner, and a person in whom the estate does not vest cannot make a valid adop-

**Hindu Law—continued.****—2.—Adoption—continued.**

tion so as to divest (without their consent) third parties in whom the estate has vested of their proprietary rights. [*Expl.*, 25 B. 306; *Doubted*, 32 B. 499=10 Bom. L.R. 692.] Four distinct classes of exceptions or qualifications to the general rule above stated have been recognised;—(i) The first exception has reference to the case of co-widows. Though on the death of the husband without male issue, the estate vests in all his widows, the elder widow can, by adopting a son with the express or implied permission of her husband, divest the co-widow or widows of their vested rights. The consent of such younger widows is not essential. (ii) The second exception has reference to the case of a mother who succeeds as heir to an unmarried son, legitimate or adopted, who dies after his father. In such a case, the widow can validly make an adoption to her husband, although the son adopted cannot properly be described as being the heir of the last full owner. (iii) In cases where an adoption takes place with the full assent of the party in whom the estate has vested by inheritance the adoption is validated by such consent. (iv) The fourth exception is based on the principle of ratification by conduct or acquiescence. *Per Parsons, J.*—The mere fact that the adopting widow is not the widow of the last male holder would not make an adoption by her spiritually invalid, while any difficulty as to the inheritance and the estate is cured by the assent to the adoption given by the person in whom that inheritance or estate is vested. *PAYAPA v. APPANNA*, 23 B. 327. [*Expl.*, 25 B. 306; *Diss.*, 7 M.L.T. 236=4 Ind. Cas. 396.]

(308)—*Hindu Law—Adoption—Specification of child for adoption in authority given by husband, Effect of.*—A husband authorising his widow to adopt very often specifies the child he wishes to be taken. Should that child die, or be refused to be given in adoption by his parents, the authority would still be held, at least in Bombay, to warrant the adoption of another child unless the husband had distinctly said "such a child and no other." In such a case the presumption should be made that the husband desired merely an adoption of some boy or other and that by specifying the object merely indicated a preference. *LAKSHMIBAI v. RAJAJI*, 22 B. 996. [*Appr.*, 26 M. 681.]

(309)—*Adoption—Estoppel to question the validity of adoption—Stridhan—Adopted son to inherit—Succession.*—S. a widow, adopted a son B, went through the usual ceremonies, represented that she had authority to adopt and thereby induced B to leave the family of his own natural father and transfer himself to the family of S's husband: Held that S, or any one deriving his title from her, would be estopped from questioning, subsequently, the validity of the adoption of B. (30 A. 549, 5 A.L.J. 568, A.W.N. 1908, 231, 4 M.L.T. 385, R.) Held, further that B, as adopted son, was



**Hindu Law—continued.****—2.—Adoption—continued.**

entitled to succeed to the stridhan of his adoptive mother in preference to the collaterals of her husband. *GANGA PERSHAD v. BUDH SEN*, 11 Ind. Cas. 27.

(310)—*Relinquishment of status—Disinherison by adoptive father.*—According to Hindu law, an adopted son cannot relinquish his status nor can the adoptive father disinherit him. *LATCHMAN v. HEMRAJ*, 17 P.R. 1878.

(311)—*Jains — Adoption — Application of rules of Hindu Law—Death of father leaving predeceased sons' widows—Divesting of estate of daughter-in-law on adoption by her—Consent of junior widow not essential for adoption by senior widow.*—The last owner of the estate having died leaving only two widowed daughters-in-law, the elder of them made an adoption without the consent of the younger. The parties were Jains and the question that arose whether the senior widow of a son who predeceased his father can adopt after that father's death without the consent of the junior widow had to be answered by applying the ordinary rules of Hindu law which, by custom, governed the Jains in matters of adoption. *Held*, the following rules have been established by judicial decisions in respect of adoptions by widows:—*First.*—That, having regard to the doctrine of satisfaction of spiritual purposes, the authority of a widow to adopt is at an end when the estate, after being vested in her son, has passed to the son's widow. *Secondly.*—That an adoption by a widow in a divided family cannot divest any estate of inheritance other than her own (and her co-widows) except perhaps with the consent of the heir in whom the estate has vested (the Rulings being conflicting with regard to such exception.) The adoption under consideration was held to be valid not being inconsistent with either of these rules. There being no question of the validity of an adoption by the sole widow of a son who has died in his father's life-time, after the father's death and after the estate has been inherited by the son's widow, the next question had to be considered whether the absence of the younger widow's consent invalidated the adoption by the elder widow, and it was held that no special custom contravening the rules of Hindu law having been proved to exist, it was the younger widow's duty to assent to the adoption in order to secure spiritual and other benefits to her husband, and her omission to do so, therefore, did not affect the validity of the adoption by her senior co-widow notwithstanding the fact that such adoption divested her estate. *AMAVA v. MAHAB GAUDA*, 22 B. 416. [*F.*, 23 B. 257, 28 M. 315 = 15 M.L.J. 143; *Appr.*, 23 B. 327; *R.*, 25 B. 306, 28 B. 461, 30 A. 197 = A.W.N. 1908, 79 = 5 A.L.J. 200; *Doubted*, 32 B. 499 = 10 Bom. L.R. 692.].

(312)—*Alienation by widow—Enures during her life—Impartible estate-holder thereof—Effect*

**Hindu Law—continued.****—2.—Adoption—continued.**

*of divesting on alienation—Adoption—Principle in Bhoobhun Moyee's case—Applicable to joint Hindu family—Stipulation by way of penalty, what is not.—White, C. J.*—Where, by an arrangement with the widows, if a person comes into possession, it enures during their life-time. Where the property is impartible, although the line of succession is governed by the same rules as if the property were joint family property, the holder has unrestricted powers to deal with the same, and, if the estate is divested, it could only divest subject to any alienations that may have been made by the holder for the time being. No question as to the purpose for which the alienations had been made would arise. (10 A. 272, 22 M. 383, 30 M. 454, 32 M. 429, *R.*) An adoption made to the last male holder of the interest claimed by the adopted son would divest an already vested interest, whether the estate is partible or impartible, but it cannot be held that, where the interest claimed by the adopted son had, at the time of the adoption, passed from the person on whom it had devolved from the original owner to some other person, that person would be ousted by adoption. (1 M. 69, 1 M. 174, 29 B. 51, 14 B. 463, 33 C. 1306, 33 M. 228, 10 M. 205, 8 C. 302, 8 M.L.J. 173, *R.*) The principle of the decision in 10 M.L.A. 279 applies also to the case of a joint Hindu family. The tendency of recent decisions is in the direction of limiting rather than extending the conditions in which an adoption can be made, which has the effect of divesting estates or interests already vested when the adoption is made. The rights of an adopted son do not relate back to a period earlier than the date of his adoption. (7 M.L.A. 169, 9 C.W.N. 795, *F.*) The effect of alienation by a landholder holding a full estate with reference to a subsequent divesting as the result of a subsequent adoption is that the adopted son takes subject to the alienations made by the previous holder. *Phillips, J.*—When a lender is dealing with a borrower who is not absolute owner of his estate mortgaged as security, it is incumbent on the lender to satisfy himself by reasonable enquiry that the loan is for the benefit or the interest of the estate. But it will be unreasonable to require such proof from one not an original party after a lapse of time and enjoyment and apparent acquiescence. The recitals in the bond are evidence as to the necessity of the loan, and may in particular circumstances throw the *onus* of proof on the other side. (6 M.L.A. 393, 21 M.L.J. 593, *R.*) An adopted son cannot defeat the alienation made before his adoption by a full male owner of the estate. When an estate is divested by an adoption, not made to the last male holder, but to a prior male holder of the estate, the adoption is not valid and does not divest the existing holder of the estate. To an impartible estate, although the successor must be sought amongst the survivors of the undivided family, the succession is not by survivorship but by inheritance. Where the bond stipulates for an



**Hindu Law—continued.****—2.—Adoption—continued.**

enhancement of the rate of interest from 12 to 15 per cent. from date of default and also for compound interest with yearly rests, the stipulation is not a penalty. *SINNACHAMI v. RAMASAWMY CHETTIAR*, 2 M.W.N. 1911, 539=10 M.L.T. 463. (29 M. 491, 34 C. 150, R.)

(313) — *Adoption by widow — Reasonable arrangement with natural father about disposition of property binding on adopted son.*—A Hindu widow who was authorised by her husband to make an adoption entered into an agreement with the natural father of the adopted son, at the time of the adoption, by which both the widow and the son were to enjoy the properties, and, in the event of any disagreement between them, the widow was to enjoy a moiety of the properties for her life time, after which they were to go to the adopted son. The terms of the agreement were consented to by the natural father prior to the adoption and the adoption took place in consequence of such consent. *Held* that the agreement was binding on the adopted son. The principle governing the validity of such agreements is that if the stipulation are unreasonable such as giving to the widow an absolute power of disposition over the property, they should be rejected. If the agreement is such as to be inconsistent with the fundamental idea underlying adoption and the purpose for which it is sanctioned by Hindu Law, as, for instance, if it deprived the adopted son of all right to the property of the adoptive father and so left him without any means of performing the necessary religious offices towards the manes of his adoptive father and his ancestors, it may well be that the Courts would regard the condition as essentially repugnant to Hindu law, and would refuse to uphold it. But when a fair and reasonable disposition of property is made, the Court ought not to refuse to recognize it as binding on the minor adopted son, for whose benefit the adoption, coupled with the agreement as to the disposition of the property, was really made. It may be assumed in these circumstances that the natural father would not have agreed to the adoption, coupled with the disposition of the property, unless it was for the benefit of his son to do so; nor would the adoptive mother have taken the son in adoption except on the condition agreed to. *VISALAKSHI AMMAL v. SIVARAMIEN*, 27 M. 577, F.B. [F., 3 Ind. Cas 378; R., 29 M. 390, F.B.=16 M.L.J. 307=1 M.L.T. 183.]

(314) — *Agreements as to rights of minor adopted.*—The rights of a minor, given in adoption, may be defined and restricted by agreement between the natural and adoptive parents. *RADHABAI v. GANESH TATYA GHOLAP*, 3 B. 7. [R., 11 B. 381.]

(315) — *Widow giving her only son in adoption — Suit by remote reversioner — Parties to suit for declaration — Estoppel — Concurrence in adoption — Ignorance of law — Estoppel.*—The adoption of an only son is not invalid under Hindu law,

**Hindu Law—continued.****—2.—Adoption—continued.**

and a widow can give her son in adoption without her late husband's authorisation. A distant reversioner can maintain a suit if the nearer ones are shown to collude with the widow or have precluded themselves from interfering, or refused to sue without sufficient reasons, or concurred in the wrongful act, and the nearer reversioners are legitimate parties to the suit. A person concurring in an adoption through ignorance of law is not estopped from impugning its validity. For, no estoppel can arise from ignorance of the law which both the parties must be presumed to know. An adoption being, according to the Hindu theory, both a religious and a secular act, estoppel cannot take the place of a religious act on which rests the conventional Hindu belief that a valid adoption generates filial relation and religious competency to make funeral and annual offerings with efficacy. *GURULINGASWAMI v. RAMALAKSHMAMMA*, 18 M. 53=4 M.L.J. 237. [Affirmed, 22 M. 398, P.C., 21 A. 460, P.C.; R., 24 B. 367, F.B., 1 Bom. L.R. 144; F., 28 M. 57=14 M.L.J. 209.]

(316) — *Spiritual benefit to be conferred by adopted son, extent of.*—In this case a husband executed to his wife an *unoomoteepotro* to adopt five sons in succession; and on the death, 10 or 12 years later, of the first adopted son, she adopted another, whose adoption it is sought to have declared invalid on the ground that the first son lived long enough to secure the spiritual benefit for which the deed was executed; *held* that a son in the situation of the first adopted son cannot exhaust the whole of the spiritual benefit which a son is capable of conferring on his deceased father. *RAM SOONDUR SINGH v. SURBANEE DOSSEE*, 22 W.R. 121. [R., 4 C.L.R. 538, 5 C. 615, 19 B. 331, 25 B. 306; Appr., 29 M. 382, P.C.=16 M.L.J. 276=1 M.L.T. 260=10 C.W.N. 921=4 C.L.J. 171=8 Bom. L.R. 700=3 A.L.J. 702=33 I.A. 145, 33 C. 1306=11 C.W.N. 12=4 C.L.J. 357.]

(317) — *Failure to exercise the authority—Widow's claim.*—Authority was given by deed, by a childless Hindoo in Bengal to his widow, to adopt a son at his decease. The widow did not exercise that power, and many years after her husband's death, brought a suit in her character as widow, claiming under his succession in the family estates. *Held*, that the mere fact of there being authority given her by her husband to adopt a son, did not, before an adoption had actually taken place, supersede and destroy her personal right, as widow, to sue. *BAMUNDOSS MOOKERJEA v. MUSSAMUT TARINEE*, 7 M.I.A. 169.

(318) — *Direction by husband to adopt—No legal duty caste on widow—Failure by widow to adopt—No forfeiture of rights of inheritance.*—A husband's express authorisation, or even direction, to his widow to adopt, does not constitute a legal duty on the part of the widow to adopt, and is, for all legal purposes, absolutely



*Hindu Law—continued.**—2.—Adoption—continued.*

non-existent till it is acted upon. The widow cannot be compelled to act upon it. (7 M.L.A. 169, (Cons.) [R., 1 N.L.R. 33.] A Hindu widow's refusal to comply with her husband's direction to adopt does not work a forfeiture of her rights of inheritance; she would be entitled as against the administrator of her husband's estate, to a decree for the property and for an account of the administration. *UMA SUNDARI DABEE v. SUROBINEE DABEE*, 7 C. 288=9 C.L.R. 83. (3 B.L.R. O.O. 90, F.)

(319)—*Omission of widow to adopt as directed in will—Right of inheritance.*—When a widow neglects to adopt a second son on the death of the first adopted son as directed by her deceased husband, she commits a wrong, but may nevertheless be the heiress of the first adopted son. *SREEMUTTY DOSSEE v. TARRACHAND COONDOO CHOWDHRY*, Bourke A. O. C. 48.

(320) — *Maintenance — Invalid adoption — Maintenance—Natural rights of such adopted person.*—Plaintiff as the adopted son of a person who was alleged to be the adopted son of the defendant, a widow, sought to recover a sum for the maintenance of himself and his adoptive mother. The adoption by the widow had been rendered invalid in consequence of the absence of necessary authority from her deceased husband. *Held* that, as no valid adoption had taken place by the widow, no claim of right in respect of the legal relationship of adoption could properly be enforced at law. The fact that the forms and ceremonies attending an adoption had been gone through by the widow did not entitle the alleged adopted son to the right to claim maintenance from the defendant, and consequently no such right passed to the plaintiff as his son by a valid adoption. Where an adoption became invalid, the natural rights of the alleged adopted person remained intact. *BAWANI SANKARA PANDIT v. AMBARAY AMMAL*, 1 M.H.C. 363. [R., 12 B.H.C. 364, 3 C. 443, 18 M. 145.]

(321)—*Maintenance—Right of son—Right of adopted son whose adoption is invalid—Limitation—Suit by adopted son to recover his share in adopter's family—Demand and refusal—Starting pointing of limitation—Res judicata—Question of validity of adoption settled in prior suit.*—A Hindu whose adoption is invalid as entitled to maintenance in the family of his adopter. Similarly, a son, whether adopted or begotten, can claim maintenance from his father so long as he is not put in possession of his individual share in the ancestral property. [R., 1 M.H.C. 363, 2 B. 573.] The statute of limitation runs against an adopted son in respect of his share in the adopter's family from the date of demand and refusal of such share. Where, in a prior suit for maintenance by an adopted son against his adoptive father, the defendant pleaded that the adoption was invalid and the Court passed a decree recognizing the adoption, the question of the

*Hindu Law—continued.**—2.—Adoption—continued.*

validity of the adoption could not be re-opened in a subsequent suit between the same parties. *AYYAVU MUPPANAR v. NILADATCHI AMMAL*, 1 M.H.C. 45. [R., 6 M. 43; D., 3 M.H.C. 217.]

(322)—*Delay in asserting rights against adopted son—Effect—Construction of deeds of adoption.*—Reversioner bound to explain delay in enforcing his rights as against adoption alleged to prejudice him. Construction of deeds of adoption. *MAHARANEE KISHEN MONEE DEBIA v. KASHEE SOONDARI DEBIA*, W. R.F.B. 106.

(323)—*Hindu Law—Adoption—Succession—Evidence—Rules for testing validity—Sale by adoptive mother.*—In all cases of adoption, most careful scrutiny is necessary. The party seeking to establish an adoption is bound to produce the best evidence procurable. The rule by which the validity of such document may be tested is contemporaneity of execution and publication of the deed of permission, and in the absence of this test, all the circumstances bearing upon the alleged deed, and all the publications for and against its genuineness must be thoroughly considered. Where the plaintiff claiming to succeed as an adopted son, having made every reasonable exertion to trace the missing documents, whereon his claim rested, and being himself not responsible for their disappearance or present non-appearance, *held* that sufficient grounds were made out for the admission of secondary evidence. The fact of the adoption and that it was made with due regard to all necessary ceremonies, being admitted without question, and the fact that it took place in furtherance of a power to adopt being, in the absence of the original document, inferrible from the acts of the parties most interested in setting aside the adoption, the plaintiff's adoption and consequent right of succession were upheld. The estate of an adopted son is not liable for a debt contracted by his adoptive mother without satisfactory proof that the debt was other than personal. *ROOPMONJOOREE CHOWDHURANEE v. RAM LALL SIRCAR*, 1 W. R. 144.

(324)—*Parsees — Adoption—Will—Effect of adoption on Will—Paluk-beta—Dhurm-putr.*—If an adoption alleged to have been made by a Parsee immediately before his death is clearly established, it would render the execution by him of a Will a short time previous thereto extremely improbable, and would necessitate the proof of the alleged Will by very clear and convincing evidence. Although in cases of adoption of a person as *Dhurm-putr* (partial adoption) it may not be indispensably necessary, as a matter of law, that a declaration should be made on the third day after the death of the adopter and a writing taken from the adoptee that he was merely *Dhurm-putr*, yet it is usual to do so. In the absence, therefore, of any such declaration, and where no such writing was produced, *held* that the adoption was



**Hindu Law—continued.****—2.—Adoption—continued.**

not as *Dhurm-putr*, but as *paluk-beta* or *paluk-putr* (i.e., as heir of all.) *HOMABHAE v. PUNJEA-BHAE DOSA-BHAE*, 5 W.R. P.C. 102.

(325)—*Hindu law — Adoption—Evidence — Registration—Adoption in zemindar's family—Acknowledgment of adoption in writing—Notice to ruling power.*—According to Hindu law, neither registration of the act of adoption, nor any written evidence of that act having been completed, is essential to its validity. In no case should the rights of wives and daughters be transferred to strangers or to more remote relations unless the fact of adoption by which this transfer is effected be proved by evidence free from all suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth. Although the Hindu law does not require that adoptions should be acknowledged in writing, it is usual, when persons in the situation of life of a zemindar adopt sons, to acknowledge such adoption in writing, to give notice to the ruling power, and to invite the neighbouring zemindars and others to be present at such an adoption. *SUTROOGUN SUTPUTTY v. SABITRA DYE*, 5 W.R. P.C. 109.

(326)—*Expression of an intention in a non-testamentary document cannot amount to adoption.*—The expression of a deceased proprietor's intention in a document, which was not testamentary to adopt an heir, cannot in the absence of the necessary formalities, amount to an adoption. *BABOO BANEE PERSHAD v. MOON-SHEE SYUD ABDOOL HYE*, 23 W.R. 192. [R., 14 C. 401.]

(327)—*Proof—Compromise of suit by widow—Admission of adoption.*—The defendant, alleging that he was the adopted son of a deceased Hindu, made a claim to his estate. The widow of the deceased entered into a compromise orally with him, by which she admitted that the defendant had been adopted, upon condition that she was to enjoy the property for her life without power of alienation, and that, after her death, her daughters were to take the self-acquired property, and that the defendant was to succeed to the ancestral estate. In a suit by the daughters as heiresses in reversion after the death of the widow, it was held that the daughters could not be bound by a compromise made by the widow under any circumstances. The compromise made by the widow cannot be said to be, even if made by her voluntarily, against her interest, for she was to remain in possession of the whole property for her life in the same manner as if the adoption had not been made. Such a conditional adoption, without a writing to support it, would, like a nuncupative Will, require very strong evidence to establish it. *IMRIT KONWUR v. ROOP NARAIN SINGH*, 8 C.L.R. 76. P.C. [F., 10 C.L.R. 337; R., 29 A. 487=4 A.L.J. 365=A.W.N. 1907, 151; D., 8 O.L.J. 458=13 C.W.N. 201.]

**Hindu Law—continued.****—2.—Adoption—continued.**

(328)—*Effect of ekrarnama surrendering a son for adoption—No adoption by itself, and no proof of it.*—Where an *ekrarnama* recited that a natural father had made over his third son to the sonship of the adoptive father "so that the latter may, whenever he wishes, fulfil the rites of adoption in accordance with the *sestras* and the usages of the country" and that from that day the declarant had no claim or right in respect of the said son, held that this deed did not operate to effect an adoption; that it did not even amount to a giving and taking of the boy as it contemplated the subsequent performance of the necessary rites: that deeds of this kind did not take the place of the necessary evidence as to actual adoption. *MUSSAMMAT MANDIT KOER v. PHOOL CHAND LAL*, 2 C. W.N. 154.

(329)—*Malabar-law—Nambudris—Adoption.*—The taking of an adult into, and constituting him a member of, a Malabar Nambudri family following the Marumakkatayam system of inheritance, cannot be dealt with, strictly on the footing of an adoption according to the Hindu law. *SUBRAMANYAN v. PARAMASWARAN*, 11 M. 116.

(330)—*Family pedigree—Report of punchayet Evidence.*—Where the adoption of the ancestor of one of the claimants was in dispute, a report of a Punchayet dated, 1819, containing references to the alleged adoption, which was filed and preserved in the Collector's office at the time of a minute local enquiry into the history of the family and which the disputants signed, each saying that he agreed to what was stated in it, was held to be conclusive evidence of the adoption, unless the other side would bring some counter-evidence to contradict or invalidate it. *AJABSING v. NANABHAU VALAD DHANSING RAUI*, 3 C.W.N. 130=26 I.A. 48=25 B. 1. P.C. =7 Sar. 443.

(331)—*Adoption of brother's son not mandatory.*—Passages, in the *Dattaka Mimamsa* and the *Dattaka Chandrika*, to the effect that a Hindu, wishing to adopt a son, shall adopt his whole brother's son as a *dwayamushyayana*, if one is in existence and capable of adoption, are not so imperative as to have the force of law, the violation whereof should be held in a Court of justice to invalidate an adoption, which has otherwise been regularly made. *WOOMA DAE v. GOKOOLANUND DASS*, 3 C. 587=5 I. A. 40=2 C.L.R. 51, P.C.=3 Sar. 786. [R., 9 A. 253, 19 B. 428, 21 B. 105, 17 A. 294, F.B., 22 B. 558, F.B., 22 B. 973, 24 B. 473=2 Bom. L.R. 190; Appl., 10 B. 80.]

(332)—*Adoption cannot be cancelled.*—When the adoption of a son has once been absolutely made and acted on for years, it cannot be cancelled or set aside at the suit of the adoptive father. *SUKHBASI LAL v. GUMAN SINGH*, 2 A. 366. [R., 23 B. 327, 24 B. 367, F.B., 26 A. 40, 5 A.L.J. 568=A.W.N. 1908, 231=4 M.L.T. 385=30 A. 549.]



**Hindu Law—continued.****—2.—Adoption—continued.**

(333)—*Hindu Law—Adoption—Factum valet.*—The adoption of a Hindu by his maternal grand-uncle, if it took full effect, and had not been questioned or impeached for a period of 20 years, must be held valid on the principle of *factum valet* so as to disentitle the person adopted from inheriting from his natural ancestors. **MATADIN v. GHANSHAM SINGH, A.W.N. 1881, 125.**

(334)—*Elder widow's rights to adopt to her husband, scope—Younger widow adopting without elder widow's consent—Validity—Factum valet—Limitation—Adverse possession.*—The plaintiff, alleging that he was adopted by the junior widow of one X, sued to recover possession of the property in dispute, from the defendant who put forward his claim to the property by virtue of his having been adopted by the senior widow. The facts were that the plaintiff was originally selected by the widows for adoption, but that subsequently the senior widow disapproved of the choice and informed the junior widow that if the plaintiff were adopted by her, she would not consent to it. The junior widow adopted the plaintiff subsequent to the declaration by the senior widow. The defendant contended *inter alia* that his adoption was a valid one having been made by the senior widow, that the adoption of the plaintiff was void, being one made by the junior widow and without the consent of the senior widow. He also set up the plea of limitation on the ground of the property in suit having been in the possession of himself and his adoptive mother (senior widow) for more than 12 years before suit. *Held* that the adoption of the plaintiff, having been made without the consent of the senior widow, was invalid, and that, as such, the plaintiff had no right to the property in dispute. *Held* also that:—(i) An adoption by a younger widow without the consent of the elder widow, of a boy who had been previously selected by all the widows for adoption cannot be supported against the wish of the elder widow. (ii) The right of adoption belongs to the elder widow, who could make the adoption without the consent of the younger, but the latter cannot adopt without the consent of the elder widow, (iii) The superior right of the elder widow is based upon her being the *patni* wife and as such entitled to take part with her husband in all religious ceremonies. The right of the elder widow is not merely restricted to one of selection. Adoption of course implies selection of the child, but there is no complete adoption until the mutual acts of giving and receiving the child are accomplished; and until they take place, there is necessarily a *locus penitentie* for the elder widow, of which she may avail herself, although contrary to the wishes of the other widows, by changing her mind and selecting another child. To hold that any one of the junior widows might perfrom the formal act of adoption of the selected child whenever it pleased her, would be tantamount to enabling her to force the hand of the

**Hindu Law—continued.****—2.—Adoption—continued.**

elder widow, and compel her to complete the adoption which, at the most, was only *in fieri*. (iv) The doctrine of *factum valet* cannot apply in this case (where an adoption had been made by a younger widow). Because, until the elder widow waives her preferential right to adopt, her right is exclusive and the other widows have no authority to adopt. The proper application of the doctrine of *factum valet* (in respect of adoption) must be limited to cases in which there is neither want of authority to give or to accept, nor imperative interdiction of adoption, and (v) That the suit was barred by limitation under art. 144 of sch. II, Limitation Act, the defendant having been in adverse possession for 12 years prior to suit. *N.B.*—In this case, the defendant was held entitled to tack the period during which he had adverse possession on to the period of time when his mother had adverse possession (either actual or constructive) against the plaintiff, because he was held to derive his liability to be sued from or through his adoptive mother, so as to bring himself within the definition of a defendant as provided by the interpretation clause (s. 3) of the Limitation Act (XV of 1877). **KADAJI RAY v. RAMRAY, 13 B. 160. (F., 17 A. 167, 24 A. 195, 26 A. 40=A.W.N. 1903, 163; R., 16 B. 91, 18 M. 277, 21 B. 159, 21 B. 376, 11 C.P.L.R. 49, 25 C. 354, 1 Bom. L.R. 799, 28 B. 461.)**

(335)—*Adoption deed not registered—Factum of adoption.*—The mere circumstance of an adoption deed not being registered is no ground why the adoption should not be believed. **KALICHANDRA CHOWDHRY v. SHIBCHANDRA BHADURI, 6 B.L.R. 501, P.C.=15 W.R. P. C., 12.**

(336)—*Married man—Validity of adoption of.*—Under the Benares school of law a married man cannot be adopted. **TEJA BAI v. MOHANLAL MARWADI, 11 C.P.L.R. 56. (9 A. 253, 9 M. 148, 13 M. 128, R.) [Cons., 1 N.L.R. 1.]**

(337)—*Benares school—Widow—Power to adopt without husband's authority.*—In the absence of express evidence of a local usage, a Hindu widow governed by the Benares school of law cannot adopt to her husband without his authority. **HIRA LAL v. MT. TANI BAI, 2 C.P.L.R. 18. (5 W.R. P.C. 69; F., 12 M.I. A. 440, 12 W.R. P.C. 1, R.) [F., 11 C.P.L. R. 49].**

(338)—*Practice—Pleadings—Administration, Suit for—Will, Construction of—Adoption—Administration, prayer for, without asking for declaration with regard to alleged adoption.*—In a suit for administration and construction of a will, under which plaintiff's interest was restricted in case a son was adopted to the testator, the plaintiff, *inter alia*, stated that plaintiff was informed that the widow of the testator purported to take in adoption a son, whose natural father was at the time and is now a Brahmo, and had renounced the Hindu religion. She submitted that such adoption



**Hindu Law—continued.****—2.—Adoption—continued.**

was absolutely invalid and did not operate to pass any title to the adopted son. There was, however, no prayer asking for any declaration. *Held*, that :—(i) Upon the suit as framed, the question of adoption was not in issue, and, upon the pleadings, the fact and validity of adoption must be taken to be admitted. (ii) If a declaration with regard to the adoption had been sought, the plaintiff must have disputed the fact or the validity of the adoption, and should have contained a prayer for a declaration as to the fact or validity thereof. (iii) The whole substance in the claim for administration being dependent on the adoption being out of the way, the question raised in the suit could not be gone into till the question of adoption was determined once for all. *SM. KUSUM KUMARI RAY v. SATYA RANJAN DAS*, 5 C.W. N. 162.

(339)—*Suit in which adoption is denied—Limitation.*—Art. 119 of sch. II of the Limitation Act, 1877, applies to all suits in which either the *factum* or the validity of an adoption is denied. *LAXMAWA BASAPPA v. RAMAPPA*, 9 Bom. L.R. 1054=32 B. 7.

(340)—*Mother, Funeral ceremonies of—Expenses for performing her funeral ceremonies must be defrayed by the son and not from her stridhan—Estate taken by mother.*—The duty of performing the funeral ceremonies of a mother (literally, offering the funeral oblations, *pinda dana*) is laid down as a religious injunction binding her son in absolute terms by the Hindu Law. The duty being laid upon him as her son independent of any assets left by her, he is bound to discharge it as a sacred obligation attaching to sonship. If he dies during her lifetime, the funeral expenses of the mother have to be defrayed out of his property, and not out of her stridhan. Under Hindu Law a mother succeeding as heir to her son takes only a limited estate. *VRIJBHUKANDAS v. BAI PARVATI*, 9 Bom. L.R. 1187=31 B. 26.

(341)—*Question of adoption of father decided against him—Decree how far binding on sons.*—If, on the facts of a particular case, the father was held to have represented his sons in the previous proceedings, the latter will be bound by the judgment against their father. *Held* that, in this case, where the question of the father's adoption was in dispute in the previous suit, and the father fought the matter out, he must be held to have represented the sons. *BASANA RAJU v. BHOGA RAJU*, 8 M.L.T. 355. (17 M.L.J. 180, 22 M. 461, F.; 10 A. 411, 29 A. 1 Not F.)

(342)—*Dispute as to adoption—Compromise by minor's natural guardian—Validity of the compromise.*—Where a dispute arises as to the *factum* or validity of the adoption of a minor the minor's natural father or, in his absence, those who would, according to Hindu Law, be the minor's natural guardians, are entitled to

**Hindu Law—continued.****—2.—Adoption—continued.**

protect his interests against rival claimants, and to enter into a compromise, provided that be for the minor's benefit. (9 B. 365, F.) Whether such a compromise is in any particular case beneficial to the minor or not is, generally speaking, a question of fact; but that question must be determined with due regard to certain principles of law. It is not enough that there was a dispute, but it is essential that the rights of the respective parties were fair subject of doubt, and that, to avoid the expense and delay of legal inquiry, the parties entered into an amicable settlement. It is also necessary that each of the parties, before entering into the compromise, put forward an honest claim, that is a claim, which however ill-founded, each party honestly believed he was warranted in making, and which they intended to pursue and would have pursued but for the compromise. Further, the parties should have been on equal terms as to information or means of information, and that there was no bad faith on the part of any. Where a compromise is entered into under these circumstances, the law will uphold it, even though there may be in the terms of inequality of benefit. *LINGAPPA NINGAPPA SHIWALLI v. SANGAWA GANDAPAGOWDA*, 12 Bom. L.R. 370=6 Ind. Cas. 523. (2 M.L.A. 181, F.)

(343)—*Payment of money to adoptive mother to induce her to adopt—Bribe—Adopted son making a gift of his property in adoptive family to his natural brother—The son having sons—Gift void—Father's power to gift property—Sale—Father's power to sell property—Gift—Revocation—Spes successions.*—B agreed with C to adopt N, a son of C, but B refused to carry out the agreement unless she was paid a sum of money. C borrowed Rs. 8,000 and paid that sum to B as an inducement to her to adopt his son N. The adoption then took place; and C, being poor, obtained from B some lands at Chinchwad yielding an annual income of Rs. 188 for parting with his son. In consideration of payment of Rs. 8,000 to B and in exchange for the lands at Chinchwad, and having regard to the benefit he had derived from the act of his natural father in giving in adoption into a well-to-do family, N conveyed by way of gift certain lands to S, his natural brother. At the date of the gift N had only one son (plaintiff No. 1); and three more sons (plaintiffs Nos. 2–4) were born after that date. After N's death the plaintiffs sued to recover possession of the lands from S, on the ground that they were part of the joint ancestral property of N and themselves, of which it was not competent to N to make a gift: *Held*, (1) as to Rs. 8,000 that its payment to B, having been a bribe, was illegal in its inception; that even if it was regarded as a debt contracted by C, it could not bind his sons, because it was contracted for an illegal purpose; and that, as N by his adoption had ceased to be C's son at the time of the gift to S, he was under no pious obligation to satisfy C's debts, As to exchange of lands,



*Hindu Law—continued.**—2.—Adoption—continued.*

that the transaction could only amount to a sale; and that it was not competent to N to effect it, for there was no antecedent debt, and, if there was an antecedent debt of C to discharge, N was not liable to pay it as by his adoption he had ceased to be C's son. (3) As to consideration of love and affection, that it was not competent to N to make a gift of ancestral property in which his sons had taken by their birth a vested interest. (4) That, therefore, the gift by N was void and inoperative. Where, on Hindu's death, the adoption is made by his widow, it must be made by her, without any coercion, free from any corrupt motive, and with an eye solely to the fitness of the boy to be adopted to fulfill the religious and secular duties binding on a son. That object is likely to be frustrated, if she is induced to adopt a boy out of greed for money and for pecuniary benefit to herself. If she is so induced, the money paid to her is a bribe which is condemned by all Smriti writers as an illegal payment. A Hindu father is not competent to make a gift of property which is immovable, which is joint ancestral estate, and in which sons have taken a vested interest by their birth. The texts of Hindu Law show that a gift once made cannot be resumed, if it is to a benefactor or to a father. These texts apply as between the donor and the donee and relate to property which it was competent for the donor to give away. They cannot affect the joint ancestral estate of a Hindu and his sons. Their rights and liabilities are regulated by special texts dealing with that estate; and such of these special texts as relate to gifts form exceptions to the general texts on the subject. A Hindu father is not competent to sell joint ancestral property to the detriment of his sons, except for an antecedent debt, which had been contracted for a purpose, neither illegal nor immoral. An agreement by an expectant heir to make a gift of property which he hopes to get after his adoption, is invalid and inoperative according to Hindu Law. *SHRI SITARAM PANDIT v. SHRI HARIHAR PANDIT*, 12 Bom. L.R. 910 = 8 Ind. Cas. 625. (25 I.A. 183, 8 Bom. L.R. 252, F.)

(344)—*Suit to set aside adoption—Burden of proof.*—In a suit to have it declared that an adoption long acted upon is a fraudulent and false adoption, the burden of proof is on the plaintiff to make out, to some extent, at any rate, the fraud and falsehood alleged. *GOOROO PROSUNNO SINGH v. NIL MADHUB SINGH*, 21 W.R. 84. [D., 30 A. 197 = A.W.N. 1908, 79, 5 A.L.J. 200.]

(345)—*Declaratory decree as to the validity of direction to minor widow to adopt—Court would not grant.*—The Court would not make a decree, declaring that an order directing a minor widow to make an adoption is a valid direction. *MUSAMUT PEAREE DAYEE v. MUSSAMUT HURBUNSEE KOOR*, 19 W.R. 127.

*Hindu Law—continued.**—2.—Adoption—continued.*

(346)—*Power of adoption—Construction.*—Where the power of adoption to a Hindu wife directed her to remain in possession of all properties of her husband during her life, held, the widow took a life-interest in such properties, with remainder to the adopted son. *BEPIN BEHARI BUNDOPADHYA v. BROJO NATH MOOKHOPADHYA*, 8 C. 357. (2 I. A. 256, F.)

(347)—*Devise for charity—Adoption by widow—Title of adopted son subject to charity under adoptive father's will.*—Where a Hindu, shortly before his death, directed his widows to make a dedication to a certain charity and also authorised the adoption of a son to him, the direction that the property be devoted to the charity, and the authority to adopt coming to effect only on the testator's death, the title of the son who was adopted only some years subsequently could not affect the rights under the charity which, under the devise took effect at once on the testator's death. The adopted son could therefore get rights only subject to the rights created in favour of the charity, the alienation relating to which it was therefore not competent to him to question. *GANAPATI AYYAN v. SAVITHRI AMMAL*, 21 M. 10.

(348)—*Hindu Law—Adoption by widow—Authority by husband—Endowment to idols.*—Held by the Privy Council, that the judgment of the High Court was perfectly right and that there was direct evidence of the execution of the *anumatipatra* and of the *katrityapatra* and that the adoption was proved, notwithstanding a finding of the Judge of the first instance that the adoption was not proved. It would be very much for the interest of the proprietors in India, if, when they execute deeds giving their widow after their death power to adopt, they would take the precaution to register the deed. It would unquestionably be more consonant with the genius and spirit of Hindu Law and usages that endowment for the worship of idols should be made to a family, by whose members in succession the worship might be performed, rather than to an individual who might sell or give them to a stranger. But this presumption is not sufficient of itself, in the absence of any language denoting the intention of the donor that the gift should belong to the family, to impress that construction upon it. *RAJAH CHUNDERNATH ROY v. KOOAR GOBIND NATH ROY*, 11 B. L. R. 86, P. C. = 18 W. R. 221 and 226.

(349)—*Will, Construction of—Authority to adopt given to wife and executors—Validity.*—A power to adopt given by a testator to his wife and executors is bad as to the executors, for they are precluded under the Hindu Law from taking any part in adoption. But if the testator associated the other executors with his wife for the purpose of ensuring a wise exercise of her discretion in the selection of a son for adoption and not with the intention of making it an essential condition of the adoption that they should take a part in the ceremony from



**Hindu Law—continued.****—2.—Adoption—continued.**

which they were precluded, the power of adoption is valid. Where a power is vested in executors (though it may not be one reposed in them by the law) and on proper construction it appears that the power was coupled with the executorial office, it will survive to the holders for the time being of the office, as though it were a power attached to the office by law. So, on the death of the first son, adoption of a second son, after taking the consent of the surviving executors and trustees, was held to be a valid exercise of the power. *AMRITO LALL DUTT v. SURNOMOYE DASSEE*, 24 C. 389=1 C.W.N. 345. (19 C. 513, 2 Ind. Jur. N.S. 225, Cons.) [*Reversed*, 25 C. 662=2 C.W.N. 389, 27 C. 996, P.C.; *Rel. on*, 4 Bom. L.R. 893.]

(350)—*Suit affecting validity of adoption—Value for purposes of jurisdiction.*—Where the fact and validity of an adoption is the subject of the suit, its value for purposes of jurisdiction is the value of the interest that would be lost to the alleged adopted son if the adoption be declared invalid. *KESHAVA v. LAKSHMI-NARAYANA*, 6 M. 192. [*Diss.*, 15 A. 378.]

(351)—*Hindu Law—Adoption — Motive of adopting widow to deprive co-widow of her share, whether affects validity of adoption.*—In this case the Assistant Judge found that the *factum* of adoption was proved but he set it aside on the ground that it was invalid by reason of its having been effected from corrupt and malicious motives to defeat the claim of her co-widow, the respondent, to a share in her husband's estate and after the respondent had instituted proceedings *in forma pauperis* to obtain a partition of her share. Held that though the adoption by the appellant had the effect of defeating the respondent's rights as co-widow, yet as the law gave such power to the appellant, her exercise of that power could not be regarded as capricious or malicious. merely because she exercised it after respondent's claim for a share in her husband's estate and with the view of defeating such claim. The exercise of a valid power by a properly authorized person cannot be held to be capricious or malicious in law solely because it defeated the expectations of others. *BHIMAWA v. SANGAWA*, 22 B. 206. [*F.*, 28 M. 315=15 M.L.J. 143; *R.*, 22 B. 558, 22 B. 789.]

(352)—*Adoption by Hindu widow—Motive for adoption—Presumption as to propriety of motive—Adoption made on sinful and corrupt motives, if valid.*—In this case the lower appellate Court declared that the adoption of defendant No. 2 by defendant No. 1, a Hindu widow, was illegal and invalid as having been made with corrupt motives and purposes. That Court had found that the evidence established that if the first defendant had not been assured of her receiving a large sum of money from the guardian of the adopted boy, she would not have adopted that boy—possibly would not have adopted at all. It was, however, not

**Hindu Law—continued.****—2.—Adoption—continued.**

decided that the widow had not the spiritual benefit of her deceased husband in view when she made the adoption. The High Court reversed the decree of the lower appellate Court, on the ground that the presumption that the widow had made the adoption from proper motives of duty was not, under the circumstances, sufficiently rebutted and should therefore be allowed to prevail. On the state of the authorities, as the law on the point obtains in Bombay, if it can be predicated of an adoption, by a widow (where the consent of the husband's kinsmen is not required) that the ceremony has been gone through by her not in the performance of a religious duty but from sinful and corrupt motives, it is on that account, invalid; and where the motives of such an adopting widow are called in question, the Court is bound to inquire into such motives. Whether the presumption that an adopting widow has made the adoption on proper motives ought or ought not to be deemed an irrebuttable presumption has not yet been judicially decided. The fact of the motives being of a mixed character has been held to be not sufficient to rebut the presumption and it is also clear that the adopting widow's making terms for herself with the father of the boy to be adopted, or selecting a boy whose father will be likely to accede to her wishes is not sufficient to invalidate the adoption as one having been made for a corrupt purpose or for a purpose foreign to the real object of adoption. *MAHABLESHVAR FONDRA v. DURGABAI*, 22 B. 199. [*Cons.*, 22 B. 206; *R.*, 22 B. 558, 22 B. 789, 29 M. 161=16 M.L.J. 22.]

(353)—*Hindu Law—Adoption by widow having power to adopt—Discussion of widow's motives in adopting, Irrelevant.*—The following questions were referred to the Full Bench in this case:—(1) Whether (in the Bombay Presidency) in the case of a widow having a power to adopt, and a religious benefit being caused to her deceased husband by the adoption, any discussion of the adopting widow's motives is not irrelevant? and (2) whether, if such an adoption can be referred to proper religious motives, the Courts ought not to presume that the widow performed the ceremony of adoption from such motives? Both the questions were replied in the affirmative by the Full Bench (*Hosking, J., dissenting*). The widow of a separated house-holder who adopts a son to continue the line of her husband, performs this act under an express or implied authority from her husband and, presumably, her exercise of this right, independently of the wishes of reversionary heirs, must be as free as if the husband himself effected the adoption. This freedom of choice also follows as a necessary consequence from the fact that in Western India the necessity of express authority from the husband or of the assent of kindred is not recognized as essential; and there is little scope for an investigation into the motives which may possibly influence the



**Hindu Law—continued.****—2.—Adoption—continued.**

widow to effect an adoption. So, in Western India in the case of a widow of a separated Hindu adopting a son to continue the line of her husband, any discussion of the adopting widow's motives is irrelevant, and if her act can be referred to proper religious motives, the Courts ought to presume that she was influenced by these motives and not by caprice. **RAMACHANDRA v. MULJI NANABHAI**, 22 B. 558, F.B. [F., 23 B. 789; R., 31 M. 446.]

(354)—*Decree of the Sudr Court (Ogilvie, C.J., and Grant and Gowan, JJ.) in No. 2 of 1823.—Claim of wife to maintenance—Attempt by such suit to set up an adoption—Zemindar of Pittapore.* **SRE RAJA ROW BOOCHEE TUMMAH, AND HIS MOTHER AND GUARDIAN, SREE VENKATA RAMANIAH v. SREE RAJA ROW VENKATA NEELADRY ROW, ZEMINDAR OF PITTAPORE**, 9 M. J. 151.

(355)—*Suit by reversioner to set aside invalid adoption — Alienation — Declaratory decree.—Although it may be that a presumptive next taker after a Hindu widow may sue in the widow's life-time, not only to prevent waste by her, but also to declare her alienations void except as against herself, he cannot sue during the life-time of the widow to set aside an actual adoption or to have it declared that he is the person who will ultimately take the property after the death of the widow.* **RANI BROH-MOMOYEE v. RAJA ANUND LALL ROY**, 13 B.L.R. 225, Note=19 W.R. 419.

(356)—*Hindu Law—Adoption—Deeds of gift and adoption — Suit to set aside deeds.—A Hindu widow sued the defendant for himself and as guardian of his minor son to set aside two deeds relating to the adoption of the said minor, one of the deeds having been executed by the defendant, by which the defendant agreed to give his minor son to plaintiff in adoption, the other being a deed by which the plaintiff agreed to take the boy in adoption. The plaintiff's case was that the defendant refused to give the boy and the adoption was not completed by the giving and taking of the boy and by performance of the other religious ceremonies. Held that the deeds were not mere agreements to give and take the boy in adoption but were deeds of gift and adoption. If they were mere agreements to give and take the boy in adoption, the plaintiff could not have any right to maintain the present suit, which was one for cancellation of the deeds. Her remedy would be one for specific performance or damages. Treating them as deeds of gift and adoption, which they were, the plaintiff was not entitled to the declaration that they were null and void under s. 15 of Act VIII of 1859, the plaintiff not being entitled to any consequential relief as against the father of the adopted boy and the deeds not being actually necessary for the validity of the adoption. If the defendant gave, or was willing to give, the plaintiff had no right to sue him in order to have a declaratory decree that the deeds were null and void because cer-*

**Hindu Law—continued.****—2.—Adoption—continued.**

tain religious ceremonies validating the adoption had not been performed. *Held, further, that the first appellate Court having omitted to find whether the boy had been actually delivered, the High Court was wrong in having decided the case on the footing that there was no actual giving and receiving of the child.* **SREE NARAIN MITTER v. SREEMUTTY KISHEN SOONDERY DASSEE**, 11 B.L.R. 171, P.C.=1. A. Sup. Vol. 149=19 W.R. 133=3 Sar. 203. (On appeal from 2 B.L.R. A.C. 279.) [R., 3 C.L.R. 17, 11 C. 402, 12 A. 328; D., 1 A. 371.]

(357)—*Hindu Law — Adoption — Adoption after payment of price—Contract Act, 1872, s. 23—Son given in adoption in consideration of annual allowance.—An adoption of a son after payment of price is not recognized in the present yuga, the Kaliyuga, the only adoption now recognized being that of the dattaka son, or son given, who alone can take the place of the aurasa son. A contract to give a son in adoption in consideration of the natural parents receiving an annual allowance during their lives is void under s. 23 of the Indian Contract Act (IX of 1872), as this contract, if it were capable of being carried out and were recognized by the Court, would involve an injury to the person and property of the adopted son and would defeat the provisions of the Hindu Law.* **ESHAN KISHOR ACHARJEE CHOWDHRY v. HARIS CHANDRA CHOWDHRY**, 13 B.L.R. App. 42.

(358)—*Hindu Law—Authority to adopt fabricated—Suit by reversioner to declare it invalid —S. 42, Specific Relief Act—No injury—Suit will not lie.—A suit by a reversioner to declare that an authority to adopt, alleged to have been given by a husband to his widow, is not genuine, will not lie, for such a document is a mere preparation, and not a distinct and separate act which can entitle him to a separate relief.* **SREEPADA VENKATARAMANA v. SREEPADA RAMALAKSHMAMMA**, 2 M.W.N. 1911, 194. (10 C.L.J. 63, D.)

(359)—*Hindu Law—Joint power to adopt to widows—Custom in Oudh and in Western India.—Where a person died leaving two widows, a joint power of adoption by the widows, when adoption has not been forbidden by the husband, is recognised in Western India, but such a custom is not known in Oudh, and it is hardly applicable to the case of a family, where the custom is single heirship and not joint possession.* **INDAR KUNWAR v. JAIPAL KUNWAR**, 15 C. 725, P.C.=15 I.A. 127=5 Sar. 150. [R., 22 C. 1, P.C., 26 A. 293, P.C.]

(360)—*Custom—Purbia Kurmis.—Held that Purbia Kurmis, calling themselves Purbia Chatteries, do not really belong to the regenerate classes, and therefore the adoption by a member of this caste of the grandson of his father's sister is not invalid as being within the prohibited degrees of relationship.* **JIWAN LAL v. KALLU MAL**, A.W.N. 1905, 235=28 A. 170.



**Hindu Law—continued.****—2.—Adoption—continued.**

(361)—*Right of—Special grant—Custom—Pattidari Jagirs in the Cis-Suteli districts.*—The right of adoption has not been recognised in the case of pattidari jagirs in the Cis-Sutlej districts. Even in the case of major jagirdars the right of adoption only exists by special grant, made in certain cases by the Government of India under rules approved by His Majesty's Secretary of State in 1902. *ATTAR SINGH v. SANT SINGH*, 1 P.R. 1910, Rev.=6 Ind. Cas. 719=102 P.L.R. 1910.

(362)—*Suit by natural heirs for property left by widow—Defendant's plea of preferential right by reason of adoption—Onus of proof as to adoption.*—When a Hindu widow dies possessed of property, it is for those who claim it adversely to the natural heirs and, against the presumption that the widow has acquired the nucleus of the property from her husband, to fully prove their special pleas and to show that it came into the widows' hands from other sources. Where, in the suit by the heirs, the plea of the defendant has been based on a preferential hereditary right set up in consequence of his adoption, it is he that must prove such adoption. *BISSESUR CHUCKERBUTTY v. RAM JOY MOJOMDAR*, 2 W.R. 326. [*D.*, 23 W.R. 125.]

(363)—*Proof of adoption.*—The greatest strictness is required in evidence to prove an adoption in a Hindoo family. *SOOTRUGUN SUTPUTTY v. SABITRA DYE*, 2 Knapp. 287.

(364)—*Adoption in the dwayamushyayana form—Infrequency of such adoptions—Burden of proof.*—Held that an adoption in the dwayamushyayana form was a matter of extreme infrequency in the North-Western Provinces; and that it therefore lay upon a plaintiff claiming property in virtue of an alleged adoption in such form to prove by very cogent and satisfactory evidence that the adoption took place in the peculiar form alleged, *BADAM KUNWAR v. RAGHUBANS RAI*, A.W.N. 1899, 28.

(365)—*Question whether natural son is alive or dead—Adoption, Validity of—Onus probandi—Deed of adoption describing person as adopted son and conferring an estate on him—Onus of proof—Former suit by plaintiff—Factum of adoption found against—Decree in his favour on adoption deed as deed of settlement—Subsequent suit based on adoption.—Res judicata.*—B, the natural son of S, having left his father the year before the latter's death in 1878, S, a few days before his death, executed a deed of adoption under which he adopted the plaintiff. The deed recited the factum of adoption, conferred the full ownership of all properties belonging to S on the plaintiff, but provided that, in case B returned, he should have one-half of the properties. The present suit was brought in 1892 by the plaintiff as adopted son, for recovering certain properties from the defendants who claimed to be the heirs of S, and impeached the validity of the adoption. Held that the plaintiff would be entitled to a decree only if he proved that the adoption,

**Hindu Law—continued.****—2.—Adoption—continued.**

under which he based his rights, was valid. With regard to the adoption it is a condition precedent to its validity, that it must be proved that S had no issue at the time of the adoption. The onus, therefore, lay on the plaintiff of proving that B was dead at the date of the adoption. There being no presumption that B was dead at that time, and the plaintiff not having let in any evidence on the point, it was impossible to say when B died and consequently that the adoption, under which the plaintiff claimed, was valid. [*Appl.*, 6 M.L.T. 153=19 M.L.J. 502=2 Ind. Cas. 977.] In the above case, the Court, however, held that the plaintiff was entitled to the properties as donee thereof under the adoption deed. S intended to give the estate to the plaintiff as his adopted son capable of inheriting by virtue of his adoption. If the adoption was invalid, the deed of gift had no effect on the property. The onus of proving that B was alive at the date of the adoption, and that, consequently, the adoption was invalid, lay on the defendants, which onus they had not discharged. Therefore the plaintiff had a right to the properties claimed as donee. Where a deed of gift or Will confers an estate upon a person named because he fills, or by reason of his filling a certain character, he is entitled to recover the estate without affirmatively proving that he fills such character. The onus of proving that he does not fill the character which is the reason of the gift, lies upon those who dispute his claim. The whole question is one of onus of proof—*Per Farran, C.J.* The plaintiff had formerly sued the father of the defendants to recover certain properties, by virtue of his being the adopted son of S. It was held in that suit that, that though plaintiff could not recover as the adopted son of S, effect could be given to the adoption-deed as a deed of title or a deed of settlement and possession of the lands was decreed to the plaintiff. Held that the issue as to adoption found against the plaintiff in the former suit did not render the question of adoption *res judicata* in the present suit for certain other properties. The plaintiff succeeded in the former suit upon the deed and recovered possession. He could neither have appealed from the decree which was in his favour, nor could he, under the C.P.C., 1882, appeal from the finding on the adoption issue which was against him. There had been no final decision upon that issue. *RANGO v. MUDIYEPPA*, 23 B. 296. [*R.*, 10 Bom. L.R. 380=32 B. 315.]

(366)—*Burden of proof—Non-examination of parties in a suit, Result of—English and Indian practice—Account books, Non-production of.*—The plaintiff brought a suit for the recovery of certain properties, alleging that he was adopted twenty years before the date of the suit. Held, the burden of proving that the alleged adoption took place twenty years before the trial rested upon the plaintiff. The presumption that would be drawn in England will be to the detriment of a plaintiff who fails to enter the witness-box



**Hindu Law—continued.****—2.—Adoption—continued.**

and face the ordeal of cross examination. But in cases between natives tried in India, a species of advocacy is tolerated by the Courts of law here, in which the unworthy effort of the advocate on each side is to force his opponent to produce his own client, in order that he himself may have the opportunity of cross-examining that client. The result is that, should the opponent refuse to be led into this trap, the parties (the principal witnesses, who possibly could throw light on all these tangled transactions which so perplex those who have to decide these cases) are never examined at all, and the litigation goes forward through tortuous windings to its unsatisfactory and uncertain end. It is a vicious practice, unworthy of a hightoned or reputable system of advocacy, tending to embarrass and perplex judicial investigation, and too often enabling fraud, falsehood or chicanery to baffle justice. Having regard to the well-known and often proved habits of the Indian people with regard to the keeping of accounts, recording their most minute transactions, the non-production of any book, in which anything connected with the matter in question is entered, by the party in whose possession it is, covers the parties' case with suspicion. *MUSSAMMAT LAL KUNWAR v. CHIRANJI LAL*, 7 M.L.T. 57=14 C.W.N. 285=11 C.L.J. 172=12 Rom. L.R. 244=32 A. 140=20 M.L.J. 182=5 Ind. Cas. 549, P.C.

(367)—*Dispute as to authority to adopt—Not acted upon for ten years—Adoption supported by persons interested in opposing it—Presumption as to factum of authority.*—Onus probandi.—A died leaving behind him three daughters; one daughter died after him, Two others married and have children. A, at this death, gave B, his wife, an authority to adopt. Ten years after, B adopted her sister's son C.D., the husband of one of her daughters, was in management of the estate on her behalf, both before and after the adoption of C. He attempted to give one of his sons in adoption but failed. He got therefore B to execute a deed, whereby a third was given to B, another third to D, and the last third to C. In a suit by C to set aside this deed, and for an account as against D, D disputed the factum of authority to adopt given by A to B, though he admitted the factum of adoption. The Sapindas of A did support the factum and authority to adopt. The other daughter of A did not dispute it, but on the other hand, was present at the time of marriage of C. The delay of ten years was explained by stating that C was an infant at the time, and in the deed now sought to be set aside, C was described as B's adopted son; B's conduct itself in waiting for ten years to make the adoption showed that she was not willing to divest herself of her rights, until an actual necessity for it had arisen. *Held*, (1) that a presumption arises in favour of the authority to adopt and it is for the person opposing it to rebut that presumption; (2) the adoption must be deemed to have been

**Hindu Law.****—2.—Adoption—continued.**

properly made and the right of D to question the deed is doubted. *KANUMALAPUDI SUBBIAH v. IMMADISSETTI SAKKAYYA*, 2 M.W.N. 1911, 350=11 Ind. Cas. 334=10 M.L.T. 558.

(368)—*Adoption by widow—Suit by reversioners—Knowledge of adoption—Limitation Act (XV of 1877), sch. II, art. 118—Burden of proof—Burden how discharged.*—In a suit by reversioners against a Hindu widow, the question was whether the plaintiffs had knowledge of an adoption by the widow more than six years before suit. *Held*, without expressing a definite opinion as to on whom lay the onus of proof as to the knowledge of an adoption, that, if the onus was on plaintiffs, it was sufficient for them to swear as to when they became aware of the adoption, unless the defendant by positive evidence brought home to them the knowledge of the factum of adoption more than six years before suit. *KANDALAM VENKUBOYAMMA v. KANDALAM NARASIMHA ROW*, 9 Ind. Cas. 163=9 M.L.T. 303=1 M.W.N. 1911, 192. (22 C. 609, 22 I.A. 51, 31 M. 230, 18 M.L.J. 19, 4 M.L.T. 80, 17 B. 341, 20 I.A. 1, 17 C. 518, R.)

(369)—*Adoption by widow—Reversioner—Suit by, for declaration of invalidity of adoption—Widow's life interest subsisting—Party relying on adoption—Onus of proof.*—Where, in a suit brought by the reversioner of a deceased Hindu for a declaration that an adoption made by the widow of the deceased is invalid, the parties who rely on the adoption admit the interest of the party who impeaches the adoption as presumptive reversionary heir, the onus is on the party who relies on the adoption to establish it, notwithstanding the fact that widow's estate intervenes between the presumptive reversionary heir and his right to possession. *RAJAGOPALA REDDI v. NATHU GOVINDA REDDI*, 9 M.L.T. 128=9 Ind. Cas. 342=21 M.L.J. 445=34 M. 329. (30 A. 197, 9 W.R. 463, Diss.; 30 C. 999, D., 24 W.R. 107, 3 B.L. R. 145, 23 A. 405, F.)

(370)—*Jains—Custom—Adoption of married man—Suit for declaration of invalidity of adoption—Burden of proof.*—*Held*, that according to the law and custom prevailing amongst the Jain community, a widow has power to adopt a son to her deceased husband without any special authority to that effect, and, if there are two widows, the senior widow may adopt without the concurrence of the junior widow. A widow is also competent, with the consent of sapindas, to give a son in adoption after the death of her husband. *Held*, also, that, adoption being amongst the Jains a purely secular institution, there is no legal objection to the adoption of a married man. 29 A. 495, F.; 6 I.A. 15, 22 B. 416, 22 M. 398, 21 A. 460, R.) *Held* also that, where the plaintiff asks for a declaration that an alleged adoption is invalid, but cannot claim immediate possession by reason of the intervention of a widow's estate, the burden is still on him to make out a *prima*



**Hindu Law—continued.****—2.—Adoption—continued.**

*facie* case that the adoption challenged by him is invalid in law or never took place in fact. **ASHARFI KUNWAR v. RUP CHAND**, A.W.N. 1908, 79=3 A.L.J. 200=30 A. 197. (9 W.R. 463, A.W.N. 1902, 62, F.; 1 I.A. 206, R.; 11 W.R. 468, 12 W.R. P.C. 1, 21 W.R. 84, 24 W.R. 107, D.)

(371)—*Wajib-ul-arz—Construction—Gift to an adopted son—Failure of adoption, Effect of—Evidence Act (I of 1872), ss. 43, 48—Entries in evidence.*—A clause in a *wajib-ul-arz* verified by one Dhanaraj, a Marwari Brahman, the sole owner of the village, ran as follows:—"Seven years ago I adopted my sister's son, Murli. He is my heir and will be the owner. If after this agreement, a son is born to me, half the property will be received by him and half by the adopted son. A sharer shall be at liberty to adopt his sister's son or brother's son or daughter's son, whomsoever he may like, and after his death, his adopted son will inherit his property." *Held*, that it was the intention of Dhanaraj to give his property to Murli Dhar, as his adopted son, capable of inheriting by virtue of adoption, and that, the adoption being invalid according to Hindu Law, and no family custom having been proved, it gave Murli Dhar no right to inherit and the gift had no effect upon the property. (26 I.A. 153, 19 A. 16, R., 19 I.A. 101, 3 I.A. 255, D.) Entries made in the *wajib-ul-arz* are admissible in evidence under s. 35, Evidence Act, in order to prove a family custom of inheritance or under s. 48 as the record of opinions as to the existence of such custom by persons likely to know of it. **MUSSAMMAT LALI v. MURLI DHAR**, 3 A.L.J. 415, P.C.=10 C.W.N. 730=8 Bom. L.R. 402=3 C.L.J. 594=1 M.L.T. 171=28 A. 488. [R., 11 O.C. 102.]

(372)—*Adoption, factum of—Question of fact to be determined according to the probabilities, Circumstances, evidence, etc., adduced in the case—Practice—Each party causing his opponent to be summoned as a witness—Objectionable.*—The main and the sole question in this case is one of fact, viz., whether M, an illiterate *pardanashin* lady, the widow of one D, deceased, adopted with the permission or direction of her husband given shortly before his death, one C, the respondent as his son. *Held*, that having regard to all the facts,—contradictions between the principal witnesses on every point, improbabilities of the respondent's story, its inconsistency with the conduct of the parties and course of business carried on by the parties, suppression of important evidence, non-appearance of the respondent as a witness to explain circumstances against him, nonproduction of accounts relating to expenses incurred for adoption, etc., the respondent's adoption was not proved. It would appear from the judgment of the High Court that in India it is one of the artifices of a weak and somewhat paltry kind of advocacy for each litigant to produce the opponent as a witness, and thus

**Hindu Law—continued.****—2.—Adoption—continued.**

give the counsel for each litigant the opportunity of cross-examining his own client. It is a practice which their lordships cannot help thinking all judicial tribunals ought to set themselves to render as abortive as it is objectionable. It ought never to be permitted in result to embarrass judicial proceedings as it has done in this instance. **KISHORI LAL v. CHUNNI LAL**, 5 M.L.T. 58, P.C.=9 C.L.J. 172=13 C.W.N. 370=11 Bom. L.R. 196=31 A. 116=19 M.L.J. 186=1 Ind. Cas. 128. [R., 3 Ind. Cas. 45.]

(373)—*Evidence of a conflicting nature—Importance of conduct—Adoption, Proof of—Where the evidence is conflicting as to the factum of an adoption, great importance attaches to the conduct of the parties between the date of the alleged adoption and the adopter's death. The fact that the adoptive father was entered in the school register against the boy's name under the heading "Parent or guardian," and that, in a partition suit in the boy's natural family, his rights were ignored, was taken into consideration in proof of the adoption.* **SOONKORO SAYAMMA v. SOONKORO ARJEE**, 6 M.L.T. 267.

(374)—*Construction of authority to adopt—Bandhuvalus, Meaning of.*—The authority to adopt given by the will of a Hindu to his wife ran as follows:—"If my younger brother N has children, and if he would give his second son among them in adoption, he should be taken. In the meanwhile, if another is adopted, much trouble would occur. If a boy is available among relations, with reference to whom trouble may not ensue, he may be taken." The construction of the above words was held to be that, if the boy to be adopted is not the second son of the brother, the testator meant that he should be taken from a family of relations, who were not likely to give trouble to the widow, that the concluding sentence was intended as advice or recommendation to the widow, and that the testator did not intend to make the adoption of a stranger dependent upon his brother's consent. The word "*Bandhuvalus*," in its popular signification applies as well to connections of the wife as of the husband. *Held* there is nothing in the will in question, which confines the term to the testator's own relations, excluding those of his wife. **RADH RUKMINAMMA v. NARASIMHA ROW**, 17 M.L.J. 186=2 M.L.T. 340.

(375)—*Anumatipara—Mode of proof—Evidence Act (I of 1872), s. 91.*—Where a boy was taken in adoption by a Hindu widow some 34 years ago, in virtue of an *anumatipatra* from her husband and all parties by their acts and conduct recognised the validity of the adoption, and it was the case of no one that the power to adopt was not strictly pursued; *Held*, that, it was not necessary to prove the *anumatipatra* in order to prove the adoption, and that, to facts like these s. 91 of the Evidence Act had no



**Hindu Law—continued.****—2.—Adoption—continued.**

application. *GANODA SUNDARI CHOWDHURANI v. GIRISH CHANDRA ROY*, 4 Ind. Cas. 400. (14 C. 486, P.C., 14 I.A. 71, D.)

(376)—*Evidence—Medical certificate—Proof—Adoption of son after death of natural father and succession to inheritance—Whether son loses inheritance—Determination of case according to allegation and proof.*—A certificate of a Civil Surgeon, which was not deposed to by that officer, should not be admitted in evidence. (9 W.R. Cr. 23, F.) The determination in a case should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. (11 M.I.A. 7, 2 Ind. Jur. N.S., 87, 6 W.R. P.C., 57, Rel. on.) Where a son has been adopted after the death of his natural father, and has succeeded to the inheritance, he does not, by subsequent adoption into another family, lose the inheritance so as to relegate it to the widow or other heirs of his natural father. *RAMPEAR RAI v. BHOGIA*, 8 Ind. Cas. 713. (1 C.L.J. 388, R.)

(377)—*Hindu Law—Fact of adoption admitted—Validity impugned—Burden of proof—Question as to custom or usage not raised in pleadings—Principles of Hindu Law to be referred to—Son of a Brahmo adopted by Hindu widow.*—It is for the party, who admits the fact of adoption but challenges its validity alone on the ground of incapacity on the part of the boy taken in adoption to establish the alleged incapacity. The adoption must be determined by reference to the principles of Hindu Law—No question as to custom or usage being raised in the pleadings. A Hindu, who has abandoned certain of the more important Hindu tenets and practices, can, if so desired at any moment, revert to Hinduism by undergoing the necessary expiatory ceremonies. When this is the case, an infant son of his can be received into Hinduism according to the rites of that religion, if his father, who is his legal guardian, in the exercise of his discretion, consents to, and approves of, that step. A Hindu becoming a Brahmo can validly give his son, born while a Brahmo, in adoption to a Hindu. So, the adoption by an orthodox Hindu of the son of a Brahmo is, in the absence of proof of special custom, valid. *KUSUM KUMARI ROY v. SATYA RANJAN DAS*, 30 C. 999=7 C.W.N. 784. (25 B. 551, F.)

(378)—*Defendant completely acquiesced by active conduct in plaintiff's adoption—Defendant estopped from disputing adoption—Adoption of married Brahmin adult.*—The defendant who took an active part in the adoption of the plaintiff by the defendant's brother, and by many acts signified his complete acquiescence in the adoption, and concurred in the performance, by the plaintiff of the funeral ceremonies of his adopting father was held to be estopped from disputing the validity of the adoption. *Quære*—Whether a Brahmin adult whose "Upanayana" and marriage ceremonies have already been performed in the family of his

**Hindu Law—continued.****—2.—Adoption—continued.**

natural father, can be adopted into another family according to Hindu Law. *SADASHIV v. HARI*, 11 B.H.C. 190. [R., 10 B. 80, 11 B. 381, 23 B. 327, 24 B. 473, A.W.N. 1907, 121=29 A, 495=4 A.L.J. 407.]

(379)—*Dismissal of suit on ground of limitation—Reversal of decision by lower appellate Court—Appeal on the merits, whether maintainable—Plaintiff's status as adopted son found in a previous suit not inter partes—Evidentiary value of finding.*—This was a suit to set aside certain sales made by the plaintiff's adoptive mother during the plaintiff's minority, on the ground that there was no valid legal necessity for making such sales. Defendant, denying the adoption of the plaintiff, stated that the sales were made for the plaintiff's maintenance. The suit was dismissed by the first Court on the ground of limitation on which point the lower appellate Court reversed the decision, finding that the plaintiff had sued in time. On second appeal, defendant-appellant claimed the right to an appeal on the merits, as the appellate Court only had recorded a decision upon them but it was held that, under Act VIII of 1859, the decision of that Court was that of an appellate Court, from which only a special appeal could be preferred to the higher Court. Further, as to the point of limitation, there was direct evidence on the disputed question of plaintiff's birth confirmed by former litigation. With regard to the question relating the adoption it appeared that, in a previous *bona fide* litigation, the status of the plaintiff as an adopted son was in issue and the question was finally disposed of in his favour on special appeal, and this was taken to be good evidence of the adoption in this case in the absence of better evidence on the side of the defendant. *SEETARAM v. JUGGOBUNDOO BOSE*, 2 W.R. 167.

(380)—*Disputed after twenty seven years—Acquiescence.*—A Hindu testator by his will gave authority to his widow, with the consent of his mother to adopt a son; in pursuance of which a son was adopted, and the other provisions of the will acquiesced in by the family for twenty-seven years, when a suit was brought by one of the testator's heirs claiming the estate then in possession of the adopted son, on the ground that the adoption was invalid. *Held*, (reversing the decree of the High Court at Calcutta), that, although the defendant was bound to prove his title as adopted son, as a fact, yet from the long period during which he had been received as adopted son, every allowance for the absence of evidence to prove such fact was to be favourably entertained, and that the case was analogous to that in which the legitimacy of a person in possession had been acquiesced in for a considerable time, and afterwards impeached by a party, who had a right to question the legitimacy, where the defendant in order to defend his status, is allowed to invoke against the claimant every presumption which arises from long recognition of his



**Hindu Law—continued.****—2.—Adoption—continued.**

legitimacy by members of his adoption, arising from the possibility of the loss of his rights in his own family by being adopted in another family. **RAJENDRA NATH HALDAR v. JAGENDRA NATH BANERJEE**, 15 W.R. 41, P.C. = 7 B.L.R. 216 = 14 M.I.A. 67.

(381)—*Deed of gift by Hindu widow—Evidence.*—Plaintiffs as next heirs of J, after his widow, sued the principal defendants R and another who were in possession of the property under a deed of gift executed in their favour by the widow. The recital in the deed of gift was that J having had no issue, took the two principal defendants (when they were boys) into his house with the intention of making them his heirs, and had also intimated it to her. Held on the evidence that the alleged deed was fabricated by the two principal defendants as it was not signed by the widow (who was able to write and in the habit of signing her own name for herself); that the evidence in support of the deed was unreliable; and that the plaintiffs were entitled to possession of the property. **BHYA RAM SINGH v. AGUR SINGH**, 1 Agra 200.

(382)—*Adoption—Daughter's son—Family custom—Estoppel—One reversioner does not claim though another—Misjoinder—Code of Civil Procedure (Act XIV of 1882), s. 578—Question dependent on evidence, raised after the evidence, not entertainable.*—The general rule of Hindu Law is that a daughter's son cannot be adopted, but it may be varied by family custom. A question, the solution of which is dependent upon evidence, cannot be entertained at a stage when the evidence was closed and nothing but the argument remained. A document, which is a deed of transfer, by certain ladies in possession, as Hindu widows, of the estate of the last male owner, and which purports to bind the ladies alone, although assented to by the plaintiff's father, creates no estoppel against the plaintiffs, as the latter claim title through the last male owner and not through their father. S. 578 of the Civ. Pro. Code has the effect of preventing the misjoinder of causes of action from being made a ground of appeal and being dealt with on appeal. **RUP NARAIN v. MUSSAMAT GOPAL DEVI**, 6 A.L.J. 567, P.C. = 10 C.L.J. 58 = 13 C.W.N. 920 = 3 M.L.T. 423 = 11 Bom. L.R. 833 = 36 C. 780 = 3 Ind. Cas. 382 = 93 P.R. 1909 = 68 P.L.R. 1910 = 146 P.W.R. 1909 = 36 I.A. 103 = 19 M.L.J. 548. [R., 12 Bom. L.R. 53; F., 7 M.L.T. 364 6 Ind. Cas. 248, D., 6 Ind. Cas. 15.]

(383)—*Mitakshara—Step-mother's brother's grand-daughter's son—Whether can be adopted.*—Under the Hindu Law, the adoption of a step-mother's brother's grand-daughter's son is valid. **RAGHUBAR DAYAL v. RANI KUNVAR**, 14 Ind. Cas. 48.

(384)—*Invalid adoption—Adoptee's rights in natural family—Not destroyed per se—Test—Estoppel—Giving away in adoption—Competency of none but parents.*—An invalid

**Hindu Law—continued.****—2.—Adoption—continued.**

adoption does not per se destroy the adoptee's rights in his natural family. (1 M.H.C. 363, 12 B.H.C. 364, R.) The test is whether, in consequence of the adoption, the position of the members of the natural family has in any way been changed to their disadvantage, so as to render it inequitable to restore the adoptee to his place in the natural family. (7 M.H.C. 250, 18 M. 145, R.) An orphan cannot be given away in adoption either by himself or by any one else. (3 M.H.C. 129, 6 B.H.C. O.C. 83, 10 B.H.C. 268, 7 B.H.C. App. XXXIII and XXXV, 7 M. 548, R.) No one but the parents of the child can give him away in adoption. **VAITHILINGA MUDALI v. MURUGIAN MUDALI**, 23 M.L.J. 189.

(385) — *Adoption—Virudha Sambandha—Rule applies to specific instances.*—Under Hindu Law, the rule that no one can be adopted whose mother the adopter could not have legally married, extends only to the daughter's son, the sister's son and the mother's sister's son. **YAMNAVA v. LAXUMAN**, 14 Bom. L.R. 543. (10 Bom. L.R. 948, 32 B. 619, F.)

See BOM. ACT II OF 1863, s. 6, cl. (2), 2 B. 529.

Suit for declaration that adoption is invalid—Property affected more than Rs. 5,000—Jurisdiction—Conversion from Hindu Law to Mahomedanism—Presumption as to custom of adoption in Mahomedan Law—See BOM. ACT XIV OF 1869, s. 24, 13 Bom. L.R. 251.

See U.P. ACT I OF 1869, s. 13 (1), 16 C. 556 = 16 I.A. 53, P.C.

Status of adopted son—See U.P. ACT II OF 1901, s. 22, 8 Ind. Cas. 228.

Adoptee a married man at the time of adoption—Mixed question of law and fact—Objection not entertainable for the first time in second appeal—See APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL, 1 N. L.R. 1.

See BURDEN OF PROOF—GENERAL, 7 M. L.T. 57 = 14 C.W.N. 285 = 11 C.L.J. 172 = 12 Bom. L.R. 244 = 32 A. 140 = 20 M.L.J. 182 = 5 Ind. Cas. 549, P.C.

Disputed adoption—Compromise of claim—Consideration—Burden of proof—See BURDEN OF PROOF—HINDU LAW, 6 M. 254.

See CERTIFICATE OF ADMINISTRATION—GENERAL, A.W.N. 1902, 62.

See CERTIFICATE OF ADMINISTRATION—MISCELLANEOUS, 20 B. 548.

Grant of certificate to collect debts opposed by alleged adopted son—Refusal by Judge to investigate title—See CERTIFICATE TO COLLECT DEBTS, 6 C. 303 = 7 C.L.R. 475.

Mitakshara law—Right of adopted son's son to share in family property along with natural son of adopter—Extent of his share—See CIV. PRO. CODE, 1908, O. XXIII, r. 3, 1 C.L.J. 388.



**Hindu Law—continued.****—2.—Adoption—continued.**

Right of adopted son in the Sialkot District among Ohima Jats to succeed collaterally to adoptive father's relatives — See CUSTOMS — PUNJAB — ALIENATION, 4 P.R. 1906 = 55 P. L.R. 1906.

See CUSTOMS — PUNJAB — INHERITANCE, 147 P.R. 1889.

See DECLARATORY DECREE, SUIT FOR — GENERAL, 1 O.C. Sup. Vol. 5.

See DECLARATORY DECREE, SUIT FOR — ADOPTION, 7 M. 401.

Adoption, invalid — Possession under — Status not altered by — See ESTOPPEL — GENERAL, 21 M.L.J. 500 = 10 Ind. Cas. 194.

See ESTOPPEL — ESTOPPEL BY CONDUCT, 18 M. 145 = 5 M.L.J. 44, 3 Agra 103-A., 19 B. 374, A.W.N. 1882, 97, 15 M. 486 = 2 M.L.J. 114, 7 M. 3, F.B.

See ESTOPPEL — ESTOPPEL BY JUDGMENT, 6 M. 43.

Fact evidencing admission neither conclusive proof, nor constitutes estoppel — See EVIDENCE ACT, 1872, ss. 31, 115, 14 B. 312.

Decree against mother representing estate, adopted son being alive — Decree in valid — No further Declaratory suit — See EXECUTION OF DECREE — EXECUTION BY AND AGAINST REPRESENTATIVES, 11 M. 408.

See FACTUM VALET, 21 A. 460, P.C. = 3 C.W.N. 427 = 26 I.A. 113 = 22 M. 398 = 9 M.L.J. 67.

Widow appointed by District Judge, guardian of minor adopted son — Right of widow to bring suit to set aside adoption — See GUARDIAN AND WARDS ACT, 1890, ss. 47, 48, 30 C. 613 = 7 C. W.N. 419.

Hindu Law — Widow — adoption subsequent to alienation — Right of adopted son to question alienation — See HINDU LAW — ALIENATION, 26 M. 143 = 12 M.L.J. 197.

Conveyance to sonless Hindu — Subsequent birth or adoption of son — Effect on conveyance — See HINDU LAW — ALIENATION, 5 B. 630.

Adoption by dancing woman — See HINDU LAW — CUSTOM, 19 M. 127.

Family not subject to Hindu Law — Succession by adoption — Point for inquiry — See HINDU LAW — CUSTOM, 11 C. 463, P.C. = 12 I.A. 72.

Dancing woman, adoption of daughter for illegal purpose, invalidity of — See HINDU LAW — CUSTOM, 21 M. 229.

Adoption by dancing girls, recognisable by Courts — See HINDU LAW — CUSTOM, 12 M. 214.

Custom — Kadwa Kunbi caste — Widow's adoption prohibited — See HINDU LAW — CUSTOM, 16 B. 470.

Gift to adopted son by Hindu widow — Adoption held invalid — Validity of gift — See HINDU LAW — GIFT, 11 M.L.J. 27.

**Hindu Law—continued.****—2.—Adoption—continued.**

Adoption by widow — Gift of husband's property to adopted son — *Persona designata* — Appointment of heir by widow — Validity — See HINDU LAW — GIFT, 2 M.L.J. 240.

Suit by donee of property by sonless Hindu — Question whether document under which donee claimed was deed of gift or will — Adoption of son by donor *pendente lite* — Whether adopted son to be added as party — Effect of non-joinder — Motive of adopter immaterial — See HINDU LAW — GIFT, 5 B. 630.

Guardianship of Hindu boy after adoption — See HINDU LAW — GUARDIANSHIP, 3 B. 1.

Adoption, junior co-wife having taken part in adoption, right of, to succeed to adopted son in preference to other co-wives — See HINDU LAW — INHERITANCE, 23 M. 1, P.C. = 26 I.A. 156.

Adoption by a zemindar in conjunction with junior wife, — Succession to adopted son — See HINDU LAW — INHERITANCE, 18 M. 277 = 5 M. L.J. 121.

See HINDU LAW — INHERITANCE, 9 W.R. 463, 20 P.R. 1897, 6 C. 289 = 7 C.L.R. 478, 1 A. 255, F.B., 17 B. 100.

Right in property of grandfather in case of adoption of father — See HINDU LAW — JOINT FAMILY, 24 P.L.R. 1911 = 9 Ind. Cas. 541.

Share of adopted son on partition — Sudra family — *Dattaka Chandrika*, s. 5, paras 24, 25, 29 — See HINDU LAW — JOINT FAMILY, 14 C.L.J. 183.

See HINDU LAW — PARTITION, 7 M. 253.

Suit by reversioner for possession after widow's death — Adoption in issue — Limitation — Limitation Act (XV of 1877), arts. 118 and 141 — See HINDU LAW — REVERSIONERS, 9 C.W. N. 222.

Hindu Law — Suit by reversioner to set aside adoption — Subsequent suit by another reversioner of same degree to set aside same adoption — No bar of adjudication — See HINDU LAW — REVERSIONERS, 13 M.L.J. 359.

By widow of deceased husband's sister's son — Validity of such adoption — See HINDU LAW — REVERSIONERS, 2 C.L.J. 116.

Adoption by widow — Suit by presumptive reversioners to declare adoption invalid — How far decree binding on other reversioners — See HINDU LAW — REVERSIONERS, 1 M.L.T. 193 = 16 M.L.J. 307, F.B. = 29 M. 390.

By widow to deceased husband — Stipulation in deed of adoption that she should be manager during her life-time, effect of — See HINDU LAW — WIDOW, 13 A. 391 = A.W.N. 1881, 144.

Alienation by widow — Adopted son how far bound by prior alienation — See HINDU LAW — WIDOW, 13 Bom. L.R. 940.



**Hindu Law—continued.****—2.—Adoption—continued.**

Widow and adopted son, agreement between—Decree against her, how for binding on adopted son's widow—See HINDU LAW—WIDOW, 7 C.W.N. 678.

See HINDU LAW—WIDOW, 2 O.P.L.R. 236, 19 B. 36.

Evidence of—Dispute after 27 years—Acquiescence—See HINDU LAW—WILL, 7 B.L.R. 216 P.C.=15 W.R. 41=14 M.I.A. 67.

Hindu Law—Will—Bequest in favour of testator's adopted son—Validity of adoption not condition precedent to bequest taking effect—See HINDU LAW—WILL, 24 M. 214=27 I. A. 162, P.C.

Will bequeathing property to wife—Subsequent adoption of son—Implied revocation—See HINDU LAW—WILL, 3 M.L.J. 174.

Directed by will—Bequest to boy named for adoption—Conditional gift on adoption—Adoption, condition a precedent for boy taking under will—See HINDU LAW—WILL, 20 B. 718.

Right of adopted grandsons to share with other grandsons in the estate of grandfather—Adopted son and appointee under a power, analogy between—See HINDU LAW—WILL, 28 M. 363=15 M.L.J. 299.

Will—Authority to widow to adopt—Adoption by testator—Subsequent will not referring to earlier—Second will proved but not first will—Adoption by widow under authority from first will—Whether authority to widow to adopt affected by adoption by testator himself—See HINDU LAW—WILL, 11 M.L.T. 307=M.W.N. 1912, 519.

Direction in will for adoption by testator's widowed daughter-in-law—Adoption so made resulting as adoption to the testator's deceased son—Nephew's son appointed by will to be taken in adoption—Bequest to nephew's son under will—Adoption whether condition precedent to his claiming under will—See HINDU LAW—WILL, 12 B. 185.

Direction by testator for adoption of a boy by his widow—Gift over to the boy as adopted son after death of the widow—Provision for the legatee's maintenance—Failure to adopt, effect of—See HINDU LAW—WILL, 16 M. 355.

Double adoption—Gift to sons by implication as devisees—Intention—Persona designata—See HINDU LAW, WILL, 2 Ind. Jur. N. S. 18.

See HINDU LAW—WILL, 3 B.L.R. O.C. 85, 28 C. 499, 20 M. 167=6 M.L.J. 218, 2 Ind. Jur. N.S. 24, 12 B. 202, Note.

See INTEREST—SPECIAL CASES, 3 O.L.J. 502=10 C.W.N. 695=33 C. 957.

Jains—Authority of widow to adopt—Adoption of married man—See JAINS, A.W.N. 1907, 121=4 A.L.J. 407=29 A. 495.

Application of Hindu Law to Jains—Effect of custom—See JAINS, 14 C.W.N. 545, P.O.=7 A.L.J. 349=12 Bom. L. R. 402=11 O.L.J. 454=6 Ind. Cas. 272.

**Hindu Law—continued.****—2.—Adoption—concluded.**

See LAMBARDAR, 2 P.R. 1883, Rev.

See LIMITATION ACT, 1908, arts. 119, 144, 24 A. 195=A.W.N. 1902, 10.

See LIMITATION ACT, 1908, arts. 140, 141, 144, 19 B. 809.

Gift by widow of portion of property inherited from husband—Subsequent adoption—Suit by adopted son—See LIMITATION ACT, 1908, art. 141, 4 A.L.J. 354=A.W.N. 1907, 148.

Adverse possession against Hindu widow for statutory period, effect of, on title of subsequently adopted son—Limitation—See LIMITATION ACT, 1908, art. 144, 13 B. 276.

Law applicable to self-acquisitions of Nambudris—See MALABAR LAW—JOINT FAMILY, 6 Ind. Cas. 583=8 M.L.T. 93=20 M.L.J. 938.

Hindu widow—Suit by adopted son for possession and profits—Amounts to be set off—See MESNE PROFITS—MODE OF ASSESSMENT, 25 A. 266=A.W.N. 1903, 34.

See MORTGAGE—CONDITIONAL SALE, A.W.N. 1881, 72.

Suit by Hindu widow—Addition of after-adopted son as co-plaintiff—See PARTIES TO SUITS—ADDING PARTIES TO SUITS, 1 M.H. C. 197.

Suit by widow and alleged adopted son in alternative—Defendant not bound to dispute validity of adoption set up—Effect of decision in favour of alleged adopted son—Res judicata—See RES JUDICATA—MATTERS IN ISSUE, 13 M.L.J. 359.

Power to adopt—Declaration, suit for, that power is invalid—Maintainability—See SPECIFIC RELIEF ACT, 1877, s. 42, 4 O.L.R. 270.

Adoption suit to set aside—Suit by distant reversioner—Pleadings—See SPECIFIC RELIEF ACT, 1877, s. 42, 11 O.L.R. 198.

Suit for declaration that defendant is not adopted son—Who can bring suit—See SPECIFIC RELIEF ACT, 1877, s. 42, 20 B. 202.

Usufructuary mortgage—Suit on mortgage by adopted son of mortgagee—Succession certificate, whether necessary—See SUCCESSION CERTIFICATE ACT, 1889, s. 4, 24 M. 22.

Suit by adopted son against adoptive father for declaration of adoption—Value of whole property determines jurisdiction—See VALUATION OF SUITS, 3 M.L.J. 46.

Suit to set aside—Valuation—Jurisdiction—See VALUATION OF SUITS, 6 Ind. Cas. 636=14 C.W.N. 929.

Gift to adopted son if valid—Person not in being—See WILL—CONSTRUCTION, 8 C.W.N. 266.

See—WILL, CONSTRUCTION, 6 B.L.R. 623.

Authority to adopt contained in an unprobated earlier will—Subsequent will admitted to probate, not containing any power to adopt—Validity of adoption—See WILL—REVOCA-TION, 6 M.L.T. 116.



**Hindu Law—continued.****—3.—Alienation.**

See HINDU LAW—DEBTS.

See HINDU LAW—GIFT.

See HINDU LAW—JOINT FAMILY.

See HINDU LAW—REVERSIONERS.

See HINDU LAW—WIDOW.

**(1)—Hindu Law—Restraint upon alienation.**

—A Hindu executed a deed of gift in favour of his daughter G, as follows:—"Now in order to make provision for the maintenance of you and your sons, making a gift of my house to you, I execute this deed of gift. From this day, after becoming the rightful owner of the said property.....I give the said property for the living of you and your sons, sons' sons and so in succession; no one amongst you, at all, at any time, in any manner whatever, shall be able to make a gift or sale thereof, or in any way squander it. Should any one of you do so, it will be inadmissible, for which purpose you and your sons, sons' sons and so on, will dwell and enjoy, and possess the same without obstruction." Held that the restraint on alienation, being one unknown to Hindu Law and inconsistent with, and repugnant to, the estates given by the testator to his daughter and her children, was void and that the Hindu Law does not recognize any absolutely inalienable estate. *NITAI CHARAN PYNE v. S. M. GANGA DASI*, 4 B L.R. O.C. 265, Note. [R., 4 B.L.R. O. C. 231.]

**(2)—Impartible raj—Grant in perpetuity.—**

The owner of an impartible raj is not prevented from making grants of the land in perpetuity, *NARAIN KHOOTIA v. LOKENATH KHOOTIA*, 7 C. 461=9 C L.R. 243. [R., 10 A. 272=15 I.A. 51, P.C.]

**(3)—Impartible estate—Alienability—Family custom.—**The impartibility of a raj does not, as a matter of law, make it inalienable; the power of alienation rests upon the general law, and inalienability, if it exists, must depend upon family custom of which strict proof must be given. Therefore, the owner of an impartible estate is not, on account of the impartibility, restricted to making grants enuring only for his life. *RAJAH UDAYA ADITYA DEB v. JADABLAL ADITYA*, 8 I.A. 248, P.C.=8 C 199=4 Sar. 290. (On appeal from 5 C. 113.) (5 M.I.A. 82. R.) [F., 13 M. 197; R., 11 C. 463, P.C., 10 A. 272. P.C. 2 C.P.L.R. 141, 19 M. L.J. 567; D., 5 A. 542, Rel. on, 13 C.W.N. 1013=11 Bom. L.R. 901=36 C. 943=6 M.L.T. 68=6 A.L.J. 847.]

**(4)—Mitakshara — Impartible estate—Right of son by birth does not exist—Alienation by father binding on son—Custom—Burden of proof.—**The property in the paternal or ancestral estate acquired by birth under the Mitakshara law is so connected with the right to partition that it does not exist where there is no right to it. Accordingly, where the Mitakshara law prevails and there is a custom of impartibility and succession according to primogeniture, the eldest son does not become a

**Hindu Law—continued.****—3.—Alienation—continued.**

co-sharer with his father, and any alienation of the property made by the latter will be binding on the former, in the absence of a custom to the contrary. [F., 20 M. 167; On appeal, 22 M. 383, P.C.=26 I.A. 83, 11 Bom. L.R. 901. P.C.; Commented on, 27 M. 435; Diss. & Expl., 18 M. 287; Diss. & F., 13 M. 197; R., 16 M. 11, 17 M. 316, 17 M. 362, 21 M. 18, 22 M. 110, 22 M. 538, 24 M. 147, P.C.=27 I.A. 151, 27 M. 131, P.C.=6 Bom. L.R. 7=8 C.W.N. 186, 31 C. 111, 30 M. 454, 29 M. 484=16 M.L.J. 499=1 M.L.T. 287, 19 M.L.J. 401, 32 M. 428, 29 B. 51=6 Bom. L.R. 268, 29 M. 453=16 M.L.J. 339=1 M.L.T. 272, 18 P.R. 1908=156 P.L.R. 1908=19 P.W.R. 1908. F.B.; D., 31 C. 224, 35 C. 823=8 C.L.J. 124=12 C.W.N. 958.] But it may be proved that such an estate is inalienable according to custom or from the very nature of the tenure; and then, the burden of proof is on the person asserting inalienability. *SARTAJ KUARI v. DEORAJ KUARI*, 10 A, 272, P.C.=15 I.A. 51=5 Sar. 139. [R., 18 M. 287, 20 A. 537, 1 C.L.J. 557, 30 M. 255=17 M.L.J. 367=2 M.L.T. 167, 13 C.W.N. 1013=6 M.L.T. 68.]

**(5)—Impartible Zamindari — Alienability — Family custom — Improvident lease.—**The owner of an estate which descends as an impartible inheritance, is not, by reason of its impartibility, restricted to making grants or gifts enuring only for his own life, and the question of inalienability is one depending on family custom, which will require to be proved. A lease granted by the holder of an impartible estate, however improvident, cannot be questioned after his death by his successor, unless the latter can show that the estate is inalienable according to custom, for purposes other than those warranted by the Mitakshara law. *BERESFORD v. RAMASUBBA*, 13 M. 197. (10 A. 272. Disc. & F.) [R., 16 M. 11, 20 M. 167, 22 M. 383, P.C., 27 M. 131, P.C.=6 Bom. L.R. 7=8 C.W.N. 186=31 I. A. 1, 29 M. 453=16 M.L.J. 339=1 M.L.T. 272.]

**(6)—Conditions restraining rights—Conditions repugnant to legal incidents of estate—Validity.—**Although the parties to the division of family property may, by mutual contract, impose on themselves an obligation restrictive of their proprietary rights, they cannot by a collateral agreement, annex hereditarily, to each separate absolute estate acquired by the division, a condition incompatible with the beneficial rights incident thereto. It is a sound principle and one of general application that an estate cannot be made subject to a condition which is repugnant to any of its ordinary legal incidents; and there is nothing in Hindu law which would permit of a departure from that principle. *VENKATARAMANNA v. BRAMMANNA SASTRULU*, 4 M.H.C. 345. [Appr., 4 M. 200; R., 7 M. 315.]

**(7)—Construction of an ikrarnamah—Restriction of the power of alienation.—**Construction of an ikrarnamah, or deed of agreement and partition, of an ancestral estate, among



**Hindu Law—continued.****—3.—Alienation—continued.**

several brothers; *held*, that the terms of the deed were not restrictive upon the power of each brother, to alienate his separate share. A., one of the brothers, had his share registered on the Collector's books as owner, and by deed of sale conveyed such share to his daughter, who was also his heir. The Collector, upon the objection of one of A's brothers (who denied A's right to alienate, on the ground that it was ancestral property), refused to register the daughter's name as proprietor. *Held*, that the Collector was bound, by Ben. Reg. VIII of 1800, s. 21, to register her name as purchaser but that such mutation of name was to be without prejudice to the question of the right of succession. **RANEE COWULBAS KOONWUR v. BABOO LOLL BAHADOOR SINGH, 9 M.I.A. 39=1 Sar. 831.**

(8)—*Joint family — Separate acquisition—Onus of proof. — Mitakshara — Alienation—Sons.*—Where a Hindu family is admittedly joint, a person claiming a particular property as separate should prove his allegation. Property cannot be alienated under the Mitakshara Law by the sons without the father's consent. **SHEO RUTTUN KOONWAR v. GOUR BEHAREE BHUKUT, 7 W.R. 449.**

(9)—*Hindu law—Mitakshara—Will—Alienation—Nephew.*—Even in those parts of India which are governed by the Mitakshara, a Hindu without male descendants may dispose by will of the separate and self-acquired property, whether moveable or immoveable, and the testamentary power may be exercised at least within the limits which the law prescribes to alienation by gift *inter vivos*.—A nephew is not competent under Hindu law, to challenge any alienation of ancestral property directly or indirectly made by his uncle. **ADJODHYA GIR v. KASHEE GIR, 4 N.W.P. 31.**

(10)—*Mitakshara law—Alienation of ancestral property—Consent of son—Right of grandson.*—Under the Mitakshara, a grandson cannot question an alienation made by his grandfather with the consent of his father. **BURAIK CHUTTUR SINGH v. GREEDHAREE SINGH, 9 W.R. 337.**

(11)—*Hindu law—Alienation by grandfather—Grandson born subsequently, whether can question alienation.*—A grandson who was neither born nor begotten when his grandfather confessed judgment, by which his property passed to a third person, cannot contest the alienation or confession afterwards. **JADO SINGH v. MUSSUMAT RANEE, 5 N.W.P. 113. (3 Agra 432, F.) [F., 2 C.P.L.R. 141; R., 9 C.L.J. 485=1 Ind. Cas. 213.]**

(12)—*Krittima adopted son—Alienation by father of self-acquired property—Right of such son to object.*—The relations established by the *krittima* form of adoption being confined to the contracting parties, and not extending beyond them on either side, the sons of a man who had been adopted in that form could not

**Hindu Law—continued.****—3.—Alienation—continued.**

set aside alienations of self-acquired property which were proved to have been made for legitimate purposes by the person who had adopted him. **BABOO JUSWANT SINGH v. DOOLEE CHAND, 25 W.R. 255.**

(13)—*Self-acquired immoveable property—Right of alienation — Mitakshara school.*—A member of an undivided Hindu family governed by the Mitakshara law can alienate his self-acquired immoveable property at his pleasure. **BALWANT SINGH v. RANI KISHORI, 20 A. 267, P.C.=25 I.A. 54=2 C.W.N. 273=7 Sar. 278. (1 A. 394, 6 W.R. 71, 10 B.L.R. 183, Appr.) [Cons., 22 M. 398, P.C.=9 M.L.J. 67=21 A. 460; R., 16 M.L.J. 491=150 P.R. 1907, 30 A. 197=A.W.N. 1098, 79=5 A.L.J. 200, 5 M.L.T. 67=32 M. 377, 31 C. 111.]**

(14)—*Hindu Law — Mitakshara — Father's powers of disposal of property—Distinction between self-acquired and ancestral property.*—There is a distinction between ancestral and self-acquired property under the Mitakshara law with regard to the right of a father to dispose of it. The fact of being an out caste would not prevent him from exercising his rights over the property to the same extent as he otherwise might have done. **AJODHYA PERSHAD SINGH v. RAMSURN, 6 W.R. 77.**

(15)—*Custom—Appointment of son-in-law as son—Right of such son-in-law.*—Suit to recover a share of the property of the plaintiff's maternal grand-father. The facts were as follows:—Plaintiff's mother and first defendant's mother were sisters, daughters of the original owner, who, having no male issue, selected, in pursuance of a special custom, the first defendant's father as a son-in-law who should take the property as if a son. On the death of the owner, the first defendant's father entered into possession of the property and, afterwards, during the minority of his son (first defendant) associated with himself the plaintiff, on promise of a share. In accordance with this agreement, the plaintiff joined the first defendant's family and continued for many years aiding in the management and improvement of the property, until, a short time before the present suit was brought, the first defendant turned the plaintiff out of doors and refused to give him the promised share. *Held*, that the first defendant's father was what was called in English law, a purchaser, and had all the powers of disposition existent over self-acquired property. There was also a complete adoption or ratification of the father's contract by first defendant and he ought to have held to it. *Per Innes, J.*—The right of the first defendant's father to dispose of property self-acquired would have depended upon whether the first defendant was or was not in being at the date of the acquisition. **CHALLA PAPI REDDI v. CHALLA KOTI REDDI, 7 M.H.C. 25. [Appr., 12 M. 442; Cons., 4 M. 272; R., 15 M.L.J. 494=35 C. 368=7 C.L.J. 359, 1 A. 413.]**



**Hindu Law—continued.****—3.—Alienation—continued.**

(16)—*Mortgage of joint family property—Right of partition by sons.*—Where ancestral property having been mortgaged by the father is sold in execution of decree, and the sons, members of a joint family, sue for determination of right and partition, held that the mortgagee cannot stand in a better position than the father against whom the sons have a right to require partition, so far as the property is ancestral. *LOCHUN SINGH v. NEMDHAREE SINGH*, 20 W.R. 170.

(17)—*Widow's right to maintenance—Ratio it must bear to family property.*—That a Hindu widow had a son, who died after his father, is no reason for reducing the maintenance she would be reasonably entitled to, if she had been a childless widow. The amount of a widow's maintenance must be fixed with reference to the amount of the family property or income, and upon equitable considerations based upon the circumstances of each individual case. *NARHAR SINGH v. DIRGNATH KUAR*, 2 A. 407. [R., 12 A. 558, 24 B. 386, 1 N.L.R. 33.]

(18)—*Hindu Law—Alienation—Son born after alienation—Right of such son to question alienation.*—An alienation of property made by a Hindu who at the time of such alienation had no issue living, cannot be contested by a son subsequently born or begotten. *MADHO SINGH v. HURMUT ALLY*, 3 Agra 432. [F., 5 N.W.P. 113; R., 9 C.L.J. 485.]

(19)—*Release from prison—Father's right of sale.*—A father may sell ancestral property to effect his release from prison. *DULFEP SINGH v. SREE KISHOON PANDAY*, 4 N.W.P. 83. [F., 6 A. 431; R., 7 N.W.P. 261, F.B.; D., 5 A.L.J. 417.]

(20)—*Hindu Law—Ancestral property—Alienation by father—Son born subsequently, Right of, to question alienation.*—A house which was the joint property of M and S, was mortgaged after S's death by M and S's widow for a debt. The mortgagee having obtained a decree on his mortgage brought the property to sale in execution of it and became the purchaser. M's son who was born after the debt was incurred sued to establish his right to the possession of a moiety of the house. Held that a purchaser under execution of decree against the holder of ancestral property is not bound to go further back than to see that there was a decree against him, that the property was properly liable to satisfy the decree, if the decree had been properly given against him; and if, after having inquired into that, he has purchased the property *bona fide* and for consideration, the son of the judgment-debtor subsequently born is not entitled to set aside all that has been done under the decree and execution and recover back the property. *SALIGRAM v. LULTA PARSHAD*, 6 N.W.P. 329.

(21)—*Alienation by widow.*—Where an estate which has devolved to a widow is sufficient to pay a small debt due by the husband, the

**Hindu Law—continued.****—3.—Alienation—continued.**

Government revenue and all other expenses, including the marriage of daughters, the widow is not justified by any legal necessity in alienating the estate. *LALLA BYJNATH PERSHAD v. BISSEN BEHAREE SAHOY SINGH*, 19 W.R. 79. [R., 19 B. 36.]

(22)—*Mitakshara—Illegitimate son—Alienation of ancestral estate—Rights of unborn children under Mitakshara Law.*—An assignment by a person, belonging to one of the regenerate classes, of a part of his ancestral estate to his illegitimate son, in lieu of maintenance, there being than no legitimate son born to him, is valid under the Mitakshara law, such illegitimate son being legally entitled to maintenance. [R., 6 A. 329.] *Quære*—Whether, under the Mitakshara law, a father, who has no child born to him, is competent, without legal necessity, to alienate the whole or any part of the ancestral estate; or, whether the rights of unborn children are so preserved as to render such an alienation unlawful? *Obiter*—If a plaintiff, claiming two reliefs in the alternative, is granted one and refused the other, and he appeals urging that the relief granted ought to have been refused and the one refused ought to have been granted, it will be competent to the appellate Court to pass a decree which it considers to be proper upon the pleadings and the evidence in the cause. *PARICHAT v. ZALIM SINGH*, 3 C. 214=4 I.A. 159, P.C.=3 Sar. 728=3 Suther. 436. [R., 2 C.L.J. 288.]

(23)—*Hindu widow—Right in husband's property—Fraudulent assignment—Onus—Charge—Legal necessity—Wager.*—One R C died, on 29th February, 1863, leaving five sons, and leaving a Will dated 18th June, 1835. M, one of the sons, died on the 25th October, 1847 intestate and without male issue, leaving the defendant B, then an infant of eleven years of age, his sole widow surviving him. She brought a suit against her husband's brother to recover the share of the property to which she was entitled as her husband's heiress. G R, a solicitor, undertook to prosecute such suit on her behalf, she agreeing to pay the costs of the suit when she should be able to do so. A considerable sum thus became due to G R from B, which she secured by giving a bond bearing interest at 15 per cent. per annum to one R S and one A R and also a warrant of attorney to confess judgment on the bond. The suit by G R failed, but one C G undertook to institute a new suit on the terms, contained in an indenture, dated 4th April, 1859 made between B, C G, and D, whereby B assigned all her right and interest, as widow of M, in the estate of R C, and all benefit to be derived from the suit to be instituted, as to half of such interest to C G, absolutely, and as to the remaining half share to C G, to retain thereout whatsoever sums he might advance to her for maintenance with interest at 12 per cent. and to pay over the residue to her. C G caused a suit to be



**Hindu Law—continued.****—3.—Alienation—continued.**

instituted in B's name and before a decree was obtained, he by a deed dated 14th November, 1860, assigned to H all his rights under the assignment of 4th April, 1859, in consideration that H should take upon himself the maintenance of B and the management of the suit and should become responsible for the costs thereof, to retain only five-sixteenths for his own remuneration out of the eight-sixteenths absolutely assigned to CG, and to pay the other three-sixteenths to CG, and out of the other eight-sixteenths to re-imburse himself for all payments with interest at 12 per cent. per annum and to pay the balance to CG. In her second suit, B on 19th August, 1861 obtained a decree in the Supreme Court declaring her right to the accumulations on her husband's one-fifth share in the estate and declaring her right as a Hindu widow to all profits made on such accumulations since her husband's death. In September 1861, GR caused judgment to be entered on the bond given to RS and A R and caused execution to be issued, and the sheriff seized and was about to sell B's right, title and interest on the estate of her husband. RG agreeing to take Rs. 12,500 in satisfaction of his claim, the plaintiff agreed to advance this amount on B executing an assignment in the name of the defendant IS, *benami* for the plaintiff, of five-eighths of the half share of her whole claim so reserved to her in the assignment to CG, of April 4th, 1859. On 18th December, 1861, the deed of assignment was made between B, IS, as agent of and *benami* for plaintiff, and C, trustee for IS, and witnessed that in consideration of payment of Rs. 12,500 by IS, to B, she sold to IS and C, five-eighths of the half share reserved to her in the estate of her husband and in the accumulations thereon, but subject to the assignment to CG of April 4th, 1859. Under the decree of the Supreme Court of 19th August, 1861, afterwards confirmed by the Privy Council, B was found entitled to Rs. 84,685 as her share of the accumulations on RO's property, and to Rs. 1,55,255 as gains and profits made thereon from her husband's deaths, and on the 20th December, 1864, the said sum were paid into Court to the credit of B in her suit against her husband's brothers. Plaintiffs brought this suit for a declaration that the assignment of December, 1861, was a *benami* transaction in which IS stood for him and that he (the plaintiff) was entitled, against both B and the reversionary heirs, to the full benefit of that assignment and prayed that the precise amount of money covered by the indenture might be ascertained and paid to him. In opening the case, the plaintiff gave up his claim against the Rs. 84,685 as he was not in a position to make out a sufficient case of necessity for the alienation by B to bind the reversionary heirs. *Held* that the bargain on the face of it was of the nature of a wager and that a person who desired to avail himself of the benefit of a contract made under such circumstances must show that the bargain was at least fairly made. *Held*, also, that the deed

**Hindu Law—continued.****—3.—Alienation—continued.**

of December 1861 operated to charge as much of the fund in Court, as B had power to charge, with the re-payment of the sum advanced, *i.e.*, Rs. 12,500 with interest at 12 per cent., and that the plaintiff was entitled to have that amount paid out of the accumulations, *viz.* Rs. 1,55,255, paid into Court. **PANNALAL SEAL v. SRIMATI BAMASUNDARI DASI, 6 B.L.R. 732.**

(24)—*Gift of ancestral land by father, Right of minor son to set aside.*—A Hindu alienated more than half of his ancestral moveable property by way of gift to his wife and deeds of *stridhanam* to his two daughters. The alienations were made by him without the consent of his son who was then a minor. On the ground that, under the Hindu Law, the father had no power to make such alienations of ancestral immoveable property on the suit of the minor son for the purpose, the alienations were set aside, not only to the extent of the father's share, but altogether. **RAYAKKAL v. SUBBANNA, 16 M. 84. [D., 24 B. 547.]**

(25)—*Mitakshara joint family—Alienation by father before birth of child—Sale in execution subsequent to birth—Rights of son.*—A purchaser at a sale in execution of a decree obtained on a mortgage executed by the father while he was childless, but the sale taking place after the birth of a son, cannot be disturbed by the subsequently born son, the purchaser having *bona fide* paid valuable consideration for the purchase and having acquired by his purchase the interest of the son as well as that of the father. **DOOLLEE CHAND v. WOOMA SUNKAR PURSHAD, 7 C.L.R. 429.**

(26)—*Estate sold for arrears of revenue—Re-grant of estate purchased by Government—Mistakshara—Nature of interest acquired by a son by birth.*—When Government purchases an ancestral estate sold for arrears of revenue, it has absolute power to dispose of it any way it thinks fit; and where it regrants the estate to the representatives of the defaulter, it can apportion it among them in any manner it pleases irrespective of any rights which they would have if the property had not been sold. And even assuming that any one of them who gets a smaller share than he thinks himself entitled to, may have a right to get the allotment altered, that is not such an interest or right as a son would by his birth acquire a share in. Whatever the nature of that right may be whether it could be enforced by a suit or by a representation to Government—it does not come within the rules of the Mitakshara law which gives a son, upon his birth, share in the ancestral estate of his father; much less so as to enable the son to assert it during his father's lifetime. **UJAGAR SINGH v. PITAM SINGH, 4 A. 120, P.C. = 8 I.A. 190 = 4 Sar. 275. [R. 31 C. 111, 12 C.W.N. 587.]**

(27)—*Alienation by father—Subsequent right of son conceived but unborn at the alienation, to set it aside.*—Under Hindu Law, as under



**Hindu Law—continued.****—3.—Alienation—continued.**

other systems of law, a son conceived is equal to a son born, and the right of the son to take objection to an alienation by the father commences from the hour of his conception and not from his birth. Consequently, an alienation by the father, even to a *bona fide* purchaser for value, is liable to be set aside to the extent of the son's share, by a son who was in his mother's womb (*in ventre sa mere*) at the time of the alienation sought to be set aside. **SABAPATHI v. SOMASUNDARAM**, 16 M. 76 = 2 M.L.J. 244. [R., 22 M. 312, 12 C.P.L.R. 63.]

(28)—*Son's share not effected by father's sale—Right of purchaser to refund of purchase-money.*—In a suit by a son against his father for partition of plaint land after setting aside certain alienations made by the latter, it was held that the plaintiff was not liable for the purchase-money paid by the alienee, in respect of his half-share which had not been affected by the sale. The words "on payment" occurring in the penultimate sentence of the judgment in 16 M. 76 (79) are not found in the original judgment, and are a printer's error. **VIRABHADRA GOWDU v. GURUVENKATA CHARLU**, 22 M. 312.

(29)—*Hindu Law—Mithila law—Ancestral property—Alienation by father.*—Where a mokurari lease, at a nominal rent, of a small portion of ancestral property, was granted for long and faithful service to a Dewan of the family by the father, without the concurrence of his infant children, the grant was held to be invalid under the Mitakshara law. **PRA-TABNARAYAN DOSS v. THE COURT OF WARDS**, 3 B.L.R. A.C. 21 = 11 W.R. 343.

(30)—*Hindu Law—Mitakshara—Alienation of ancestral property—Legal necessity.*—The fundamental principle of Mitakshara law is that the family-estate be kept together joint in the family and it is only in cases of special necessity, such as the performance of the *shraddh*, paying off the debts of the deceased, the celebration of necessary ceremonies, such as marriage, etc., the jeopardy of losing the whole family estate if a portion be not sold, and such like real necessities, that an alienation is allowed. Such necessity cannot be inferred from the habits and general character of a vendor. **MITRAJIT SING v. RAGHUBANSI SING**, 8 B.L.R. App. 5. (6 M.I.A. 303, R.) [D., 25 W.R. 532.]

(31)—*Zur-i-peshghee lease or purchase of joint family property—Purchaser not bound to see to application of money.*—In the case of joint family property, according to the decisions, it is not necessary for lender of money upon *zur-i-peshghee*, or for the purchaser of an estate which is actually sold, to see to the application of the purchase money. It is necessary for him only to make due enquiry as to the necessity to borrow or sell. **MUSSAMUT NOWRUT-TUN KOOR v. BABOO GOUREE DUTT SINGH**, 6 W.R. 193. [F., 4 B.H.C. 169; R., 12 W.R. 478, 17 W.R. 102, 25 W.R. 532.]

**Hindu law—continued.****—3.—Alienation—continued.**

(32)—*Alienation of son's co-parcenary right—Burden of proof.*—Although the son or son's creditor cannot set up his vested interest in ancestral property for the purpose of denying the father's power to alienate it for a debt, the father has no power to alienate the son's co-parcenary share in the absence of any debt. It is for the purchaser from the father to give evidence that the alienation was for some purpose which would bind the son, or that it was made with his consent. **CHINNAYA v. PERUMAL**, 13 M. 51. [Appr., 29 M. 200 = 16 M.L.J. 69 = 1 M.L.T. 28, F.B.; R., 21 M. 28 = 7 M.L.J. 96, 4 Bom. L.R. 587, 14 M.L.J. 181.]

(33)—*Mortgage by father, when binds son's undivided share.*—In order to justify a sale or a mortgage by a father so as to bind the son's share, there must be, in fact, an antecedent debt, i.e., a debt prior to such mortgage or sale. **SAMI AYYANGAR v. PONNAMAL** 21 M. 28. [Not F., 27 M. 326 = 14 M.L.J. 181; F., 53 P.R. 1901 = 62 P.L.R. 1901, F.B., 31 A. 176 = 6 A.L.J. 263, F.B.; Appr., 29 M. 200 = 16 M.L.J. 69 = 1 M.L.T. 28; R., 23 M. 60, 4 Bom. L.R. 587, 17 M.L.J. 283.]

(34)—*Sale of family property to redeem mortgage—Sufficient necessity to validate sale—Necessity for creation of original mortgage, purchaser not bound to enquire into.*—Plaintiff appellant, son of one L.S., had, more than 12 years before the institution of this suit, executed a deed of conveyance of some of the joint family property, which it was the object of the present suit to set aside. The case of the purchasers was that the property had been sold to them for redeeming other family property which had been mortgaged and was about to be foreclosed. The mortgage-debt being a proper and due debt and notice of foreclosure having been previously issued, it was held that, so far as money was paid by the purchasers in order to discharge such debt due by L.S. it was money paid in order to enable L.S. to do that which it was necessary and for the benefit of the family that he should do. To that extent, therefore, the sale was held to be good as against the plaintiff according to the Mitakshara law. It was contended for the appellant that, even supposing that there was any necessity as to a certain portion of it, there was no such necessity as to the other portion of it, and that, therefore, the sale was bad; it was however held that, though, according to the general rule, only so much of the property should be sold as will meet the necessity, and, if a larger portion than is required has been sold, it must be shown by the purchaser that the money required to pay off the claim could not be raised otherwise; this rule can have no application to cases where the excess is comparatively but small or where the money really required could not be raised otherwise than by the course adopted. In this case, it was not shown that by any other means than by the sale of the property, the estate could have been



*Hindu Law—continued.***—3.—Alienation—continued.**

freed from the claims upon it. Looking at the transaction as a whole, the High Court considered it to be one in which it was proved that the purchaser had acted with reasonable and sufficient care and caution, and in which a necessity did exist, and declared the same to be good and valid as against the plaintiff. **BABOO LUCHMEDHUR SINGH v. EKBAL ALI**, 8 W.R. 75. [D., 10 W.R. 57.]

(35) — *Hindu Law — Mitakshara — Ancestral property — Respective rights of son and father.* — Under the Mitakshara Law, a son has an equal right with his father in the ancestral property; he can compel his father to divide the property during his lifetime, and any alienation made after the birth of the son without his consent, unless for a purpose justified by the Hindu law as legal necessity, will not bind the son. If, therefore, the father, during the minority of the son, alienated the property in fraud of his creditors, such fraud would not bind the son who was neither a party nor privy to it. **BABOO BEER KISHORE SUHYE SINGH v. BABOO HUR BULLAB NARAIN SINGH**, 7 W.R. 502. [P., 8 W.R. 465, 1 A. 159, F.B., 6 Bom. L.R. 925.]

(36) — *Hindu Law — Alienation by father — Suit by son to set aside sale — Mitakshara family.* — A suit by a member of a joint Hindu family living under the Mitakshara law, brought during his father's life-time, for a declaration of his future right to a one-sixth share in a portion of immoveable property belonging to the family, and to set aside an alienation of it by his father, on the ground of no legal necessity for the alienation, is not maintainable. **RAOL GORAIN v. TEZA GORAIN**, 4 B.L.R. App. 90.

(37) — *Hindu Law — Mitakshara — Competency of father to sell self-acquired immoveable property — Sale of ancestral property by father. Suit by son to set aside — Onus of proof.* — This was a suit to set aside a deed of sale executed by the plaintiff's father to the defendant, as being invalid under the Mitakshara law, and for the recovery of the land conveyed thereby. The decree obtained by the plaintiff in the first Court was reversed by the Judge on appeal on the ground that the property having been acquired by the plaintiff's father, by gift, it must be deemed to have been his self-acquired property, and therefore capable of being alienated by him. On special appeal by the plaintiff, the following points had to be determined. The first point was whether, even assuming that the property was self-acquired, the plaintiff's father was capable of creating a valid title to it by sale without the consent of his sons, and it was held that according to the law as laid down in the Mitakshara, a father is not incompetent to sell immoveable property acquired by himself. In answer to the next point the High Court held that landed property acquired by a grand-father, and distributed by him among his sons, does

*Hindu Law—continued.***—3.—Alienation—continued.**

not, by such gift, become the self-acquired property of the sons, so as to enable them to dispose of it by gift or sale without the consent and to the prejudice of the grandsons. Although the father took the property in question with the incidents to which the undivided share for which it was sub-tituted would have been subject, the sons could not, on that ground alone, claim a right to ask that the sale shall be unconditionally cancelled. The sale by a father of ancestral immoveable property without the concurrence of his sons is not necessarily void, though it may be avoided, unless the purchaser can show that it was made during a season of distress for the sake of the family or for pious purposes. In the absence of evidence to the contrary, it must be assumed that the price received by the father became a part of the assets of the joint family. If, therefore, the son seek, the aid of the Court to set the purchase aside he must do equity and offer to re-pay the purchase-money, unless he can show that no part of such purchase-money or the produce of it had ever come to his hands. Were this otherwise, the plaintiff might get the estate and keep its price, while the purchaser might have no remedy. **MUDDUN GOPAL THAKOOR v. RAM BUKSH PANDEY**, 6 W.R. 71. [P., 10 W.R. 287, 12 W.R. 478, 1 A. 394, 12 C.L.R. 104, 9 B. 438, 10 B. 528, 20 A. 267=25 I.A. 54=2 C.W.N. 253, 24 M. 429=11 M.L.J. 210, 33 C. 1158=10 C.W.N. 978, 29 A. 354=4 A.L.J. 257=A. W.N. 1907, 77, 35 C. 823=8 C.L.J. 124=12 C.W.N. 958; D., 9 W.R. 511, F.B.]

(38) — *Hindu Law — Mitakshara — Joint family — Sale by father. Suit by son to set aside on ground of waste by father — Failure to establish waste — Offer to re-pay purchase money whether exercisable.* — Plaintiffs sued as members of a joint Hindu family to set aside, as invalid under Mitakshara law, certain sales made by their father. The case had been previously remanded with the observation that, if the sons sought the aid of the Court to set aside the purchase, they must do equity and offer to repay the purchase money, unless they could show that no party of such purchase money or the produce of it ever came to their hands; the plaintiffs came into the Court with an amended plaint with the allegation that the consideration money was spent in dancing and debauchery, and that the plaintiffs derived no benefit from the sale, inasmuch as the consideration money was not applied in extending the property or advancing the welfare of the family. On the evidence, the first Court found that it was fully proved that the father was a respectable and conscientious Brahmin of high character and great temperance and that the purchase money was expended in paying debts contracted for the *shradh* of his parents, etc. The first appellate Court affirming the judgment of the first Court dismissed the suit. On special appeal by the plaintiffs it was objected that the onus of proving that the purchase money was not applied by the father to the family purposes



**Hindu Law—continued.****—3.—Alienation—continued.**

ought not to have been caste on the plaintiffs. But the High Court held that the plaintiffs, claiming as heirs of, and co-heirs with, their father, came in to complain of a wrong done to them and the nature and extent of that wrong was peculiarly within their own knowledge. It was next contended that the plaintiffs, on the finding of the Courts below, were entitled to a decree for a return of the estate on payment of the purchase-money. But the High Court was of opinion that there was no ground for such contention. The plaintiffs having had leave to amend their plaint, deliberately chose to allege that their father had wasted the money in debauchery and, on that footing, claimed to get back the estate unconditionally. They failed to establish the case upon which they came into Court, and they were therefore not entitled to claim a decree as for the return of the estate on payment of the purchase-money. **MUDDUN GOPAL THAKOOR v. RAM BUKSH PANDEY, 6 W.R. 74.**

(39)—*Hindu Law—Alienation—Obstructed property Right of son to control father's acts.*—A son cannot control his father's acts in respect of property, the succession to which is liable to obstruction. It is only in respect of property not subject to obstruction that the wealth of the father and the grandfather becomes the property of his sons or grandsons by virtue of birth. **JAWAHIR SINGH v. GUYAN SINGH, 3 Agra 78.**

(40)—*Joint family—Gift by father of share in ancestral moveable and immovable.*—A Hindu father, while unseparated from his son, has no power, except for purposes warranted by special texts; to alienate to a stranger his undivided share in the ancestral estate, moveable or immovable. **BABA v. TIMMA, 7 M. 357, F.B. [Appr., 9 M. 273, 14 M. 459; R., 10 M. 251, 16 M. 353, 18 M. 73, 20 M. 167, 12 C.P.L.R. 63, 24 B. 547, 26 B. 163=3 Bom. L.R. 647.]**

(41)—*Hindu Law—Debts incurred by father—Sale of house in execution of decree—Son's right to impeach sale.*—The father of a family may, in order to discharge a just debt and escape the legal penalties of default, alienate ancestral family property, and an alienation thereof for the same purpose, in the course of law, for debts that are not proved to have been on account of monies borrowed for or applied to improper purposes, is not impeachable or voidable by his sons. A judgment-debt is a *prima facie* proof of necessity. **MUSSUMAT BHOWNA v. ROOP KISHORE, 5 N.W.P. 89.**

(42)—*Mitakshara—Personal decree against co-sharer in joint ancestral estate. Effect of—Right of purchaser at execution sale—Voluntary alienation by co-sharer.*—The right, title and interest of one co-sharer in joint ancestral estate may be attached and sold in execution to satisfy a decree against him, personally, under the Mitakshara law, as well in Bengal as in Madras and Bombay. **[F., 1 M. 354, F.B., 1 M. 358, F.B., 4 C. 809; R., 5 C. 425=5 C.L.R.**

**Hindu Law—continued.****—3.—Alienation—continued.**

112, 8 C. 517=10 C.L.R. 489, 4 M. 1, F.B., 4 M. 73, 4 M. 96, F.B., 5 A. 430=3 A.W.N. 102, F.B., 9 B. 305, 20 C. 805, 4 Bom. L.R. 537.] The purchaser at such a sale acquires only the right to compel a partition of such share as the judgment-debtor possessed. **[F., 3 C.L.R. 282, 5 C.L.R. 26, 5 C. 845, 2 A. 800, 10 C. 626=11 I.A. 26, P.C.; Appl., 2 C.L.R. 223; Exol., 13 C. 21=13 I.A. 21, P.O.; Diss., 5 C.L.R. 36, 12 C.L.R. 104, 9 M. 343, F.B., 9 M. 424, 3 Bom. L.R. 322, 2 A. 746, 3 A. 72, 3 A. 118, 3 A. 191, 9 C. 452, 13 C.L.R. 47, 8 B. 481, 11 B. 361, 15 C. 471=15 I.A. 18, P.C., 14 R. 597; R., 4 C. 142, 5 C. 148=4 C.L.R. 226=6 I.A. 88, P.C., 5 C. 144, 2 A. 267, F.B., 7 C.L.R. 218, 465 3 A. 88, 8 C. 149, 8 C. 517=10 C.L.R. 489, 8 C. 898=10 C.L.R. 505, 4 M. 1, F.B., 5 M. 201, 6 M. 1=9 I.A. 128=12 C.L.R. 169, P.C., 9 C. 389, 5 M. 61, 5 M. 125, 6 B. 564, 7 B. 91, 7 B. 438, 9 C. 817, 10 C. 1, 8 B. 489, 9 M. 188, 8 A. 205=6 A.W.N. 58, 8 A. 495, 14 C. 572=14 I.A. 77, P.C., 9 A. 672, 11 M. 64, 12 B. 691, 14 M. 408, 15 A. 339=20 I.A. 116, P.C., 23 C. 262, 1 O.C. 112, 21 B. 616, 21 B. 797, 27 C. 724, 23 A. 106, 25 M. 690, 27 A. 16=1 A.L.J. 310, F.B.]** *Quære*—Whether, under the law of the Mitakshara in Bengal, a voluntary alienation by one co-sharer, without the consent of the rest, of his undivided share in joint ancestral property is valid? **[R., 5 C. 148=4 C.L.R. 226=6 I.A. 88, P.C., 4 M. 1, F.B., 5 A. 384=3 A.W.N. 61, 8 A. 495, 18 C. 157=17 I.A. 194, P.C.]** Though a partner in a trading partnership cannot, himself, sell his share so as to introduce a stranger into the firm without the consent of his co-partners, yet the purchaser, at an execution-sale, of the interest of such partner acquires a right to have the partnership accounts taken in order to ascertain and realise its value. **[R., 13 M. 447, 20 C. 693.]** *Obiter*—Though a purchaser, at an execution-sale, of the right, title and interest of the judgment-debtor (a father in a joint Hindu family acquires a right only to a severance of his judgment-debtor's share, as distinguished from the shares of his sons, the wife of judgment-debtor, if he leaves any, will be entitled to a share in the partition to be enforced at the instance of the purchaser. **DEENDYAL LAL v. JUGDEEP NARAIN SINGH, 3 C. 198=1 C.L.R. 49=4 I.A. 247, P.C.=3 Sar. 730=3 Suther 468. [R., 2 B. 494, 10 C.L.R. 401, 9 C.W.N. 270=32 C. 234=1 C.L.J. 283]**

(43)—*Mitakshara Law—Joint Hindu family—Alienation by members of joint family—Alienation made without necessity—Purchaser at execution sale. Right of.*—Where several of the members of a joint Hindu Mitakshara family pledge the family property for re-payment of a loan, and the creditor obtains a decree against the debtors, in execution of which he sells, purchases, and takes possession of the property pledged, then, in a suit by the other members of the family for recovery of the property, on the ground that the pledge was made without necessity or for immoral purposes, the



*Hindu Law—continued.***—3.—Alienation—continued.**

purchaser is entitled to retain so much of the property as belonged to his judgment-debtors, and to have that partitioned off from the remainder. *BABOO SOOMRUN THAKOOR v. CHUNDER MUN MISSER*, 3 C.L.R. 282. (1 C.L.R. 49, 4 I.A. 300, F.)

(44)—*Power of a father to alienate ancestral property—Immoral purposes.*—By the majority of the Full Bench (*Spankie, J. & Oldfield, J.*) An alienation of ancestral property, made for immoral purposes by a father during the minority of his son, can be set aside wholly, even though the purchaser may have taken *bona fide* and for value; it is not valid even to the extent of the father's share. *Per Oldfield, J.*—The law on the point has been settled by a course of decisions invalidating sales by one co-parcener without the consent, express or implied, of the others. *Per Pearson, J.*—The purchaser, having acted in good faith, is entitled to take the father's share and to have it ascertained by partition. *CHAMAILI KUAR v. RAM PRASAD*, 2 A. 267, F.B. [F., 5 A. 384=3 A.W.N. 61; *Appr.*, 15 A. 339, P.C.; R., 8 A. 205=6 A.W.N. 58.]

(45)—*Father's power to alienate ancestral property.*—An alienation, made by a Hindu father, of joint ancestral property, which is not made with the consent of his son or for any purpose allowed by Hindu law, can be set aside, at the suit of his son, not only to the extent of the son's share, but altogether. *GANGA BISHESHAR v. PIRTHI PAL*, 2 A. 635. [F., 16 M. 84, 4 Bom. L.R. 383; R., 29 B. 51.]

(46)—*Sale in execution of a proper decree against father—Binding on the son's interest as well.*—In Madras, when ancestral property is brought to sale in execution of a personal decree obtained against the father of an undivided family, the son's interest also passes by the auction sale, if the decree against the father was properly obtained, and a *bona fide* purchaser is protected, from any suit at the instance of the sons. *SIVASANKARA MUDALI v. PARVATHI ANNI*, 4 M. 96, F.B. (1 I.A. 321, *Girdharee Lal v. Kantoo Lal*, 14 B.L.R. 187, F.) [R., 22 M. 49=8 M.L.J. 312.]

(47)—*Alienation of ancestral property by father—Rights of son to prevent—Mitakshara Law.*—Under the Mitakshara Law, the father and the son are joint owners in the ancestral property. The son's power of interdiction to prevent alienations by the father of ancestral estate extends to acts of dissipation or waste of property only, and not to alienations for the payment of joint family debts and for the maintenance of the family. *BISSAMBUR NAIK v. SUDASHEEB MAHAPATTUR*, 1 W.R. 96.

(48)—*Hindu Law—Sale of ancestral estate—"Family necessity"—Discretion of manager.*—The expression "family necessity" justifying a

*Hindu Law—continued.***—3.—Alienation—continued.**

sale of ancestral estate, must receive a reasonable construction, and the head of the family and those dealing with him must, in the interest of the family itself, be supported in transactions which, though in themselves diminishing the estate, yet prevent or tend to prevent still greater losses. A reasonable latitude, too, must be allowed for the exercise of a manager's judgment, especially in the case of a father, though this must not be extended so as to free the person dealing with him from the need of all precautions where a minor son has an interest in the property. The Hindu law recognizes a debt contracted in order to put the father in the way of earning a maintenance, as one created under the pressure of a family necessity. A sale of ancestral property may still be for family necessity although the mortgage or bond for paying off which the money has been raised, had some time to run. *BABAJI MAHADAJI v. KRISHNAJI DEVJI*, 2 B. 666. [R., 5 B. 99, 8 B. 602.]

(49)—*Paternal estate—Right by birth, Its nature—The intervention of a woman as heir does not alter what was originally ancestral into self-acquired property.*—Property inherited through a mother is not self-acquired as between her son and grandson. Ownership by birth is not confined to ancestral or paternal grand-father's property, but extends to father's or mother's property, and, in the former case, it is a vested interest, and equal to, and co-ordinate with, that of the father, while in the latter it is inchoate and consists in a chance of succession and in a power of prohibition where the father alienates immoveable property for other than authorised purposes. The alienation of ancestral property, in which the son acquires ownership by birth, is valid as against him when it takes place before his birth, but a debt incurred but not secured on the zamindari before he was born is not governed by the same principle. [F., 9 M. 188; R., 9 B. 198, 9 B. 279, 10 M. 251, 12 B. 122, 20 C. 328, 8 M.L.J. 312, F.B., 27 M. 300=13 M.L.J. 398, F.B.; *Doubted & D.*, 20 M. 207.] The course of decisions in Madras, from the date of *Ramaswami v. Seshachella*, has been to recognize equal ownership by the son in the grand-father's estate, though it may not be divided between the father and son and to uphold the father's alienations only to the extent of his share. *Semble.*—The pious duty of paying a father's debt does not apply to the case of an impartible zamindari in which the son cannot protect his interests by electing a division. *MUTTAYAN CHETTI v. SIVAGIRI ZEMINDAR*, 8 M. 370.

(50)—*Girdharee Lal v. Kantoo Lal—Binding on Madras—Impartible zamindari—Liability how effected—Son's liability to the extent of the assets—Rights, title and interest of the son, what.*—The decision in *Girdharee Lal v. Kantoo Lal* is binding on the High Court of Madras, just as it is binding on the High Courts of other provinces. [*Appr.*, 9 M. 343; R., 10 M. 251, 22 M. 49, F.B.] The fact of the Zemin-



*Hindu Law—continued.***—3.—Alienation—continued.**

dari being impartible could not affect its liability for the payment of the father's debts, when it came into the hands of the son by descent from the father. [R., 11 M. 64.] A son is liable for the debts of his father, to the extent of the assets which descended to him from his father, and all the right, title and interest of the son in the zamindari, which descended to him from his father is liable, if not duly administered, in payment of his father's debts, as against the son, to be attached and sold in execution of the amount that may be decreed against him. *MUTTAYAN v. ZEMINDAR OF SIVAGIRI*, 6 M. 1, P.C.=9 I. A. 128=12 C.L.R. 169. (14 B.L.R. 187=1 I.A. 321, R. & F.) [F., 29 M. 484=16 M.L.J. 499=1 M.L.T. 287; Appr., 9 M. 188, 9 C. 238, 9 M. 424=4 Sar. 345, 13 M. 265; R.; 9 C. 389, 10 C. 1, 8 B. 481, 9 B. 188, 8 A. 205, 2 C.P.L.R. 146, 20 C. 328, 19 A. 26, 3 Bom. L.R. 322, 4 Bom. L.R. 587.]

(51)—*Powers of alienation by a member of joint family of his undivided share in ancestral property—Liability of sons, father's debts—Exceptions—Auction-purchasers under no duty to make enquiries regarding nature of debt—Execution sale of joint property for father's debt—Objection by sons on the ground of nature of debt—Notice of purchasers—Execution sale of family property attached during father's lifetime—Debt not binding on sons—Right of purchaser.*—In Madras one member may dispose of his share of undivided ancestral estate even by private conveyance, whether for value or by gift; and *a fortiori* such share may be seized in execution and sold for his separate debt. (1 M.H.C. 471, 2 M.H.C. 270, 416 and 4 M.H.C. 30, R.) [R., 4 M. 1, 5 M. 125, 16 M. 353, 6 C.P.L.R. 60, 18 M. 73, 25 N. 690, F.B., 27 M. 300=13 M.L.J. 398, F.B.] In Bombay also, unauthorised voluntary alienations may be made by one co-parcener. (1 B.H.C. 182, 11 B.H.C. 72, 76, R.) But to support such an alienation by one co-parcener of his share in undivided property, the alienation must be for value. (12 B.H.C. 229, R.) [R., 21 B. 797.] In Bengal, though the Law of Madras and Bombay regarding property alienated by private deed has not yet been adopted, the purchaser of undivided property at an execution sale, during the life of the debtor, for his separate debt, does acquire his share in such property with the power of ascertaining and realising it by a partition. [R., 5 C. 425; *On appeal* 10 C. 626=11 I.A. 26.] Subject to certain limited exceptions (*e.g.*, immoral or illegal debts), the whole of the family undivided estate is liable in the son's or grandsons' hands for the father's or grand-father's debts. (1 I.A. 321, R.) Where joint ancestral property has passed out of a joint family, either by a voluntary alienation by the father for an antecedent debt, or in execution of a decree for the father's debt, such property could be recovered by the sons only on proof of the immorality of the debt and of the purchaser's notice of such immorality. [F., 3 A. 125, 15 C. 717=15 I.A. 99, P.C., 2 C.W.N.

*Hindu Law—continued.***—3.—Alienation—continued.**

603; D., 5 C. 144, 2 A. 800, 6 M. 155; *Relied on*, 1 A.L.J. 191; R., 5 C.L.R. 36, 5 C.L.R. 112, 5 C.L.R. 224, 5 C. 855, F.B., 7 C.L.R. 429, 5 B. 14, 5 B. 48=7 I.A. 18, P.C., 7 C.L.R. 218, 3 A. 118, 3 A. 191, 7 C. 58, 8 C. 517, 8 C. 898, 4 M. 96, F.B., 4 M. 111, 9 C. 389, 12 C.L.R. 104, 6 B. 520, 13 C.L.R. 96, 7 B. 438, 6 A. 193=4 A.W.N. 23, 6 A. 234=4 A.W.N. 47, 13 C. 21=13 I.A. 1, P.C., 9 M. 343, 8 A. 205=6 A.W.N. 58, 8 A. 279, 11 M. 64, 11 M. 413, 14 B. 320, 12 A. 99, 20 C. 328, 15 A. 75 F.B., 23 C. 262, 21 M. 28=7 M.L.J. 96, 22 M. 49, F.B.=8 M.L.J. 312, 27 C. 724, 3 Bom. L.R. 322, 25 A. 214, F.B., 4 Bom. L.R. 587, 29 M. 200=16 M.L.J. 69=1 M.L.T. 28, 28 A. 508=A.W.N. 1906, 117=3 A.L.J. 274, 11 C.W.N. 613, 6 A.W.N. 73, 34 C. 735, 11 C.W.N. 613=5 C.L.J. 569, 10 O.C. 360, 31 A. 176=6 A.L.J. 263.] A purchaser, at an execution-sale being a stranger to the suit, is not bound to go further back than to see that there was a decree against the father and that the property was property liable to satisfy the decree, if the decree had been given properly against the father. [R., 4 B. 126, F.B., 4 M. 96, F.B.] Where, prior to the execution-sale of joint family property for the father's debt, under Mitakshara Law, the sons have objected to the sale on the ground of the nature of the debt being such as would not bind them, upon which they were referred to a regular suit, the purchaser must be taken to have had actual or constructive notice of the objection to the binding nature of the debt and to have purchased the properties subject to the result of the suit by the sons. [R., 2 A. 899.] If, in execution of a decree obtained against a father, the proceedings, under which property is attached and sold, have advanced so far as to constitute, in favour of the creditor, a valid charge upon the land, to the extent of the debtor's undivided share therein, his subsequent death before the actual sale would not defeat the creditor's interest. [F., 7 A. 731, 5 C.L.J. 80=11 C.W.N. 163; D., 3 A. 495=6 A.W.N. 154; R., 4 M. 1, F.B., 4 M. 73, 4 M. 302, 9 C.L.R. 16, 5 M. 232, F.B., 11 A. 302, 15 B. 673, 20 C. 895, 16 A. 449=4 A.W.N. 169, 2 Bom. L.R. 32, 23 A. 106, 23 A. 467, 25 M. 690, 6 O.C. 271, 8 C.W.N. 843, 33 C. 1158=10 C.W.N. 978, 3 A.L.J. 127=A.W.N. 1906, 10, 11 C.W.N. 593, F.B., 30 M. 413=17 M.L.J. 334=2 M.L.T. 265.] The restrictions imposed by the Mithila Law, on a father's power of alienation over ancestral immoveable estate, or the same as those imposed by the Mitakshara Law. The purchaser of undivided property, at an execution sale, during the life of a debtor, for his separate debt, does acquire his share in such property, with the power of ascertaining and realising it by a partition. [F., 10 C. 626=11 I.A. 26, P.C.] All Courts are agreed that co-parceners may impeach an alienation of any portion of the joint estate by another co-parcener, without their express or implied authority, and such authority will be implied, at least in the case of minors, if it can be shown that the



**Hindu Law—continued.****—3.—Alienation—continued.**

alienation was made by the managing member of the family for legitimate family purposes. It is not so clearly settled whether, in order to bind adult co-parceners, their express consent is not required. *SURAJ BUNSI KOER v. SHEO PERSAD SINGH*, 5 C. 148=4 C.L.R. 226, P.C.=6 I. A. 88=4 Sar. 1. [R., 5 C. 845, 4 A. 309, 5 A. 384=3 A.W.N. 61, 11 B. 605, 18 C. 157=17 I. A. 194, P.O., 34 C. 372=11 C.W.N. 462.]

(52)—*Joint family property—Alienation by father—Rights of sons.*—An alienation of joint ancestral property made by a father in a joint Hindu family, in order to raise money to pay off family debts and for family necessities, cannot be questioned by his sons, who are bound to pay such debts. The sons can impeach an alienation made by their father, only by showing that the debts for the discharge of which the property was alienated were contracted for immoral purposes, and that the purchasers had notice that they were so contracted. Long continued acquiescence, on the part of the sons, in the undisturbed possession of the purchasers, will raise a presumption that the alienation was *bona fide*. *DARSU PANDEY v. BIKARMAJIT LAL*, 3 A. 123. (Ruling of the Privy Council in 5 C. 148, F.)

(53)—*Mitakshara—Son's interest at birth—Alienation of entire estate by father as managing member, when valid—Execution sale of more than father's share for his separate debt, when valid—Distribution of ancestral property during father's life-time and after his decease—Share of wife—Alienation by father—Consent of adult members.*—Under the Mitakshara Law, each son takes, upon his birth, a share (interest) equal to that of his father in ancestral immovable estate. The father alone, acting as manager of a Mitakshara family, may convey or charge the entire estate when all the members are minors and for family necessity; otherwise his power—and in Bengal his creditors' rights—could extend only to his interest in the property. If the managing member of a family, the other members of which are at the time minors, having authority (the touchstone of which is necessity), mortgages the whole of the ancestral property, the sale under the mortgage would pass the whole property, although the mortgagor alone was made defendant. [F., 11 C.L.R. 263; *Appr.*, 15 C. 70=14 I.A. 187, P.C.; *Rel. on*, 27 C. 724; R., 6 C. 135=7 C.L.R. 97, 8 C. 517, 2 C.P.L.R. 221, 14 B. 597, 20 C. 453; 20 B. 338.] Though sons are liable for their father's debts, not contracted for immoral purposes, the liability, for their father's separate debt, of anything other than the father's share in the property would arise only on the other members being made parties to the suit. Upon a distribution of ancestral property during the life-time of the father of a Mitakshara family or after his decease, the wife is to take an equal share; but in the latter event she will be entitled only to a half share, if any separate property has been given to her. Upon an execution sale which would pass only the father's

**Hindu Law—continued.****—3.—Alienation—continued.**

share in ancestral property, and whereby the purchaser takes possession during the father's life-time, the wife would be entitled to an equal share with her two sons. [F., 8 C. 17=9 C. L.R. 415; *Rel. on*, 32 C. 234=9 C.W.N. 270.] *Quære*—Whether, even in cases of necessity, a father, as managing member, has authority to affect the interest of the adult members of the family, without their consent? *PURSID NARAIN SINGH v. HONOOMAN SAHAY*, 5 C. 845=5 C.L.R. 576.

(54)—*Joint family property—Execution of decree against father—Rights of sons.*—Where, in execution of a decree obtained against the father of a joint Hindu family, on a bond hypothecating the whole of the joint family property, "such rights and interests only as the father has in a joint undivided family" are sold, the sale can affect the father's interests only, and the auction purchasers can claim to have purchased only such interests; for, although a Hindu father has a power of dealing with his son's interests, that circumstance alone will not make those interests his own, so as to pass them by a sale which affects his own interests only. *NANHAJ JOTI v. JAIMANGAL CHAUBEY*, 3 A. 294.

(55)—*Joint family—Debts contracted by father as manager of family business—Sale of ancestral property in execution of decree against father—Son's share.*—Where the father of a joint Hindu family, who is managing the joint family business, contracts debts in such capacity, and in execution of decrees, obtained on such debts in suits instituted against him as proprietor of the family business, the ancestral property of the family is sold, his son cannot sue for the setting aside of such sale and to recover his share of the property, on the ground that such decrees had been passed against his father personally and that his interest alone in such property, passed by the sale; for, the capacity in which the father was sued and the nature of the debts for which decrees were passed against him, both show that such decrees must have been passed against him as the manager of the family business, and the sale in execution must therefore pass the whole of the family property. *PHUL CHAND v. LACHMI CHAND*, 4 A. 486=A.W.N. 1882, 123. [F., 20 C. 453.]

(56)—*Mitakshara—Money-decree against father—Sale of joint family property—Interest of purchaser, how determined.*—It cannot be broadly laid down that, in all cases, under a sale in execution of a money-decree against the father in a joint family consisting of a father and sons, whether adults or minors, nothing but the father's share passes. In each case, what was sold in execution must first be determined, the mere circumstance that a decree was obtained against the father alone not being conclusive on the point. If the father was not sued in his representative character, no further question



**Hindu Law—continued.****—8.—Alienation—continued.**

would arise, but, if otherwise, it has to be determined whether the sons are entitled to set aside the sale *quæ* their shares. **UMBICA PROSAD TEWARY v. RAM SAHAY LALL**, 8 C. 898 = 10 C.L.R. 503. (Note—The decision in *Deen Dayal Lall v. Jagdeep Narain Singh* (3 C. 198) explained and reconciled with the principle in *Muddun Thakoor v. Kantoo Lal*, 3 C. 198, 14 B.L.R. 187 = 1 I. A. 321, R.) [*F*, 13 C.L.R. 96; *R*, 9 C. 389, 9 C. 495, 7 B. 438, 9 M. 343, F.B., 3 Bom. L. R. 322.]

(57)—*Father's power of alienating ancestral property for debts—Indian Insolvent Act, 11 and 12, Vic., s. 7—Vesting of ancestral estate in Official Assignee on insolvency of father—Purchaser's title to entire ancestral estate including son's interest.*—Where a Hindu father becoming an insolvent takes the benefit of the insolvent Act, 11 and 12 Vict., cl. 21, the usual vesting order made has the effect of vesting in the Official Assignee the estate and effects of the insolvent father with his right, under the Mitakshara law, to dispose of his sons' interest in ancestral immovable estate for paying up the father's debts. When the property and rights of the father are so vested in the Official Assignee, he not merely may but ought to sell the ancestral immovable estate, including the interests of the sons therein, so far at least as is necessary for the payment of the debts of the insolvent; and he can give to the purchaser a good title to such ancestral immovable estate including the above mentioned interests. Also the proceedings in insolvency and the powers of the Official Assignee continue after the insolvent's death and, in the eye of law, the natural existence of the insolvent is, for the purpose of his estate being realised and dealt with, artificially continued in the Official Assignee who can after such death deal with that estate as he could have dealt with it while the insolvent was still alive. **FAKIRCHAND MOTICHAND v. MOTICHAND HURRUCKCHAND**, 7 B. 438. [*F*, 19 M. 74; *Apr.*, 4 Bom. L.R. 587; *R*, 2 Bom. L.R. 59, 26 M. 214, 6 Bom. L.R. 925 = 11 C.W.N. 478, P.C.]

(58)—*Mithila Law—Vivada Chintamani—Mitakshara—Ancestral property—Accrual of son's interest—Hindu Law—Legal necessity—Decree against father—Sale of son's interest.*—To ascertain the Mithila law, Vivada Chintamani must be looked to. Where the Vivada Chintamani is silent, the Mitakshara is to be taken as the guide. Under the Mitakshara law, a son has an ownership in ancestral property even during his father's lifetime; the ownership accrues on the son's birth, and the father and son are joint owners in such property from the son's birth. The existence of a decree against the father is not sufficient evidence as to the necessity of the sales by the father of his son's interest in ancestral property. **KANTOO LALL v. CHIREEDHAREE LALL**, 9 W.R. 469. [*Reversed*, 14 B.L.R. 187, P.C. = 22 W.R. 56 = 1 I. A. 321.]

**Hindu Law—continued.****—8.—Alienation—continued.**

(59)—*Mortgage—Execution—sale—Immoral loan.*—Where the allegation was that a mortgage loan was contracted for immoral purposes and that it could not bind the plaintiffs, who were minors, held that the creditors were not bound to go behind the decree itself unless clear proof were given of the immorality of the loan. **MUSSAMUT ANOORAGEE KOOR v. MUSSAMUT BHUGOBUTTY KOOR**, 25 W.R. 143. (22 W.R. 56, P.C., *F*.)

(60)—*Execution sale of portions of joint family property—Partition suit—Portions of a joint family estate in course of partition should not be sold in execution of decree against the whole on account of debts of former holder; though, where such debts were not immoral, and the property was liable for them, the sales should not be set aside.* **MUSSAMUT PHOOL KOORY v. GOPEE SINGH**, 23 W.R. 185.

(61)—*Execution sale of family property mortgaged by father during minority of son—Effect—Mortgage-deed—Money decree;—Decree declaring lien.*—Where a Hindu father mortgages his ancestral property during the minority of the son, a decree obtained by the mortgagee, also during the minority of the son, should be treated as a decree against the father in his representative capacity, and the son will be left no interest in the property. There is no difference between a decree for money passed upon a mortgage-bond, and a decree expressly declaring a lien also based upon a similar mortgage-bond. What is sold under either of these decrees is the same interest, namely, the interest of the mortgagee and the mortgagor taken together. **MUNBASI KOER v. NOWRUTTUN KOER**, 8 C.L.R. 428. [*D*, 8 C. 517.]

(62)—*Promissory note by widow not representing the estate—Liability of the reversioner.*—Where a widow borrows money on personal security, but not as representing her husband's estate, and fails to charge the estate, the reversioners take the estate as assets of her husband uncharged by debts incurred by her, however necessary and proper they may have been; and as the reversioners succeed as heirs not to her, but to her late husband, they do not represent her, and there is no privity of contract or estate to render them liable. Hence a plaint based on a promissory note executed by the widow, discloses no cause of action as against the reversioners, and is liable to be rejected. **RAMASAWMI MUDALIAR v. SELLATTAMMAL**, 4 M. 376. (3 B. 237, *Apr.*; 6 C. 36, *Diss.*) [*R*, 19 A. 300, 23 M. 597, 2 Bom. L.R. 738, 26 B. 206.]

(63)—*Liability of son's interest in family property for father's debts.*—A son's inchoate interest in excepted debts which will ripen on father's death, is not separate from the father's interest or free from liens on it. **SHAH VAJED HOSSEIN v. BABOO NANKOO SINGH**, 25 W.R. 311.

(64)—*Immoral debts—Right of son to set aside alienation.*—A bona fide purchaser for valuable



*Hindu Law—continued.**—3.—Alienation—continued.*

consideration of ancestral property, sold in execution of a decree, is not bound to go further back than to see that there was a decree, and that the property was liable to satisfy the decree. Where this is done, the heirs of the deceased judgment-debtor are not entitled to come in and set aside the proceedings and recover the property. A son's freedom from obligation to discharge his father's debt has respect to the nature of the debt and not the nature of the property. If the debt of the father was contracted for any immoral purpose, the son might not be under any pious obligation to pay it. Attending nautches and occasionally giving nautches at one's own expense, cannot be considered immorality on the part of a father absolving a son from obligation to pay his debts. *BUDREE LALL v. KANTEE LALL*, 23 W.R. 260. (14 B.L.R. 187, F.) [R., 9 C. 495.]

(65)—*Mitakshara—Son's right—Ancestral property—Partition—Father's illegal and immoral debts, Son's position with respect to—Onus of proof—Suit to set aside father's alienation—Question for trial—Father's illegal debts, Binding nature of.—*Even though A's father had made a partition, between himself and his brother, of ancestral property originally belonging to A's grandfather, A acquires by birth an interest in his father's share obtained in partition. [R., 6 C.L.R. 473, 15 C.P.L.R. 21] The Privy Council decision in *Girdharee Lal v. Kantoo Lal* (14 B.L.R. 147=24 W.R. 56=1 I.A. 321) practically makes the son, governed by the Mitakshara Law, with respect to his father's debts, an heir succeeding to the ancestral estate upon his father's death. In a suit by a son to set aside an alienation by his father of ancestral property, during the son's minority, the true question for consideration is not whether there was any legal necessity for the alienation, but whether the debt, to satisfy which the alienation was made, was for an immoral purpose. The onus of proving that the debt, to discharge which the alienation was made by the father, was tainted with immorality, lies on the person seeking to set aside the alienation. *Quære*—Whether a son ought to discharge his father's illegal, though not immoral debts? *ADURMONI DEBI v. CHOWDHRY SIB NARAIN KUR*, 3 C. 1.

(66)—*Father's power to deal with ancestral property—Curtilment of—Son's liability to discharge the father's debt—Nature of the question—Contract or inheritance—Sale in execution of a money decree—Sale to enforce a mortgage—Difference—Son no party—Remedy—*While the power of the father to deal with ancestral immoveable property has been curtailed by admitting the son to equal ownership in the estate, the complete dominion of the father was preserved by the recognition of the obligation of the son to discharge the debt of the father. The obligation of the son to discharge his father's debt is limited to the extent

*Hindu Law—continued.**—3.—Alienation—continued.*

of the assets received by him and, for this purpose assets include also the ancestral property of the family and the liability is commensurate with the whole estate, ancestral or self-acquired. (6 M.H.C. 371 R.) [Modified, 9 M. 343; R. 19 A. 26, F.B.] The question of the extent of the liability of a son to the debtor is as much a question of succession as the question, as to who is the person upon whom the debts devolve. It is not a question of contract. [Modified, 9 M. 343; R., 19 A. 26, F.B.] Where a Court orders an absolute sale to enforce a mortgage, it professes to sell whatever interest the mortgagor was, under any circumstances, competent to create, and intended at the time of the mortgage to create. Where a Court orders a sale in execution of a money-decree, it professes to sell whatever interest in the property would under any circumstances, be available to creditors at the date of the attachment. [R., 9 M. 273, 19 A. 26, F.B.; Cited, 6 M. 155; Appl., 23 A. 467; Modified, 9 M. 343.] If the son was not a party to the suit nor the sale proceedings so as to be bound by them, then, save as against a bona fide purchaser, it is competent to him in subsequent proceedings to contest the sale on any grounds which, had he been a party to the suit or sale proceedings, he might have advanced to protect his interest.—*Per Kernan, J.* [F., 4 M. 320, 9 C. 389; R., 5 M. 134, 2 N.L.R. 90, 19 A. 26, F.B.; Cited, modified, 9 M. 343.] In an undivided family, a sale or mortgage, by a father alone, of ancestral property after the birth of a son, for the purpose of raising money, not for family necessity or benefit, but to pay a debt incurred by the father not for immoral consideration, binds the son and his interest by birth. Such obligation of the son arises and may be made effectual against him in the lifetime of his father. If there be a decree against a father alone for the sale of the undivided family property in respect of a money debt, and if a bona fide sale be had under such decree, the son is not bound by the decree by way of estoppel, and it is open to him to impeach the title of the purchaser on any ground legalised sufficient.—*Per Kindersley, J.* The son is bound to discharge his father's debts unless they were contracted for an immoral or illegal purpose. This is a part of the law of inheritance, not of contract. A son is responsible for his father's debts even in the lifetime of the father, according to *Girdharee Lal v. Kantoo Lal*—*Per Innes, J.* The question of the extent of the liability of the son to the debtor of the father is a question of contract and not of inheritance. The only interest that is available as assets for the payment of the father's debts, is the share of the father, which survives to his sons on his death. No doubt *Girdharee Lal v. Kantoo Lal* enforces on the son the obligation of paying the father's debts, but it has not the effect of altering the Law as to rights in property, to the extent of converting the interest of the son into the estate



**Hindu Law—continued.****—3.—Alienation—continued.**

of the father. The case of *Girdharee Lal v. Kantoo Lal* is not binding on the Courts of Madras.—*Per Muthusami Aiyar, J.* The personal obligation of the son to pay his father's debt, otherwise than as a co-parcener or by reason of assets inherited from him, has been treated in the Madras Presidency for more than 40 years as a moral and not a civil obligation. Hence the son's special obligation to pay the father's personal debt does not remove the restrictions placed on or enlarge, the father's power of disposition over the ancestral immoveable estate, and so the father's share is all that passes by sale during his life when the debt is neither justified by family necessity nor beneficial to the family. [*R.*, 4 M. 236, 8 P. 481, 19 A. 26, F.B.; *Appr.*, 7 M. 357; *Cons.*, 10 M. 251; *R.*, 27 M. 206; *Modified*, 9 M. 343] A son is not bound by the direction, in the decree against his father for the sale of the property under hypothecation which is ancestral and in which the father and the son have equal ownership. *PONNAPPA PILLAI v. PAPPUVAYYANGAR*, 4 M. 1, F.B. [*Modified*, 9 M. 343; *R.*, 19 A. 26, F.B.]

(67)—*Mortgage by father—Son no party—Liability.*—Where a mortgage debt was contracted for family purposes, by a father, the son is bound by the decree against the father, though he is not a party to the suit. *SUNDRA-RAJA v. JAGANNADA*, 4 M. 111. (1 I.A. 321, 6 I.A. 88, F.)

(68)—*Hindu Law—Mitakshara—Joint Hindu family—Ancestral property—Self-acquired property—Legal necessity—Purchaser.*—Where in consequence of a dispute as to the succession to joint property, a compromise was come to among the members of a joint Hindu family by which the property was divided between them, it was held that each of the different members took the property, not as ancestral property, but as a definite share which became his in pursuance of the agreement, and which, therefore, became his own absolute property. Where ancestral property is sold on the plea of necessity, it is sufficient for the purchaser to be satisfied of the fact of necessity; he need not inquire into its causes. *MAHABIR KOWER v. JUBHA SINGH*, 8 B.L.R. 38=16 W.R. 221.

(69)—*Alienation by father—Not binding on a co-parcener or his sons.*—An alienation made by a father to procure funds for the satisfaction of the debts incurred by him, though binding on the sons, on the authority of the ruling of the Judicial Committee in *Girdharee Lal v. Kantoo Lal*, is not binding on a co-parcener (minor and nephew) unless the alienee can show that the debts existed at the time of alienation and they were such as were incumbent on the minor to discharge. *GANGULU v. ANCHA BAPULU*, 4 M. 73, F.B. (1 I.A. 321, R.) [*F.*, 4 M. 320, 5 M. 61; *R.*, 9 Bom. L.R. 114; *D.*, 9 A. 493.]

**Hindu Law—continued.****—3.—Alienation—continued.**

(70)—*Sale of family property for father's debt—Rights of sons.*—Where in execution of a decree against a Hindu father, the family lands are attached and the father's right, title and interest in them are put up for sale, and the auction-purchaser is put in possession of the whole land instead of the interest of the father purchased, the son, in a subsequent suit, cannot recover his share, unless he can show that the debts of the father was illegal or immoral. *GOPALASAMI v. CHOKKALINGAM*, 4 M. 320. (4 M. 1, 74, F.)

(71)—*Decree against one co-parcener—Extension of its scope as against other co-parceners—Permissibility of—Decree against one co-parcener—Effect as against those not parties—Son's liability.*—If a suit is brought against one co-parcener on an obligation entered into by him, and a decree obtained, and it is, afterwards, sought in another suit to extend the scope of the decree by making other co-parceners liable upon the obligation this course is not permissible, because the cause of action upon the obligation is one and indivisible, and a second suit cannot be maintained upon the same cause of action. (3 C. 353, *Appr.*) [*R.*, 22 M. 49, F.B.=3 M.L.J. 312, 22 A. 307, 25 B. 378; *D.*, 7 M. 328, 16 M. 335.] If it is sought to declare that the decree binds the whole body of co-parceners, it would be a good answer to it to say that they were not parties to the suit in which the decree was passed, actually or constructively. If it is sought to declare that the property of other co-parceners is liable under a decree against one, it will be an answer to say that the operation of the decree cannot be extended to property other than that which the array of parties will warrant. [*R.*, 5 M. 133] *Per Muttuswami Aiyar, J.*—The decision in *Girdharee Lal's* case (1 I.A. 321) does not say that the Court is to sell the son's property in satisfaction of a decree against the father during the father's life. *GURUSAWMI v. CHINNA MANNAR*; *GURUSAMI v. SADASIVA*, 5 M. 37.

(72)—*Decree against a father for debt—Sale of his right, title, and interest in ancestral property—Purchase in possession of son's share—Suit by son to recover.*—Where there has been a decree for debt against the father, and the right, title and interest of the father in ancestral property has been sold under the decree, and the purchaser has been placed in possession of the entire mass of the property advertised for sale in place of the mere interest of the judgment-debtor in the property, which was all that was advertised to be sold, a son, desiring to obtain his share in the property which by an error in execution has thus got into the possession of the purchaser, cannot avail himself of the decision in *Deendayal's* case (3 C. 198), and he can recover his share only if he can show that debt for which the decree was obtained against the father without joining the



**Hindu Law—continued****—3.—Alienation—continued.**

son was an illegal or immoral debt. **VELLIY-AMMAL v. KATHA**, 5 M. 61. (4 M. 1, 4 M. 73, 3 C. 198=4 I.A. 247, R.) [R., 11 M. 296.]

(73)—*Mortgage by father of ancestral property—Its validity as against the son's share—Burden of proof.*—A mortgage, by a Hindu father, of ancestral property in order that it may bind the share of the son as well, must be shown to have been contracted for necessary purposes, which include payment of an antecedent debt due by the father. The burden of proof lies on the mortgagee; and if he does not discharge it, the father's share alone will be affected and not the whole property. **SITARAMASAMI v. MIDATANA**, 6 M. 400.

(74)—*Mortgage by father—Liability of son's shares—Burden of proof.*—Where a mortgage by a Hindu father, of family property, was not executed to secure the payment of an antecedent debt, and the mortgage obtained a decree against the father alone, but attached the son's shares also in execution, and the sons' shares were released from attachment at their instance, in a suit by the mortgagee against the sons to declare their shares liable to satisfy their father's debt, the burden of proving that the debt was for the benefit of the family lies on the mortgagee. **ARUNACHALA v. MUNISAMI**, 7 M. 39. [R., 8 B. 481, 26 B. 163=3 Bom. L.R. 647.]

(75)—*Debts—Father and son.*—Where, in a suit on a mortgage bond against a Hindu father governed by the Mitakshara, the decree awarded interest at the usurious rate mentioned in the bond and was one not only directing the mortgaged property to be sold but also one against the father personally, some ancestral property in the hands of the father other than the one mortgaged was sold, and the son afterwards sued the auction-purchaser for his share therein on the ground that the decree was not binding on his share: *held* that, the decree being a proper decree, the purchaser need not look beyond it in order to ascertain whether the Court was right in ordering the sale of property other than the mortgaged property. **LUCHMI DAI KOORI v. ASMAN SINGH**, 2 C. 213=25 W. R. 421. (14 B.L.R. 187, R.)

(76)—*Joint family—Suit on mortgage by father—Liability of son's share.*—In a suit against a father and his minor sons, governed by the Mitakshara, on a mortgage executed by the father, *held*, the creditor ought to prove the necessity for the loan and the purposes justifying the mortgage of the sons' shares also, or, at any rate, that the creditor was reasonably led into believing that the father had justifiable grounds for charging the sons' shares also. **BHEKNARAIN SINGH v. JANUK SINGH**, 2 C. 438. [Not F., 5 C.L.R. 224=13 C.L.R. 96; Cons., 14 B. 320; Principle applied, 9 A. 493=A.W.N. 1887, 116; R., 20 C. 328.]

(77)—*Mitakshara joint estate—Alienation by father of joint family—Alienee, Rights of.*—An

**Hindu Law—continued.****—3.—Alienation—continued.**

alienation of joint family property made by a father under the Mitakshara Law, for the purpose of paying of an antecedent debt, is binding upon the sons, unless they show that the debt was contracted for immoral purposes. **GUNGA PERSHAD v. SHEODYAL SINGH**, 5 C. L.R. 224. (2 C. 438, Not F.) [F., 13 C.L.R. 96; D., 8 C. 517.]

(78)—*Mitakshara family of father and minor son—Mortgage by father—Mortgagee-lender, Right of Decree by mortgage against such only minor, son after father's death—Decree by such mortgagee against father alone—Mortgagee's rights as against the minor in estate—Rights of such mortgagee if the son were an adult instead—Purpose of loan—Partly for payment of antecedent debt—Zurpeshgi and sub-lease of family property by managers of joint Mitakshara family—Purchase by zurpeshgi in execution of decree for rent—Son's rights.*—Where the father of a Mitakshara family, consisting of himself and a minor son, mortgages ancestral property and there is no proof of legal necessity for the loan, or of its immorality or illegality, or of any enquiry on the lender's part of the purpose for which it was raised, the mortgagee lender cannot in a suit against the father and the son, enforce the mortgage itself; but, the debt being an antecedent one and the son being a party to the suit, he would be entitled to a decree directing the debt to be raised out of the entire estate inclusive of the property mortgaged. **N.B.**—In the above case, the debt was assumed to be an antecedent debt. [F., 8 C. 131, 20 C. 328; D., 15 A. 75, 2 C.W.N. 603; Cons., 31 A. 176=6 A.L.J. 262, 6 C. 135; R., 8 C. 517, 9 A. 493=7 A.W.N. 116; 34 C. 941, F.B.=6 C.L.J. 237=11 C.W.N. 959, 14 B. 320, 4 Bom. L.R. 587, 11 C.W.N. 613=5 C.L.J. 569=34 C. 735=17 M.L.J. 282, 11 C.W.N. 294=34 C. 184=5 C.L.J. 441.] If the minor is the only son in this case, the mortgagee would be entitled to a similar decree against him after his father's death. If the mortgagee gets a decree for sale of the property upon a suit against the father alone and purchases it himself in execution, he is not a bona fide purchaser for value and his rights in the property, as against the infant son, extend only to the father's interest in it. [R., 23 C. 262.] If, in the above cases, the son were an adult at the time of the loan and the mortgage and he was a party to the suit, the mortgagee would be entitled to a decree. If the loan were raised partly to pay an antecedent debt and partly for some other unexplained purpose, the whole of it would be treated, in the view taken of the case as an antecedent debt. [R., 27 C. 762, 29 M. 200=16 M.L.J. 69=1 M.L.T. 28.] Where two brothers as managers of a joint Mitakshara family consisting of themselves and their sons, executed a zurpeshgi lease of family property, the lenders making no enquiry as to the necessity for the loan, and subsequently took a sub-lease, being merely a device to raise money and continue in possession of the property, and where the



*Hindu Law—continued.***—3.—Alienation—continued.**

zurpeshgidar purchased the same property in execution of a decree for arrears of rent, it was held that the sons, if not parties to the suit, could recover their shares and that, even if they had been made parties to the suit, could recover their shares and that, even if they had been made parties, they would have apparently a good defence to the suit upon the merits. *LUCHMUN DASS v. GIRIDHUR CHOWDHURY*, 5 C. 855=6 C.L.R. 473, F.B. [D., 7 O.L.R. 429.]

(79)—*Mitakshara*—Son's duty to discharge father's debt even in his lifetime and consequent validity of sale or mortgage—Suit upon mortgage by father alone—Property liable as against sons, made parties—Adult son's interest in property not ordinarily affected by decree against father alone.—Under the *Mitakshara*, the payment, even in the father's lifetime of an antecedent debt due by him, is a pious duty on the part of the son, and its discharge is, therefore, such a necessary purpose as to give validity to a sale or mortgage by the father as against his minor sons. Such antecedent debt must not be for an immoral purpose and refers to a debt antecedent to the transaction in question. [Appr., 15 A. 75, 2 C.W.N. 603; R., 20 C. 328.] In a suit upon a mortgage by the father alone, the property would be bound as against the sons where they are made parties, though they may have been adult when the debt (not immoral) was incurred. *Qua* ancestral property, therefore, the son is as liable for the father's debts (not immoral) as for his own debts. [D., 8 C. 517; Cons., 9 C. 495.] But if the interest of an adult son could not be affected by a decree against the father alone, in the absence of special circumstances, thus where it appeared that an adult son, though a party neither to the bond nor to the suit brought upon it, was himself liable for a good portion of the antecedent debt secured by the bond and present at its execution and allowed the mortgagee to remain in possession for more than eleven years and to go to expense in paying off encumbrances on the property, the son, though he ought to have been made a party to the suit by the mortgagee, was not held entitled to recover his share in such property. *LALJEE SAHOY v. FAKHER CHAND*, 6 C. 135=7 C.L.R. 97. (5 C. 855, Diss.)

(80)—*Mitakshara*—Mortgage of ancestral property by managing member—Mortgagee's right of sale—Property acquired out of income of ancestral property—Son's rights.—In a suit upon a mortgage executed by a Hindu governed by *Mitakshara* Law against the mortgagor and his sons, the mortgagee would be entitled, even if the property was ancestral and the mortgage not valid against the sons, to recover the debt by the sale of the property of the father and the sons. [F., 20 C. 328, 53 P.R. 1901=62 P.L.R. 1901, F.B.; R., 14 B. 320, 5 C.L.J. 569=11 C.W.N. 613=34 C. 735, 31 A. 176; Commented on, 9 A. 493=7 A.W.N. 116.] A son becomes co-owner with his father only in a

*Hindu Law—continued.***—3.—Alienation—continued.**

property which was inherited from the father of the latter. But a property acquired out of the income of the ancestral property is not a property inherited. It is true that, if a property be purchased out of such income after the birth of the son, the latter acquires a joint interest in it. But he has no such interest in the profits of such property before his birth—*Per Mitter, J. GUNGA PRASAD v. AJUDHIA PERSHAD SINGH*, 8 C. 131=9 C.L.R. 417. (5 C. 855, R.) [Diss., 10 B. 528, 11 M. 246,]

(81)—*Mitakshara*—Alienation by father to discharge debts—Suit by son to set aside alienation by father—Onus of proof—Joinder of adult son in alienation by father—Estoppel—Decree upon mortgage by father—Son's position—Suit to make family property liable for father's debt—Parties—Right of execution purchaser.—The father may alienate the family property to discharge his debts that are neither illegal nor immoral. [Cons., 9 C. 495; R., 9 M. 188, 4 Bom. L.R. 587.] The son seeking to set aside his father's alienation with respect to his interest in the property, must show that the object of the alienation was illegal or immoral. [Cons., 9 C. 495; R., 9 M. 188, 4 Bom. L.R. 587.] If an adult son has joined in the conveyance by the father or led the alienee by his conduct to infer his assent thereto, he will be estopped from disputing its validity. Points 3, 4 and 5 apply to a mortgage so as to place the purchaser at an execution-sale under a decree upon the mortgage-bond, in the position of an alienee by private sale. [Cons., 9 C. 495; R., 9 M. 188, 4 Bom. L.R. 587.] If the son is a party to the mortgage suit, he is concluded; if not, he can recover his share only on proof of the illegality or immorality of the original debt. [Cons., 9 C. 495; R., 9 M. 188, 4 Bom. L.R. 587, 8 B. 481.] Where the father has neither alienated nor mortgaged the family property but it is sought by suit to make the property liable for the father's debt, both the father and the son must be made parties to the suit. If the father alone is sued for his debt, the purchaser in execution of the right, title and interest of the father, does not take the son's interest. *RAMPHUL SINGH v. DEGNARAIN SINGH*, 8 C. 517=10 C.L.R. 489. [Cons., 9 C. 495; R., 9 M. 188, 4 Bom. L.R. 587; Diss., 9 C. 389.]

(82)—*Mitakshara*—Money-decree against father alone—Execution-sale of joint family property.—Notwithstanding the fact that a decree was passed against the father only of a joint *Mitakshara* family, there may, under certain circumstances, be a valid sale of joint property belonging to the family in execution thereof. *SHEO PROSHAD v. JUNG BAHADOOR*, 9 C. 389=12 C.L.R. 494. (8 C. 898, 4 M. 1, F.; 8 C. 517, Diss.) [R., 7 B. 438, 8 B. 481, 9 M. 343, F.B., 3 Bom. L.R. 322.]

(83)—*Mitakshara*—Joint family—Decree against father alone for lawful debts—Execution-sale of entire joint family property.—Where



**Hindu Law—continued.****—3.—Alienation—continued.**

the debt, that formed the basis of a decree against the father alone of a joint Hindu Mitakshara family, was proved to have been contracted for lawful purposes, the decree-holder was held entitled to execute his decree against the whole of the joint family property. The ruling in 3 C. 198 applies only where the father's interest alone is sold in execution of a decree. **RAMDUT SINGH v. MAHENDER PRASAD**, 9 C. 452=12 C.L.R. 47. [R., 7 B. 438.]

(84)—*Mitakshara or Mithila Law—Power of co-sharer over joint property—Liability of joint property for father's personal antecedent debts—Necessity for proof of antecedent character of debts—Purchase money in voluntary sale, no antecedent debt.*—Although no member of a joint Hindu Mitakshara or Mithila family has authority, without the consent of his co-sharers, to sell or mortgage even his own share in order to raise money on his own account, and not for the benefit of the joint family, yet if a father does alienate even the whole joint property of himself and his sons, in order to pay off antecedent personal debts, the sons cannot avoid the alienation, unless they prove that the debts were immoral. [R., 15 A. 75, F.B., 31 A. 176=6 A.L.J. 263.] But to make the alienation to this extent binding upon the sons who did not consent to it, it must be shown that it was made for the payment of antecedent debts, and not simply in consideration of a loan, or of a payment made to the father on the occasion of his making the alienation. The purchase money itself, in the case of a voluntary sale, cannot constitute an antecedent debt, such as to render that sale binding on the sons, in the absence of proof of immorality of the transaction. **HANUMAN KAMAT v. DOWLAT MUNDAR**, 10 C. 528. [R., 15 A. 75, F.B., 31 A. 176=6 A.L.J. 263.]

(85)—*Mitakshara Law—Antecedent debt—Sale—Right, title and interest of father—Equity—Devise by father to sons—Character of property in the hands of sons.*—A Hindu father devised his ancestral estate to his two sons. Subsequently he usufructually mortgaged a portion of the estate to pay off some antecedent debts. The mortgagee got a decree in execution of which he sold the right, title and interest of the judgment-debtor, and the purchaser was put in possession of the entire property. Held that the sons of the judgment-debtor were not entitled to set aside the sale. When joint ancestral property has passed out of a family either by a conveyance, executed by a father in consideration of an antecedent debt, or in order to raise money to pay such a debt or in execution of a decree for the father's debt, the sons cannot dispute it except by showing (1) that the debt was immoral, and (2) that the purchaser had notice of the immorality. The fact that a father has apportioned the ancestral estate between his two sons cannot have the effect of converting its character, and rendering it "self acquired" in the sons' hands. The question, whether an apportionment could legal-

**Hindu Law—continued.****—3.—Alienation—continued.**

ly be made is immaterial, but, in any case, the nature of the property cannot be altered. **HARDAI NARAIN v. HARUCK DHARI SINGH**, 12 C.L.R. 104. (6 W.R. 71, 3 M.H.C. 50, F.)

(86)—*Mitakshara—Liability, for father's debts, of family property in sons' hands—Alienation of family property by father—Suit by sons for shares in such property—Purchase money tantamount to debt by father—Necessity for refund of money by sons prior in suit—Objection of entire family property not being included in above suit, not technical.*—Under the Mitakshara law, the son is bound to pay, out of the ancestral property in his hands, the debts contracted by his father, unless he can show that those debts were contracted for immoral purposes mentioned in the Hindu shastras. (1 I.A. 321, R.) In a suit for partition of certain family property sold by a Mitakshara father during his son's minority, brought by such sons against the father and the purchaser, wherein the sons failed to prove that the purchase money was obtained for immoral purposes, held, on the principle laid down in this case, that the sons would be entitled to succeed, only on a refund of the entire purchase-money, as it would otherwise constitute a debt, for which the entire property including that in suit would be liable in the hands of the sons. [R., 14 M.L.J. 14=27 M. 361; Appr., 30 A. 352=5 A.L.J. 339=A.W.N. 1908, 143.] In the above suit if it is treated as one for partition, the objection that the entire family property is not included in the suit by is no means a technical one. **KOER HASMAT RAI v. SUNDER DAS**, 11 C. 396.

(87)—*Ancestral property—Vested interest—Debt—Father's right—Son's obligations.*—Under the Mitakshara and Mayukha, the son takes a vested interest in ancestral estate at his birth; but the interest is subject to the liability of that estate for the debts of his father and grandfather. Under the Hindu Law, the freedom of the son from the obligation to discharge the father's debt as reference to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt. (6 M.I.A. 393, F.) Even the ancestral property of a Hindu father may be sold either by himself, or by a Civil Court having jurisdiction, in satisfaction of debts not contracted for purposes either illegal or immoral; and such sale will bind sons *in esse* at the time of the sale. **NARAYANACHARYA v. NARSO KRISHNA**, 1 B. 262. (14 B.L.R. 187=1 I.A. 321=22 W.R. 36, F.) [F., 24 B. 343; Appr., 2 B. 494; R., 2 M. 339, 1 M. 358, F.B., 3 M. 37, F.B., 8 C. 517, 6 B. 520, 7 B. 438, 9 M. 343, F.B., 2 Bom.L.R. 59, 4 Bom. L. R. 587; D., 9 A. 493=7 A.W.N. 116.]

(88)—*Sale of ancestral property by father—Suit by son for setting aside sale—Proper issue to be tried.*—The plaintiffs sued to set aside a sale of ancestral lands by their father and to be restored to the possession of those lands, on



**Hindu Law—continued.****—3.—Alienation—continued.**

the ground that the sale was in order to pay debts contracted for immoral purposes. The fact was that certain sums amounting to nearly Rs. 4,500 had been borrowed by the father and grandfather of the plaintiffs on a mortgage of those lands, and also on bonds, from the purchaser, and the father subsequently sold the equity of redemption in those properties for a trifling sum of Rs. 250, having previously agreed with the purchaser that the latter should enter satisfaction as regards all the bond-debts also. *Held* under these circumstances (i) that the proper issue to be framed was not whether there was any necessity for the sale by the plaintiff's father, but whether those debts in respect of which the sale was made, were incurred for immoral purposes; and as there was no allegation nor any evidence as to the immorality of the antecedent debt of Rs. 4,500, the plaintiffs were held not to have established any case entitling them to set aside the sale. (ii) That, even if the amount of Rs. 250 alleged to be the consideration of the sale, had been made use of for immoral purposes the amount being so trivial as compared with the amount of the pre-existing debts, the release of which constituted the main portion of the consideration of the sale, such immoral purpose alone cannot justify the setting aside of the sale. (1 Ind. App. 321, 15 B.L.R. 264, R.) (iii) Lastly, that it ought to have been first ascertained in this case whether any or either of the plaintiffs had been born before the date of the sale; for if any or all of them had not been born then, the suit by him or such of them would not have been sustainable, as he or they could not have had any vested interest in the lands. *KASTUR BHAVANI v. APPA*, 5 B. 621. [R., 5 B. 630, 4 Bom. L.R. 587.]

(89)—*Sale of ancestral property under decree against father—Sons' shares when not bound—Illegal or immoral nature of father's debts—Burden of proof.*—Subject to certain limited exceptions (as, for instance, debts contracted for immoral or illegal purposes), the whole of the estate of a Hindu undivided family would be, when in the hands of sons or grandsons, liable to the debts of the father or grandfather. So, in a suit by the sons to recover their shares of ancestral family lands sold in execution of a mortgage decree against their father, the burden of proof that the mortgage debt was for an illegal or immoral purpose, was held to lie on the plaintiffs, the sons, and they, not having proved anything beyond the fact that their father kept a mistress, and having failed to establish any connection between that act and the debt of the father, the sale in question was held to be binding on the shares of the plaintiffs. *SADASHIV DINKAR JOSHI v. DINKAR NARAYAN JOSHI*, 6 B. 520. [F., 14 B. 320; R., 7 B. 438, 4 O.C. 277, 4 Bom. L.R. 587.]

(90)—*Decree for sale of ancestral property mortgaged by father—Right of purchaser in execution—Purchaser when bound to inquire as to*

**Hindu Law—continued.****—3.—Alienation—continued.**

*nature of debt—Divided sons, right of, to redeem in entirety.*—Suit to recover possession of a house bought by plaintiff at a Court sale in execution of a decree obtained by his father against the defendants' father under a mortgage of the family property by the latter. Defendants contended that only the undivided share of the father passed under the purchase and the plaintiff must therefore sue for partition. *Held*, the decision in *Deendyal's case* (4 I. A. 247) limiting the "right, title and interest" passing under such an auction-sale, to the father's share, would not apply where the decree itself directs the mortgaged property to be sold. Unless, however, the mortgage-deed by the father expressly provided for the redemption of the sons' interests on payment of a proportionate part of the debt, the mortgage in such a case must be treated as one and entire. In this case, the shares of the sons were validly bound by the mortgage, as it appeared that the debts were not contracted by the father for any improper or immoral purpose. There had been a partition of the house in question between the father and his sons, so that the father could not be taken to have sufficiently represented his divided sons in the suit. The sons were therefore held entitled to redeem, but only upon the condition, if the plaintiff insisted on it, of their redeeming the whole of the property. *TRIMBAK BAL-KRISHNA v. NARAYAN DAMODAR DABHOLKER*, 8 B. 481. [R., 12 B. 691, 9 B. 198.]

(91)—*Mit k hara—Mortgage by father, of joint ancestral property—Sale of such property in execution of decree against father—Liability of sons' share.*—Where a Hindu family is joint, and the joint property is in the father's possession and management, the whole of it is liable under a decree obtained against the father for money borrowed by him for the use of the joint family; the suit and the decree in such a case must be regarded as against the father as representing the joint family. *DEVA SINGH v. RAM MANOHAR*, 2 A. 746 (6 I.A. 233=5 C.L.R. 477, F.; 3 C. 198, D.) [R., 10 C. 1.]

(92)—*Mitakshara—Mortgage of ancestral property by father—Sale of father's rights and interests in execution—Liability of son's share.*—Where a Hindu father mortgages ancestral property, and, in execution of a decree on such mortgage, the rights and interests of the father only are sold, the purchaser cannot take possession of the whole estate; and in a suit against him by the sons for the recovery of their shares, it would be unnecessary to enquire into the nature of the debt on account of which the father's rights and interests were sold. *BIKA SINGH v. LACHMAN SINGH*, 2 A. 800. (3 C. 198, P.C. F.; 1 I.A. 321, P.C.=14 B.L.R. P.C. 187, D.)

(93)—*Joint family property—Personal decree against father—Sale of father's rights and interests in execution—Son's rights.*—Where in execution of a personal decree for money against the father in a joint Hindu family, his rights



**Hindu Law—continued.****—3.—Alienation—continued.**

and interests in the joint property are only sold, the purchaser cannot take possession of the whole property. If he does take possession, the sons would be entitled to recover their shares. *CHANDARANSEN v. GANGA RAM*, 2 A. 899. (5 C. 184, D.)

(94)—*Mitakshara—Mortgage of joint ancestral property by father—Sale of property in execution of decree against father—Son's rights.*—In a Hindu family "the father is in all cases naturally, and in case of infant sons necessarily the manager of the joint estate," and when a suit is brought against the father, the assumption, that he is sued as representing the minor son, is thus consistent with the constitution of the Hindu family and the father's position. Therefore, where the whole ancestral estate of a joint Hindu family, consisting of a father and his minor son, was mortgaged for money borrowed for family purposes, a suit against the father to enforce such a mortgage and a decree obtained in such suit, must be regarded as a suit, and as a decree against him in a representative capacity, and the decree can be executed against the whole estate, although the minor son has not been formally joined as defendant in the suit. *GAYA DIN v. RAJ BANSI KUAR*, 3 A. 191. (1 I.A. 333=5 C.L.R. 477, F.; 3 O. 198, D.) [F., 20 C. 453.]

(95)—*Joint family—Alienation by father—Rights of sons.*—Where joint ancestral property has passed out of a joint family either under a conveyance executed by the father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt or for other lawful purposes, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted. Purchasers at an execution-sale, being strangers to such a suit, if they have not had notice that the debts were so contracted, are not bound to make enquiry beyond what appears on the face of the proceedings. *RADHA KISHEN MAN v. BACHHAMAN*, 3 A. 118. (1 I.A. 321=14 B.L.R. 187, P.C.=5 C. 148, P.C., F.)

(96)—*Joint family—Mortgage of joint family property by father without joining adult son—Decree against father—Rights of sons.*—When a Hindu father, who has an adult son, mortgages undivided ancestral property of the family as security for a debt incurred by him for necessary purposes without joining his son, and the mortgagee obtains a decree against the father alone for the sale of the property, the son is not entitled to claim that his share of the property should be exempted from sale merely because, although he was of age, he was not asked by the mortgagee to join in the mortgage and was not made a party to his suit; he is in the same position as he would have been, if he had been a minor at the time

**Hindu Law—continued.****—3.—Alienation—continued.**

of the mortgage and of the decree. He could only succeed by showing that the debt was incurred by his father for immoral purposes. Where, under the above circumstances, the debt is contracted for necessary purposes, and his son is aware of it and does not protest against it, but on the contrary stands by and benefits by the loan, and, being aware of the suit does not apply to be made a party to it, he would be too late if he afterwards claims that his share of the property cannot be sold. (3 A. 443, R.) Every son born to a father of a joint Hindu family in possession of ancestral property, acquires a positive, though undefined, share in the joint estate, co-extensive with, and as large as, that of every other member of the joint family including his father, and it is competent for each and every member of such family at any time to demand partition of the ancestral property. *PHUL CHAND v. MAN SINGH*, 4 A. 309=A.W.N. 1882, 49. [R., 8 A. 205.]

(97)—*Joint family—Alienation of ancestral property by father—Son's right—Burden of proving immorality.*—In a suit by a Hindu minor, to set aside an alienation of ancestral property by his father, on the ground that such alienation was made to discharge a debt contracted for immoral purposes, the burden of proving the immoral character of the debt, and that the purchaser knew of it, is on the plaintiff. General proof of extravagant waste of ancestral property is not enough, either to make the defendant liable, or to raise a presumption in favour of the plaintiff's case. (*Straight, J.*) (6 M.I.A. 392, 5 C. 148, R.) General proof of extravagance and waste would shift the burden on the defendant. Where the circumstances of the case lead to the inference that suit is brought at the instance of the father, it would be unsafe to give the plaintiff a decree. (*Stuart, C.J.*) *HANUMAN SINGH v. NANAK CHAND*, 6 A. 193=A.W.N. 1884, 23. [Appr., 9 A. 493, 14 B. 320.]

(98)—*Mitakshara and Mithila Law—Father's alienation for antecedent debt—Son's liability—Sale of entire joint estate for father's debt—Right of sons to question nature of debt—Extent of interest in joint estate sold for father's debt, Determination of—Parties to proceedings.*—Both under the Mitakshara and the Mithila Law, there is no conflict of authority as to the principle that sons cannot set up their rights which are to take present vested interests, on their birth, jointly with their father in ancestral estate, against their father's alienation for an antecedent debt, or against his creditor's remedies for his debt, if not tainted with immorality. [F., 8 A. 231, 72 P.R. 1893, 1 A.L.J. 310=27 A. 16=24 A.W.N. 151; *Expl.*, 3 A.L.J. 274=28 A. 508=A.W.N. 1906, 117, 11 C.W.N. 613=5 C.L.J. 569=34 C. 735; R., 87 P.R. 1887, 20 C. 326, 20 B. 385, 19 A. 26, F.B.=16 A.W.N. 183, 24 A. 459=22 A.W.N. 123, 4 A.L.J. 424=A.W.N. 1907, 159=29 A. 544, 5 A.L.J. 175=A.W.N. 1908, 61=30 A. 156, 31 A. 176=6 A.L.J. 263.] If the



**Hindu Law—continued.****—3.—Alienation—continued.**

father's debt, not having been contracted for an immoral purpose, is such as to support a sale of the entirety of the joint estate, either he may sell the latter without suit, or the creditor may obtain a sale of it by suit. But the joint sons, not being parties to the execution proceedings or to the sale, will not be precluded from having a question as to the nature of the debt tried in a suit of their own; a right, which will, however, avail them nothing, unless it can be shown that the debt was not such as to justify a sale of the joint estate. [*F.*, 15 C. 70, P.C., 12 M. 309, 1 O.C. 53, 21 M. 222; *Rel. upon*, 1 A.L.J. 191; *D.*, 9 A. 493=7 A.W.N. 116; *R.*, 11 B. 37, 12 B. 18, 12 B. 431, 2 C.P.L.R. 234, 14 B. 320, 20 C. 453, 15 A. 75, F.B., 16 A. 449=14 A.W.N. 169, 1 O.C. 112, 17 A. 537, F.B., 10 C.P.L.R. 67, 22 B. 825, 22 M. 49, F.B.=8 M. L.J. 312, 21 A. 301=19 A.W.N. 79, 16 C.P.L. R. 19, 3 Bom. L.R. 322, 26 M. 214, 25 A. 214=23 A.W.N. 21, F.B., 4 Bom. L.R. 587, 6 O.C. 101, 6 O.C. 271, 14 M.L.J. 431, 29 M. 200=1 M.L.T. 28=16 M.L.J. 69, F.B., 11 C.W.N. 294=34 C. 184=5 C.L.J. 441, 11 C.W.N. 593=5 C.L.J. 491=2 M.L.T. 207=34 C. 642, F.B., 11 C.W.N. 959=6 C.L.J. 237=34 C. 941, F.B.] If, upon the proceedings and in regard to the intention of the parties (in respect of an alienation of joint estate for the father's debt), doubts are raised whether what has been sold is the interest of the father alone, or the joint estate, the absence of the sons from the proceedings may be a material consideration. But, if the purchaser has bargained and paid for the entirety, he may defend his title upon any ground which would have justified a sale, had the sons been brought in to defend their interests in the execution proceedings. [*F.*, 9 M. 424, 11 B. 42, 12 B. 625, 11 M. 64, 17 C. 584, P.C.; *Appl.*, 11 B. 361; *Rel. upon*, 27 C. 724; *R.*, 8 A. 205=6 A.W.N. 58, 9 A. 142=6 A.W.N. 323, 14 C. 572, 10 M. 316, 12 B. 691, 13 M. 47, 14 B. 597, 15 B. 87, 23 C. 262, 24 B. 135, 1 Bom. L.R. 627, 26 C. 677, 3 C.W.N. 637, 20 B. 338, 21 B. 616, 9 C.L.J. 453=13 C.W.N. 544.] 3 C. 198=4 I.A. 247 does not lay down as an invariable rule that co-parcenary interest will not pass by an execution sale, unless the co-parceners are joined in the suit, or that only the father's interest passes to the purchaser where the suit was against the father alone. *NANOMI BABUASIN v. MODHUN MOHUN*, 13 C. 21, P.C.=13 I.A. 1=4 Sar. 682.

(99)—*Liability of ancestral estate for father's debt—Mortgage decree, Money decree—Effect of sale in execution.*—Where a decree is obtained against the father only, in an undivided Hindu family, for a debt incurred for purposes neither illegal nor immoral, and in execution of the decree, family property is sold, the sons cannot recover their shares from the purchaser, if the decree has been obtained upon a mortgage or hypothecation of the property, directing such property to be sold to realise the debt. The case is otherwise, when the decree, in execution of which the sale takes place, is only a money decree

**Hindu Law—continued.****—3.—Alienation—continued.**

*Per Kernan, J.* It will still be necessary in all cases where a creditor seeks in suit to bind a son's estate in ancestral or other property, for a debt incurred by his father and not by him, that the son should be made a party to the suit. *PONNAPPA v. PAPPUVAYYANGAR*, 9 M. 343, F.B. [*R.*, 9 M. 424, 3 Bom. L.R. 322, 4 Bom. L.R. 587.]

(100)—*Money-decree against father—Sale of ancestral estate in execution—Son's liability and rights.*—Where a money-decree is obtained against the father alone, and the entire family estate is sold in execution, his sons can claim that; not being parties to the sale or execution proceedings, they ought not to be barred from trying the facts or the nature of the debt in a suit of their own, but such a right will avail them nothing, unless they can prove that the debt was not such as to justify the sale. If the purchaser at the sale in execution of the money-decree, has bargained and paid for the entirety of the family estate, he may defend his title to it upon any ground, which would have justified a sale if the sons had been brought in to oppose the execution proceedings. The revised ruling of the Full Bench in 9 M. 343, as to sales in execution of money-decrees against a Hindu father, has been overruled by the decision in 13 I.A. 1=13 C. 21. *NARASANNA v. GURAPPA*, 9 M. 424. [*R.*, 11 M. 64, 4 Bom. L.R. 587; *D.*, 10 M. 316.]

(101)—*Joint family—Power of father to alienate family property for pious purposes—Issue as to real motive for alienation.*—In a joint Hindu family, the father can, without the consent of his sons, provide a permanent shrine for a family idol out of family property. *Gopal Chand Pande v. Kunwar Singh*, S.D.A. L.P. 1843, Vol. V. p. 24, *R.* [*R.*, 24 B. 517; *D.*, 11 M.L.J. 310] In a suit by a son to set aside his father's alienation of family property for pious purposes, the plaintiff alleged that the real motive of his father was not piety to the gods, but malice against him. The High Court remitted an issue to the lower appellate Court for the purpose of ascertaining what was the real motive. *RAGHUNATH PRASAD v. GOBIND PRASAD*, 8 A. 76.

(102)—*Joint Hindu family—Father's debts—Liability of ancestral property—Immoral purposes.*—A son cannot set up his right against his father's alienation of ancestral property for an antecedent debt, or against the creditor's remedy for the father's debt, if it is not tainted with immorality. *SITARAM v. ZALIM SINGH*, 8 A. 231=A.W.N. 1886, 62. (13 C. 21, P.C., *F.*) [*R.*, 14 B. 320, 31 A. 176, F.B.=6 A.L.J. 263; *D.*, 9 A. 493.]

(103)—*Joint family—Alienation by father—Suit by sons to set aside alienation—Duty of sons to pay father's debts—Burden of proof.*—In *Suraj Bunsu Koer's case* (3 C. 148). Their Lordships of the Privy Council say as to the effect of the earlier decision of the same tribunal



**Hindu Law—continued.****—3.—Alienation—continued.**

in *Muddun Thakur v. Kantoo Lal* (14 B.L.R. 18=1 I.A. 333), that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an ancestral estate, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted. This principle is limited to antecedent debts, that is to say, debts contracted before the sale or mortgage sought to be impeached by the sons; and it does not cover cases in which a sum in ready money has been paid over to the father by the vendee or mortgagee. The authorities therefore seem to come to this, that in those cases where a person buys ancestral estate or takes a mortgage of it from the father, whom he knows to have only a limited interest in it, for a sum of ready money paid down at the time of the transaction, such person, in a suit by the sons to avoid it must establish that he made all reasonable and fair inquiry before effecting the sale or mortgage, and that he was satisfied by such inquiry, and believed, in paying his money, that it was required, for the legal necessities of the joint family, in respect of which the father, as head and managing member, could deal with and bind the joint ancestral estate. *LAL SINGH v. DEO NARAIN SINGH*, 8 A. 279. [*Diss.*, 13 A. 216; *R.*, 9 A.W.N. 142; *Appr.*, 9 A. 493, 4 Bom L.R. 587, 16 C.P.L.R. 169, 31 A. 176, F.B.=6 A.L.J. 263.]

(104)—*Joint family — Suit against father alone for debt incurred by him—Subsequent suit against son for same debt not barred—No difference between simple debt and mortgage debt—Liability of Hindu son to pay debt incurred by father. Nature of.*—Although a decree may have been obtained against the father of a joint Hindu family, a subsequent suit is maintainable against the son, in respect of the same debt, for the enforcement of the son's liability for it, the debt not being tainted with immorality. The fact of the creditor having committed to implead the son in his first suit, does not preclude him from suing the son afterwards. And in this respect, there is no difference in principle between the case of a debt secured by a mortgage and a simple money debt. (16 A. 449, 19 A. 379, 17 A. 537, 22 M. 49, 11 M. 413, *R.*) [*F.*, 23 A. 355, 29 A. 544=A.W.N. 1907, 159=4 A.L.J. 424; *R.*, 22 A. 307, 22 A. 394, 25 A. 57, 25 A. 162, 11 C.W.N. 403=5 C.L.J. 315, 12 C.W.N. 107=6 C.L.J. 612; *D.*, 7 O.C. 137. The liability of joint debtors under the same contract does not apply to the case of the pious liability of a Hindu son for the debt of his father not tainted with immorality. Such liability arises, not from a contract entered into by the father, but from the fact that he is the son of the father, and that the debt

**Hindu Law—continued.****—3.—Alienation—continued.**

incurred by the father is of such a nature that it is the duty of the son to pay it, i.e., it is a liability which the Hindu law imposes on the son, and is independent of the contract made by the father. Therefore, the creditor's cause of action against the father and the son is not a single cause of action which is exhausted upon a decree being obtained against one of them only. *DHARAM SINGH v. ANGAN LAL*, 21 A. 301=A.W.N. 1899, 79. (13 C. 21, 3 C. 353, 5 C. 292, *R.*) [*R.*, 9 O.C. 350, 11 O.C. 334.]

(105)—*Joint Hindu family — Mortgage of family property by undivided father—Decree after death of father against eldest son alone — Sale of family property other than mortgaged property—Minor sons not parties to decree how far bound by it.*—After the death of the mortgagor who was the undivided father of a Hindu joint family, the mortgagee sued on his mortgage as against "the mortgagor deceased by his heir, his eldest son" without impleading the other sons, the present plaintiffs who were at the time minors. In execution of a decree in that suit, a part of the family property (other than the mortgaged property) was put up for sale and purchased by the defendant. The lower Courts decreed the plaintiffs claim on the ground that, as the mortgagee had not sued the mortgagor in his life-time, nor had sued the eldest son as manager and as representing the family, only the share of the eldest son passed to the defendant under his purchase. The High Court reversed the decree, holding that since the deceased father had been made a party through his son and heir and the only other members of the family were minors, the eldest son must be held to have been sued as fully representing the family. Looking at the substance of the execution proceedings, it was the family estate, in its entirety that was intended to be sold. *JAIRAM BAJABASHET v. JOMA KONDIA*, 11 B. 361. [*F.*, 20 B. 338; *Appr.*, 12 B. 101; *R.*, 24 B. 135=1 Bom. L.R. 627; *D.*, 12 B. 18, 3 Bom. L.R. 97.]

(106)—*Mortgage of ancestral property by father—Decree on mortgage—Right of sons to claim exemption.*—The plaintiffs sued for a declaration of their proprietary right in certain ancestral property and for exemption of the property from being sold in execution of a decree against their father in a suit on a mortgage executed by him. It was admitted on behalf of the plaintiffs that although their father was a person of immoral character, the creditor had no means of knowing that the monies advanced by him were likely to be applied to any other purpose than that for which they were professedly borrowed. *Held*, that the plaintiffs were not entitled to the declaration sought for by them. *BALBIR SINGH v. AJUDHIA PRASAD*, 9 A. 142=A.W.N. 1886, 323. [*R.*, 16 A. 449, 16 C.P.L.R. 19.]

(107)—*Debt—Liability of sons for father's debts during father's life-time—Right of creditor*